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The blurry line between smuggling and rescuing migrants according to the international law of the Sea

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Les llengües de treball son castellà, català, anglès i francès

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Langues de travail: catalan, castillan, anglais et français

THE BLURRY LINE BETWEEN SMUGGLING AND RESCUING MIGRANTS ACCORDING TO THE INTERNATIONAL LAW OF THE SEA

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Tutora: Dra. Cristina Blasi Casagran

RESUMEN: Este artículo tiene como objetivo analizar los límites del ejercicio de los poderes de los Estados fuera de su territorio, especialmente para combatir la delincuencia organizada transnacional, que debe equilibrarse con la obligación de proteger la vida humana en el mar. Con este fin, presentará el marco legal del derecho del mar con el fin de arrojar luz sobre dos medidas cuyo propósito es claramente distinto pero que a menudo se confunden en la práctica de los Estados: intercepciones y operaciones de rescate, destinadas a combatir dos delitos diferentes que también están confundidos, pero son claramente diferentes: trata de personas y tráfico de migrantes.

RESUM: Aquest article té l'objectiu d'analitzar els límits de l'exercici de les potències dels Estats fora del seu territori, especialment per combatre el crim organitzat transnacional, que s'ha d'equilibrar amb l'obligació de protegir la vida humana al mar. Amb aquesta finalitat, presentarà el marc legal de la llei del mar amb el propòsit de donar llum a dues mesures que tenen com a finalitat clarament diferents però que sovint es confonen en la pràctica dels Estats (intercepcions i operacions de rescat) destinades a combatre dos delictes diferents, que també es confonen, però són clarament diferents: el tratra de persones i el tràfic de migrants.

SUMMARY: This article is aimed at analysing the limits of exercise of States powers outside their territory, especially to tackle transnational organised crime, that should be balanced with the obligation to protect human life at sea. To this end, it will present the legal framework of the Law of the Sea with the purpose of shedding light on two measures whose purpose is clearly distinct but that are often confused in States practice – interceptions and rescue operations - aimed at combating two different crimes that are also confused but are clearly different – trafficking in person and smuggling of migrants.

PALABRAS CLAVE: Derecho del mar, UNCLOS, intercepciones, búsqueda y rescate, trata de personas, tráfico ilícito de migrantes, ONGS, derechos humanos.

PARAULES CLAU: Dret del mar, UNCLOS, Intercepcions, cerca i rescat, tratra de persones, tràfic de migrants, ONGs, drets humans.

KEYWORDS: Law of the Sea, UNCLOS, Interceptions, Search and Rescue, Trafficking in Persons, Smuggling of Migrants, NGOs, Human Rights.

Index

1. Introduction

Since 2015 a so-called "migration crisis"[1] perceived as a new phenomenon dominated the news with alarming rise in the number of migrants and refugees arriving in Europe, mostly across the Mediterranean Sea, to claim asylum and/or entering States' borders irregularly by sea, especially in the south of Europe.[2]

States have taken up increasingly pervasive measures to address the challenges posed by irregular migration by framing it more as a security matter, rather than focusing on the concerns in terms of protecting human rights of the individuals involved. To this end, in order to manage migration effectively, border States and particularly the coastal ones have opted to regulate external borders entries[3] by stressing their requirement to tackle internal and international security threats, including transnational organised crime, rather than abiding by humanitarian obligations.

Nevertheless, human mobility is not a new global occurrence, and especially not for an old continent like Europe, which has always been driven by bidirectional in and out movements of goods and people – origin of the European Union organization itself. This freedom of movement of persons and goods has strengthened the economic relations among EU Member States, as well as facilitated the creation of more employment and labour mobility across the territory of these countries. Yet, recently the perception of migration has changed. As mentioned above, migration has been associated to an uncontrolled movement of people who constitute a threat, accompanied by a negative narrative and thus requiring to be dealt with beyond States' sovereign territory. Consequently, migration is managed already at sea, including the interception of vessels transporting migrants in international waters. These actions are often confused with rescue operations at sea, for which all States are called to respond in case of situation of

[1] According to the *International Organization for Migration* (IOM), a migration crisis is: "The complex and often large-scale migration flows and mobility patterns caused by a crisis which typically involve significant vulnerabilities for individuals and affected communities and generate acute and longer-term migration management challenges. A migration crisis may be sudden or slow in onset, can have natural or man-made causes, and can take place internally or across borders". International Organization for Migration, *IOM Migration Crisis Operational Framework.* 15 November 2012, MC/2355, para. 4.

[2] The Guardian, Five Myths About the Refugee Crisis, June 2018, available at at https://www.theguardian.com/news/2018/jun/05/five-myths-about-the-refugee-crisis, last accessed on 24 October 2019.

[3] Border management is defined as "the administration of measures related to authorized movement of persons (regular migration) and goods, whilst preventing unauthorized movement of persons (irregular migration) and goods, detecting those responsible for smuggling, trafficking and related crimes and identifying the victims of such crimes or any other person in need of immediate or longer-term assistance and/or (international) protection". International Organization for Migration (IOM), *Glossary on Migration*, Geneva, 2019

danger or distress at sea. In the case of migrants and refugees the danger is obvious: most of the times they are risking their lives on unseaworthy embarkations to cross the Mediterranean in the attempt to reach Europe.

To fill the gap in humanitarian protection, since the start of the "crisis", many non-governmental organisations (NGOs) have intervened in search and rescue in the Mediterranean Sea but they have been later condemned for criminal activities such as smuggling of migrants and trafficking in persons, that interceptions are aimed at combating. This fact not only highlights the need to understand what type of transnational organised crime the operations at sea are intended to counter, but also the necessity to redefine and update the constitutive elements of these crimes. For instance, smuggling, as currently regulated, could be interpreted in detriment of protecting individuals in distress at sea in need to be rescued, and or/deter any vessels to expeditiously proceed with these operations, no matter their status or flag State is. This interpretation could oppose to the international human rights law and international refugee law. In fact, according to international standards, States have the responsibility to ensure that border management legislation, policies and practices adhere to human rights and refugee law and respect the rights of all people moving across their borders despite their migration status.

In light of these elements, the present article is aimed at analysing the limits of exercise of States powers outside their territory, especially to tackle transnational organised crime that should be balanced with the obligation to protect human life at sea. To this end, it will present the legal framework of the Law of the Sea with the purpose of shedding light on two measures whose purpose is clearly distinct but that are often confused in States practice – interceptions and rescue operations - aimed at combating two different crimes that are also confused but are clearly different – trafficking in person and smuggling of migrants.

2. Applicable international Law of the Sea

Whenever an action at sea is undertaken, no matter the purpose,[4] States have the obligation to first render assistance if needed.[5] This fundamental principle is enshrined in

[4] It would even include cases of transnational organised crime.

[5] This duty enshrined in article 98, par. 2, UNCLOS, is also supplemented by other international law of the sea thematic treaties, the SOLAS Convention and the SAR Convention.

the United Nations Convention on the Law of the Sea (UNCLOS) (Montego Bay, 1982), which is the constitution for the use of the different maritime zones and regulates the use of the seas, being the legal framework of reference to which other international law treaties add further specific regulations. The peculiarity of the Law of the Sea, as codified within the UNCLOS, is that the latter contains few norms directly addressed to individuals at sea and their conduct, rather than setting a framework for the States and the powers they can exercise in the use of the seas as reflected in customary law.[6] While States are in general called upon to protect human life at sea on the basis of Article 98 of the UNCLOS, the norms concerning human conduct are aimed at combating illicit activities at sea such as piracy, the transport of slaves, illicit drug trafficking and psychotropic substances and unauthorized transmissions, which allow some[7] or even all States [8] to exercise repressive powers and punish the responsible of such crimes. However, this has not prevented the Law of the Sea to evolve with reality and respond to the current challenges and threats to the safety of maritime navigation. Among those there is transnational organised crime, including smuggling of migrants at sea and the tragic consequences deriving from it in terms of loss of human lives. The illegality of such type of illicit trafficking and the risks they entail are condemned by the international community and particularly by the United Nations General Assembly, which encourages States to manage international migration safely and according to a global approach, through constant dialogue between States aimed at enhanced cooperation.[9]

Notwithstanding this, no UNCLOS norm nor any other standard of customary international law, authorises a State to interfere in the freedom of navigation on the high seas by exercising its jurisdiction against foreign ships, even when there are reasonable grounds that the latter are used for the transport of irregular migrants. In fact, the illicit trafficking or transport of migrants is not considered as *crimen juris gentium* according

[6] Papanicolopulu, *The Law of Sea Convention: No Place for Persons?* in *The International Journal of Marine and Coastal Law*, 2012, p. 867.
[7] Articles 99, 108 and 109 UNCLOS.
[8] Articles 100 and 105 UNCLOS.
[9] United Nations General Assembly, *Resolution 67/68 Oceans and the law of the sea*, doc. UN A / RES / 67/78, 11 December 2012: « Calls upon States to continue to cooperate in developing comprehensive approaches to international migration and development, including through dialogue on all their aspects;"(par. 130). See also paragraphs 111-113 and 126-130, expressly dedicated to the challenges linked to transnational organised crime, in which the Assembly invites to strengthen the cooperation between States to counter this phenomenon and the consequences that derive from it, ensuring the safety of navigation in a more effective fashion and encouraging the application of the instruments on this subject promoted by the International Maritime Organization (IMO).

to international law.[10] This activity is rather relevant to the internal legal systems of the States, involving violations of immigration laws regulating the entry conditions to the territory. Therefore, all the infractions are realised only once the suspected ships transporting irregular migrants enter the territorial sea of the coastal State, breaching immigration laws and authorising the State to intervene with preventive powers.[11] Conversely, vessels transporting irregular migrants cannot be seized or searched when they are still on the high seas. Beyond the twelve nautical miles delimiting the territorial sea, the coastal State can exercise the powers of control to enforce the internal laws on immigration provided by the contiguous zone regime, on condition that such zone has been established, declared and accepted by other States.

However, the coastal State can always legitimately exercise the right to visit ships and boats without nationality on the high seas, in order to conduct operations of control and prevention of irregular immigration.[12] This practice is quite widespread by coastal States, especially by those on the southern borders of the European Union, including Italy and Spain. Indeed, usually smuggled migrants use boats without a name, and they do not fly the flag of any given national state. More often they are unsecure wrecks out of use or removed from the naval registers due to unfitness to navigate, and the people transported are put at the command of helmsmen without the necessary permits for navigation.

In contrast, for irregular migration, the only legitimate interference against foreign ships on the high seas derives from the consent of the States concerned, on the basis of the

[10] According to the *International Law Commission* a "*crimen juris gentium*" triggers the principle of "universal jurisdiction", which is a unique ground of jurisdiction in international law enabling a State to exercirse national jurisdiction over certain crimes in the interest of the international communitity. It is described as *criminal* jurisdiction based solely on the nature of the crime, withough regards to the territory where the crime was committed, the nationality of the alleged or convicted perpretrator, the nationality of the victim, or any other connection to the State exercising such jurisdiction. The principle of universal jurisdiction increasingly has been invokerd by States in the fight against impunity for heinous international crimes, which are among the most serious crimes of concern to the international community as a whole. Piracy is considered to be a classic example as it comes to a crime affecting the *communis juris* and is a *delictum juris gentium* (a "crime against the law of nations"). See United Nations International Law Commission, *Report of the International Law Commission (Seventieth session) – Annex A*, doc. A/73/10, 10 August 2018, parr. 1, 2 and 4.

[11] Articles 21, par. 1 letter *h*, 25 and 27 UNCLOS.

[12] Article 110, par. 1, lett (d) UNCLOS: "a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109; (d) *the ship is without nationality*; or (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship" – italic added.

principle *volenti not fit injuria.*[13] The consent can be expressed orally by the flag State of a ship whenever the State deciding to intervene requests it to proceed with the exercise of the right of access on a ship suspected of transporting irregular migrants to its coasts. As alternative, it can be lent through an agreement between the coastal and the flag State. In any case, the conclusion of such type of treaties does not exempt the parties involved from the obligation to safeguard human life at sea, including that of irregular migrants. This should be taken into consideration by States whenever they prevent any vessels engaged in search and rescue to save migrants' lives at sea.[14] In fact, to fill the humanitarian gap of coastal States that do not take immediate action to respond to distress calls of migrants at the mercy of sea while crossing the Mediterranean, many NGOs have intervened at sea with their own means and vessels to take migrants to a place of safety. The first ones where *Migrant Offshore Aid Station (MOAS)* in 2014, then *Sea-Watch* and *Médecins Sans Frontières (MSF)* in 2015.[15] These private initiatives raised many controversies with coastal States trying to stop them or preventing them to enter their territorial waters. Many more NGOs started the same type of operations in 2016, but the number experienced a decrease the following year due to the concern that these organisations had to be prosecuted by the coastal State of disembarkation (especially in Italy) on the ground that the NGOs ships were transporting irregular migrants. The State could claim that they were aiding illegal migration and therefore these NGOs could be assimilated to "smugglers" or criminal networks.[16] Conversely, while some of these NGOs limited their assistance to irregular migrants to providing basic response (food, water and medical assistance), others were patrolling international waters to spot migrants in distress and embark them, provide humanitarian aid and subsequently disembark them in the nearest port of safety. Thus, they were filling the gap left by the end of the Italian mission *Mare Nostrum*. NGOs' interventions can be considered fully fledged "rescue operations" and, in any case, they cannot be assimilated to "smuggling of migrants", since it does not come to the procurement by the NGOs of the illegal entry of rescued migrants

[13] Ronzitti, *Coastal State Jurisdiction over Refugees and Migrants at Sea*, in Ando, Mcwhinney, Wolfrum (ed.), *Liber Amicorum Judge Shigeru Oda*, 2002, p. 1274.

[14] According to the UN experts, any measure against humanitarian actors should be halted. See United Nations Office of the High Commissioner for Human Rights (UNOHCHR), *Italy: UN experts condemn bill to fine migrant rescuers*, 20 May 2019.

[15] Gomber, Fink, *Non-Governmental Organisations and Search and Rescue at Sea, in Maritime Safety and Security Law Journal, 22 June 2018.*

[16] The Washington Post, Aid groups say Italy is forcing them to stop rescuing migrants at sea, 15 August, available at at https://www.washingtonpost.com/news/worldviews/wp/2017/08/15/aid-groups-say-italy-is-forcing-them-to-stop-rescuing-migrants-at-sea/ 2017 (last accessed on 24 October 2019).

into the coastal State for the purpose to obtain a financial or other material benefits.[17] On the contrary, NGOs respond on the basis of the duty to render assistance to any person in danger at sea. As also specified by the United Nations Experts, article 98 UNCLOS is considered customary law and it applies to all maritime zones and to all persons in distress, without discrimination, as well as to all ships, including private and NGO vessels under a State flag.[18]

2.1. The *IMO Circular* paving the way for the adoption of the *Palermo Protocol*

States have committed to take joint action to prevent, repress and prosecute smuggling and transport of irregular migrants at sea. This has resulted into the elaboration and adoption of many international thematic instruments, particularly some soft-law recommendations which paved the way for the most relevant international binding treaty: the *Palermo Protocol*. A list of recommendations was promoted and drafted in a document by the International Maritime Organization (IMO)'s Maritime Safety Committee, in December 1998, and then updated in June 2001. This instrument contains standards concerning provisional measures to be taken in the fight against dangerous activities associated with smuggling and transport of migrants at sea.[19]

The IMO was the first organisation to tackle the problem of illegal smuggling of migrants by sea, focusing in particular on the aspects concerning navigation safety. The purpose of the 1998 IMO circular is to guide the States to coordinate their efforts recalling relevant rules of the IMO Conventions already in force and applicable in terms of maritime safety. It also encourages the States Parties to respect the obligations contained in the IMO Conventions.[20]

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[17] According to the definition set by article 3 of the *Palermo Protocol*.

[18] United Nations Office of the High Commissioner for Human Rights (UNOHCHR), Italy: UN experts condemn bill to fine migrant rescuers, 20 May 2019, available at at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24628&LangID=E, last accessed 24 October 2019.

[19] International Maritime Organization (IMO), *Interim Measure for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea*, doc. MSC / Circ.896 / Rev.1, 12 June 2001

[20] "The purpose of this circular is to promote awareness and co-operation among Contracting Governments of the Organization so that they may address more effectively unsafe practices associated with the trafficking or transport of migrants by sea which have an international dimension" (par. 3), IMO, *Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea*, doc. MSC / Circ.896 / Rev.1, 12 June 2001.

The measures in this instrument concern only indirectly the transport of migrants, being more aimed at guaranteeing the safety of navigation and the protection of human life at sea.[21] These measures are applicable to any ship engaged in international transport with passengers on board.[22] According to the circular, a ship is performing dangerous activities when, by carrying out an international transport, it contravenes the fundamental principles of maritime safety codified in the Convention for the Safety of Life at Sea (SOLAS, London, 1974) and when there is no crew nor permits required for this type of transport. This constitutes a threat to the life and health of people on board.[23] Therefore, the circular reaffirms a general obligation of the States to cooperate by collecting and disseminating the information concerning all the ships dedicated to the traffic and transport of migrants. In addition, State should prevent that these ships undertake any other dangerous journeys again or leave from the port where they are. The obligation of cooperation in the repression of such trafficking is applicable not only for the flag State of the ship, but also for every State that has justified reason to believe that a particular vessel is dedicated to the smuggling of migrants.[24] The measures in the circular include some exceptionally coercive powers that can be exercised on the high seas. Provided that there is a well-founded reason that a ship navigating on the high seas is involved in the illegal transport of migrants, a State may request the consent of the flag State so that its military ships[25] may carry out the inspection on board the suspected vessel. If such suspicions are confirmed, the intervening State authorities may take "appropriate measures" for which it has been authorised by the flag State.[26] In the event that the suspected ship is without a

[21] Before the IMO, UNHCR had brought to the international attention the issue of the need for rescue with reference to the protection of refugees at sea during the Indochinese crisis. UNHCR, *Problems Related to the Rescue of Asylum-Seekers in Distress at Sea*, doc. EC/SCP/18, 19 August 1981. The topic was then discussed first at the IMO Assembly in 1997 and then by the IMO Maritime Safety Committee. See: IMO, *Resolution A.867 (20), Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea*, doc. A 20 / Res. 867, 27 November 1997; Nordquist, Nandan, Kraska, *United Nations Convention on the Law of the Sea, 1982: A Commentary. Supplementary Documents*, Geneva 2012, p. 790.

[22] See definition of "ship" contained in par. 2.1 of the Circular.

[23] Section 2.3 of the Circular.

[24] Section 11 of the Circular.

[25] Paragraph 20 of the Circular. According to par. 22 all vessels that have assisted people in danger at sea and have therefore embarked migrants should not be considered as engaged in dangerous activities, in compliance with international law and in particular with the SOLAS Convention.

[26] Paragraph 12 of the Circular: "A State which has reasonable grounds to suspect that a ship exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another State is engaged in unsafe practices associated with the trafficking or transport of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that ship. The flag State may authorize the requesting State to, inter alia: 1. board the ship; 2. inspect and carry out a safety examination of the ship, and 3. if evidence is found that the ship is engaged in unsafe practices, take appropriate action with respect to the ship, persons and cargo on board, as authorized by the flag State. A State which has

nationality or assimilated to it and is engaged in unsafe practices associated with the trafficking or transport of migrants by sea, the State may request the assistance of other States in preventing the use for that purpose. The States so requested should render such assistance as is reasonable under these circumstances.[27] Every State that intervenes can avail itself of the prompt collaboration of the State whose consent is requested, and this consent might be subjected to certain conditions of mutual agreement between the two States, especially regarding the measures to be taken jointly.[28] In fact, such conditions must comply with domestic and international law concerning the illegal transportation of migrants.[29] They also have to comply with the safety of navigation rules, taking into account the humanitarian principles applicable to people on board.[30] Noteworthy is the reference, in paragraph 5 of the Circular, to the respect of the rights of asylum seekers and refugees contained in *the Convention relating to the status of refugees* of 1951 and in the attached *Protocol* of 1967. Lastly, States are required to transmit to the IMO a report on the incidents eventually occurred and, on the measures taken to reestablish safety conditions.

2.2 The Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention against Transnational Organised Crime

In the framework of combating transnational organised crime, the action to reduce the incentives for irregular migration through combating exploitative practices is the first result that States are committed to achieve. This should be done through addressing the root causes of migration in countries of transit and origin, considerably before crossing the sea.

Smuggling of migrants indicates "(…) the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident".[31] The *Protocol*

taken any action in accordance with this paragraph should promptly inform the flag State concerned of the results of that action."

[27] Paragraph 11 of the Circular.

[28] Paragraph 13 of the Circular.

[29] Paragraph 16 of the Circular.

[30] Paragraph 17 of the Circular.

[31] Article 3, lett. a) of the *Palermo Protocol*.

against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention against Transnational Organised Crime (New York, 2000)[32] is a dedicated thematic international treaty adopted to prevent smuggling of migrants, tackle the criminal consequences of irregular migration by sea and promote the cooperation among States, while ensuring that the rights of the individuals involved are respected. In fact, the *IMO Circular* represented a fist attempt to encourage such cooperation among States to comply with safe and secure navigation rules. However, this latter instrument was not including any provision on prevention mechanisms or rights of migrants, but it was rather aimed at safeguarding the lives of migrants.

As a country particularly affected by international migration and arrivals by sea, Italy played an important role first in proposing the adoption of the *IMO Circular*, and also in the elaboration of the *Palermo Protocol*. The latter advocates for the introduction of a specific legal framework aimed at making international cooperation more effective for the prevention and repression of this dangerous illegal activity. To this end, Italy presented a joint proposal with Austria to the United Nations Commission for Crime Prevention and Criminal Justice, a body created by the Economic and Social Council (ECOSOC).[33] The United Nations General Assembly approved the initiative establishing an *ad hoc* committee for the drafting of the text of an international treaty against transnational organised crime, whose formal adoption was completed in 2000.

Along with the *Palermo Protocol*, an additional treaty was also prepared with the objective to combat irregular migration by sea. The provisions contained in the 1998 *IMO Circular* were largely transposed in this. Its rules focus on the objective of prevention, leaving a certain unclarity regarding the measures to be adopted in the repression of smuggling and illegal transport of migrants. The State Parties maintain discretion in defining the methods of carrying out law enforcement actions against the crime exploiting irregular migrants. They can act in cooperation with each other by virtue of the international cooperation scheme that the Protocol itself intends to promote.

The need for enhanced cooperation for this particular illicit activity derives from the issue of addressing the smuggling of migrants taking place out of the jurisdiction of one single

[32] Hereinafter: *Palermo Protocol*, adopted by General Assembly Resolution A/RES 55/25 on 15 November 2000. Currently (September 2019) 149 States are parties to the Protocol. The text is reproduced in United Nations, *Treaty Series, Vol*. 2241, doc. A/55/383, p. 507.

[33] Momtaz, *La lutte contre « introduction clandestine » de migrants par mer,* in *Annuaire du Droit de la Mer*, 1999, p. 49; Brolan, *An analysis of the Human Smuggling Trade and the* Protocol Against the Smuggling of Migrants by Land, Air and Sea *(2000) from a Refugee Protection Perspective* , in the *International Journal of Refugee Law* , 2001, p. 582.

State, in an area where many more might be involved instead. Therefore, it is not always easy to identify which is the responsible State to protect the rights of the individuals, prosecute the authors of this crime and ensure compliance with the international standards. In this sense, high seas become the privileged area for carrying out illicit activities, including in the case of unsafe boats used for such type of unsecure transportation of irregular migrants. In this case the principle of territorial jurisdiction implies the extraterritorial application of States' jurisdiction, thus requiring joint enforcement actions. In fact, precisely because irregular migration by sea is transnational by nature itself, only interstate cooperation can ensure an effective cross-border management.

Since smuggling of migrants entails illegal entry and cross-border movements, migrants accept and take the risk consenting to be transferred from a place to another, being then exposed not only to the vulnerability of the sea crossing but also to other exploitative conditions to the detriment of their fundamental human rights. The *Protocol* however pursues the objective to criminalise the illicit activity avoiding making migrants liable for it.[34]

2.3 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime

Smuggling of migrants, an illicit activity always transnational, is often confused with trafficking in person. Trafficking in persons is defined as: "(...) the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."[35] From this deifinition, it can be deduced that six fundamental elements distinguish trafficking in

[34] Article 5 of *Palermo Protocol*.
[35] Article 3, lett a) of the *Palermo Protocol*.

persons from smuggling of migrants.[36] First, the victims of trafficking are subject to coercion or fraud by the author of such illegal conduct, while migrants knowingly choose and consent to use the services provided by smugglers. Secondly, the smuggling of migrants ends when a migrant reaches the destination irregularly, while trafficking might take place within the border of the same country or the exploitation might continue – but not necessarily - after the victim reaches another country. The third relevant element is the border crossing, which is required for smuggling to happen, and not necessarily for trafficking. Moreover, the modality in which the profit is generated is different for trafficking in person as it derives from the exploitative activity, while for smuggling of migrants the facilitation of border crossing generates an income. Unlike for migrants involved in trafficking in persons, smuggled migrants are not considered as victims. Lastly, if smuggling of migrants is considered as crime against the State, trafficking in persons is a crime against the person.

3. Distinguishing interception at sea from rescue operations

Besides the distinction between smuggling and trafficking, there is another two concepts that are also often confused: (1) rescue operations at sea, for which all States are called to respond in case of situation of danger or distress at sea, and (2) interception or interdiction at sea, which are aimed at safeguarding internal security of a given State, involving one or two countries that share a sea border. The balancing interests and objectives pursued by the two operations are completely different: human life at sea on the one side, and internal security on the other. Therefore, according to The United Nations Refugee agency (UNHCR) such operations should be kept neatly separated, prioritising the first over the second. In fact, UNHCR proposed the following operational definition of interception: "[It] is defined as encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination."[37]

[36] Obokata, *The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air, in Ryan*, Mitsilegas (ed.), *Extraterritorial Immigration Control. Legal Challenges*, p. 152.

[37] UNCHR – Executive Committee (ExCOM) Standing Committee 18th Meeting, *Interception of Asylum Seekers and Refugees. The International Framework and Recommendations for a Comprehensive Approach*, doc. EC/50/SC/CRP.17, 9 June 2000.

Although there is no uniform consensus on the definition of maritime interception at international level, this concept encloses measures to control the sea borders and entry and also the territory that States put in place outside the national borders, being that in the high seas or in the territorial waters of a third State, as long as the latter has given consent. In compliance with relevant immigration laws, these measures are aimed at combating irregular immigration by sea and pursue the objective to prevent and interrupt the navigation of the boats on which irregular migrants are transported. However, this form of extraterritorial control could undermine the possibility of obtaining international protection for those who, unlike migrants who leave the country of origin for economic or other reasons, are forced to leave and seek international protection. This would require State to adopt appropriate procedures and safeguards.[38]

States have taken steps to adopt bilateral treaties to combat irregular immigration even before the *Palermo Protocol* came into force in 2004. For instance, the agreement between Italy and Albania to stem arrivals by sea to southern Italy, concluded in 1997, represents the first case of bilateral agreement in the Mediterranean area. Multiple other examples of bilateral agreements on this matter have been concluded later on that model, even in the Americas and Australia.[39] Nevertheless, the methods used to carry out operations to combat irregular migration at sea might imply breaches of the obligations of international Law of the Sea and violations of the fundamental rights of migrants involved in smuggling and trafficking practices.

With regards to the first point, it should be noted that not always States' action is compatible with the rules of the Law of the Sea. In fact, control of irregular migration by

[38] *Ibidem*, par. 35.

[39] Consider, for example, some of the bilateral treaties concluded by the United States with Cuba in 1995 (See United States Department of State - Bureau of Public Affairs, *United States Joint Statement with the Republic of Cuba on Normalization of Migration*, in *United States Department of State Dispatch Magazine*, Volume 6 No. 19, 2 May 1995), with the Domincan Republic in 2003 (See United States of America – Department of State. Treaties and Other International Acts Series (Tias), *Agreement between the Government of United States and the Governement of Dominican Republic concerning cooperation in maritime migration law enforcement*, no. 03-520, 20 May 2003) and with Bahamas in 2004 on trafficking of drugs and migrants (See United States of America – Department of State. Treaties and Other International Acts Series (Tias), *Agreement between The Government of The United States of America and The Government of The Commonwealth of The Bahamas concerning cooperation in maritime law enforcement*, no. 04-629, 29 June 2004). Australia concluded treaties with Nauru and Manus Island and Papua New Guinea in 2001 to intercept vessels carrying asylum seekers and move them to detention centers out of Australia mainland (See Parliament of Australia, *The 'Pacific Solution' revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island*, 4 September 2012, available at at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/PacificSolution#_Toc334509636, last accessed 24 October 2019.

sea on the basis of international instruments allows the right to visit the vessels only, not followed by any exercise of coercive powers, unless the flag State of the ship consents so. However, some States, especially in the southern border of Europe, have undertaken unilateral interdiction programmes. These States have got agreements with other coastal States following the scheme used for the treaties stipulated on the subject of the fight against drug trafficking.[40] Therefore, these bilateral agreements allow States to resolve any eventual uncertainties on the exercisable measures not otherwise specified in the Protocol. Nevertheless, States' action must comply with the limits deriving from the respect of the obligations of safeguarding human life at sea, which - as mentioned above - applies even when the risks of unsafe transportation by sea effects smuggled migrants.[41] Furthermore, States must also comply with the obligations to protect human rights deriving from international human rights and refugee law, in compliance with the 1951 *Convention* and the 1967 *Protocol relating to the Status of Refugees*, enshrining the principle of *non-refoulement*.[42]

In practice, naval interdiction programmes aimed at controlling irregular immigration can be conducted jointly by several States and also unilaterally by one single State. These programmes consist of preventing ships from entering the territorial and internal waters of a given coastal State, often contravening with the above-mentioned relevant standards of international law. Through this type of interventions, States implement measures that concretely extend their sovereignty beyond the maritime zones. In these areas, the Law of the Sea provides less pervasive jurisdictional powers to the coastal State, depending on how far away from territorial waters they are undertaken and towards the freedom of seas regime. Interceptions could disturb the navigation of foreign ships, forcing them to change route. The reason why these control operations take place also outside the territorial sovereign area stands in the interest and intention of States to prevent foreign ships to enter the territorial waters under the jurisdiction of the coastal State.

States try to control these movements yet when the boat or ship is in the high seas. However, this is contrary to the regime of the freedom of the high seas included in

[40] Consider, for example, the treaty between Italy and Spain for the suppression of drug trafficking by sea, which is part of the 1988 Vienna Convention against drug trafficking and psychotropic substances. See Adam, *La repressione del traffico di droga via mare in un recente trattato italo-spagnolo", in La Comunita Internazionale*, 1992, p. 348-378

[41] Article 9 of the *Palermo Protocol*.

[42] Article 19 of the *Palermo Protocol* and article 33 of the *Refugee Convention*.

article 87 UNCLOS,[43] which implies that a foreign ship cannot be subjected to interference in navigation, nor that it can be forced to change the route pursued, as the power belongs to the flag State only and exclusively. Yet, this rule is not without exceptions. One exception may occur in case the *theory of constructive presence* principle. This principle applies when the foreign ship is anchored on the high seas but, at the same time, it has sent small boats to the territorial waters of a coastal State with the purpose of disembarking smuggled migrants in contravention of this latter's immigration laws. The coastal State in this case is certainly authorised not only to intercept and warn the anchored foreign ship to divert its route, but also to capture the small boats by virtue of its sovereign powers applicable in the maritime zone under its jurisdiction.

The absence of nationality of such small boats seems to be the condition most often used and invoked by States to intercept vessels carrying irregular migrants, refugees and asylum seekers on the high seas. Under the Law of the Sea, the latter should be subject exclusively to the right of visit.[44] However, since ships without nationality do not enjoy the protection of any State, they can be placed under the jurisdiction of the State intervening on them in order to re-establish public order on the high seas and guarantee the respect of the requirements of safety of navigation, whose control would normally be under the flag State.[45] Consequently, these boats can be taken to the port of the visiting State in order to proceed with required further checks regarding the purposes and conditions of transportation undertaken by the ship transporting migrants, including the identification of the individuals on board. Neither the Law of the Sea codified in the UNCLOS nor the *Palermo Protocol*, however, authorise the State that has intercepted the boat without nationality to exercise coercive powers towards individuals on board and to proceed with any arrest nor detention of any individuals. Given that these sovereign powers can be exercised depending on the national legislation of the intercepting State, it should be clarified that, according to the provisions of the *Palermo Protocol*, individuals

[43] According to article 87 UNCLOS: "The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States: (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in section 2; (f) freedom of scientific research, subject to Parts VI and XIII. 2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area."

[44] Article 110, par. 1, lett. *d*, UNCLOS.

[45] Article 94, par. 3 and 4, UNCLOS.

cannot be criminally prosecuted for the sole reason of transporting migrants.[46] This applies also to the master of a ship or captains, members of an NGO, who embarked migrants after having provided them with assistance at sea. Conversely, the provision contained in article 19 of the *Smuggling Protocol* encourages not to prosecute rescuers and it does not apply for those responsible or involved in smuggling of migrants activities it refers to a conduct that all States shall criminalise in their domestic systems, according to the *Protocol*. In any case, any persons involved in the transportation of irregular migrants cannot be subjected to any form of detention or arrest for violating the immigration laws of the coastal State, as long as the intercepted ship is still on the high seas.

There are other forms of maritime interception to prevent the access of a foreign ship transporting irregular migrants to the territorial sea (or to the contiguous zone, if declared) by a given coastal State. These are border surveillance operations of the coastal State that, unless there is a danger or risk, can legitimately deny the entry into one of its ports as a preventive measure against any illegal activity such as irregular immigration.[47]

Another issue raised by the interception at sea programmes concerns the compliance with the obligations relating to the fundamental rights of migrants involved in smuggling or trafficking activities. If a State intervenes on a ship with no nationality and engaged in the transport of irregular migrants, it is allowed to directly apply relevant international obligations to protect the persons on board. This State has the duty to prevent transported individuals to be in further danger or distress at sea and their life and integrity to be threatened. However, even if this is not specified by international law, if a ship on the high seas transports irregular migrants who are found to be in danger or are potential asylum seekers, States are required to take all necessary measures to rescue them. In such cases, international law calls States to proceed with rescue by immediately taking migrants to a safe place where their life is no longer in danger, ensuring international protection to whom qualify for it.

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[46] Article 6, par. 1, on the criminalization, lists the criminal conducts as follows: "Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit: (a) The smuggling of migrants; (b) When committed for the purpose of enabling the smuggling of migrants: (i) Producing a fraudulent travel or identity document; (ii) Procuring, providing or possessing such a document; (c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means."

[47] Ronzitti, *Coastal State Jurisdiction over Refugees and Migrants at Sea*, in Ando, Mcwhinney, Wolfrum (ed.), *Liber Amicorum Judge Shigeru Oda, op. cit.*, p. 1278.

Unfortunately, States often attempt to stop the passage to the maritime zones that fall under the jurisdiction of the coastal State already on the high seas to avoid taking any responsibility for the treatment of asylum seekers and refugees on board. Such actions, especially in the case of transport and smuggling of irregular migrants whose lives are most likely in danger at sea, are contrary to the international laws. Particularly, these practices oppose Article 98 of the UNCLOS regarding the duty to render assistance at sea, the customary and international standards relating to the safeguard of human life at sea and, more generally, all the obligations to protect human life, personal integrity and the rights of refugees and asylum seekers.

The problematic issue arising from the practice of interceptions is that they are claimed by States to be rescue operations. On this matter, the United Nations General Assembly has stated that States should avoid the categorisation of interception operations as search and rescue operations, because this can lead to confusion with respect to disembarkation responsibilities.[48] Instead, States tend to define interceptions as rescue operations as a way to interfere on a foreign ship even on the high seas legitimately. However, interceptions are rather related to the internal security of the State and aimed at maintaining effective border and immigration controls and the security and safety of international shipping. It follows that States, in practice, take advantage of this confusion in the attempt to reduce their responsibilities following disembarkation. Even if the latter should be shared in collaboration with the other States involved in the search and rescue region, often they do not respond immediately nor adequately.[49]

The *Palermo Protocol* provides the conclusion of bilateral or regional agreements between the States Parties aimed at achieving better efficiency in complying with the standards contained hereto.[50] Therefore, States are called to create a cooperation

[48] United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, *The treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees Report of the Office of the United Nations High Commissioner for Refugees*, doc. A/AC.2579/17, 11 April 2008, par. 20. 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 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 (Frontex)*, doc. COM 2013(197) final, April 2014.

[49] UNHCR, *Meeting of State Representatives on Rescue at Sea and Maritime Interception in the Mediterranean – Background Discussion Paper: Reconciling Protection Concerns with Migration Objectives*, Madrid 23-24 May 2006.

[50] Article 17: "States Parties shall consider the conclusion of bilateral or regional agreements or operational arrangements or understandings aimed at: (a) Establishing the most appropriate and effective measures to prevent and combat the conduct set forth in article 6 of this Protocol; or (b) Enhancing the provisions of this Protocol among themselves."

mechanism both at the international level among them and at interinstitutional level (*operational arrangements or understandings*) among the respective competent bodies.[51] A relevant example of this are the maritime operations conducted within the framework of the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX), established by Regulation (EC) n. 2007/2004 of the Council of 26 October 2004.[52] Such operations pursue the objective to guarantee the coordination of the actions undertaken by the Member States of the European Union in implementing the control measures and the surveillance of the external borders. Border ontrol, however, remains and falls under the responsibility of each Member States.[53] Since its creation, FRONTEX has conducted numerous joint patrolling and naval interdiction operations, both on the high seas and in the territorial waters of third or non-EU States, such as Mauritania, Senegal and Cape Verde. However, these actions raise concern about their legality, due to the undue interference occurring in maritime zones usually subject to the sovereignty of States not involved in the bilateral agreements with the given Member States. FRONTEX Agency operates on the basis of such agreement.[54] Furthermore, since these operations are conducted in an extraterritorial space, the enforcement of coercive powers, such as the arrest of smugglers or the seizure of a vessel or boat, should not be exercised if they are not expressly included in an official agreement providing the legal basis for it.[55]

[51] United Nations Office on Drugs and Crime (UNODC), *International Framework for Action to Implement the Smuggling of Migrants Protocol*, Vienna, 2011, paragraph 185: "Given That addressing migrant smuggling is complex and necessarily multiple Involves agencies with important roles to play, to coordinate and to cooperate with the national community, which has to be carried out in the process of combating migrant smuggling, including through inter-ministerial consultations and the various strands of relevant policy tied together in a comprehensive response. Member States may also consider centralizing migration-related issues in a dedicated ministry or agency. Experience suggests that the establishment of an inter-agency coordinating body to work on smuggling issues 'across government' greatly assists in both policy and operational coordination. Such a body can provide agencies with a forum for regular meetings and policy making. Depending on the country concerned, the establishment of such a body may or may not involve legislation."

[52] 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.

[53] *Official Journal of the European Union*, number L. 349/1, 25 November 2004.

[54] Papastavridis, *"Fortress Europe" and FRONTEX: within or without International law?* in *Nordic Journal of International Law*, 2010, p. 93. Dünnwald, *On Migration and Security: Europe managing migration from Sub-Saharan Africa*, 2011.

[55] Koka, Veshi, *Irregular immigration by sea. International law and European Union law*, in *European Journal of Migration and Law*, p. 26.

4. Relevant examples of bilateral agreements on immigration control: Spain and Italy

States are not only encouraged to comply with the *Palermo Protocol*, but they are also compelled by bilateral agreements that regulate the Law of the Sea.[56] As mentioned above, the maritime interceptions of vessels with the aim of controlling irregular immigration and other illicit trafficking became the main tool for preventive purposes.[57] In particular, European Southern border States have also started interception plans in the Mediterranean in order to prevent the arrival and disembarkation of unsafe boats coming from North-African countries. Migration from Africa to Europe through the Mediterranean Sea increased significantly in the last two decades, so the Sicilian island of Lampedusa in Italy, Spain and the Canary Islands and finally Malta, have witnessed many incidents at sea due to the unstable boats used by smugglers. These three States, which are the first entry points to Europe, have therefore requested assistance to the European Union and also to FRONTEX, which became operational in 2008.[58]

Italy and Spain have concluded a series of operational agreements with North African countries from where irregular migrants depart and criminal networks operate to facilitate their border crossing, more oriented to the purpose of readmitting migrants, rather than engaging on the cooperation to control and combat illegal activities and protect people on the move and in need of protection. The practice of conducting joint patrols in the Mediterranean off the African coast, aimed at creating a deterrent to the departures of illegal migrants, gave rise to numerous episodes of lack of assistance at sea and insufficient or ineffective cooperation between the States involved in terms of protection

[56] Article 311 UNCLOS, par. 3: "Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

[57] Goodwin-Gill, McAdam, *The Refugees in International Law*, Geneva, 2007, p. 372.

[58] It became operational at the end of 2008 and has since conducted around 50 maritime border control operations. See European Parliament and the Council, *Regulation (EU) 2016/1624*, 14 September 2016, establishing Frontex, the European Border and Coast Guard Agency; European Commission, *Third annual report on the development of a common policy on illegal immigration, smuggling and trafficking in human beings, external borders and the repatriation of illegally staying persons*, doc. SEC (2009) 320 final, 9 March 2009. Spain, in particular, has been involved since 2006 in the Hera operations (supervising the area of the Canary Islands), Hera II (for the control of the arrivals of boats in the area between the Canary Islands and West Africa, through bilateral agreements with Senegal and Mauritania) and Hera III (in collaboration with the Senegalese authorities). On this point see Baldaccini, *Extraterritorial Border Control in the EU: The Role of Frontex in Operations at Sea*, in Ryan, Mitsilegas (ed.), *Extraterritorial Immigration Control. Legal Challenges*, *op. cit.*, p. 229.

of the human rights of individuals. Consequently, intercepted migrants were abandoned to their uncertain destiny at sea. The safety of such migrants was not promptly ensured and they were summarily pushed-back to countries in breach of the *non-refoulement* principle, mostly to Libya.[59]

4.1. Spain

Spain committed to border management and control of irregular migration through the conclusion of an agreement with Morocco. Morocco is a target transit country for those wishing to reach Europe through the two autonomous Spanish cities of Ceuta and Melilla, located on the African coast of the Mediterranean, near the Strait of Gibraltar.[60] The cooperation agreement between the two countries provides the repatriation of irregular migrants to the territory of one of the two States involved.[61] The continuous attempts of migrants to cross the border through reaching the Spanish enclaves and the harsh repression implemented by Morocco and the overall management of this crisis affecting this particular area raised the reaction of the United Nations and the then-Secretary-General Kofi Annan called for humane treatment of migrants.[62]

Since 1999, Spain has developed a maritime interception programme through a satellite system that allows for the identification and implementation of interdiction measures against small boats transporting irregular migrants to the Spanish coasts and the Canary Islands. If the such boats are considered sufficiently safe, they are diverted and escorted back to the country of origin.[63] However, since such type of interventions are performed without checking on the presence of asylum seekers and refugees on board, they are contrary to international fundamental rights obligations. Moreover, many of the migrants

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[59] Gil-Bazo, *The Practice of the Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revised*, in the *International Journal of Refugee Law*, 2006, p. 579

[60] More agreements have been concluded by Spain on the control of maritime borders with Senegal and Mauritania in 2006, with Cape Verde in 2007 and with Gambia, Guinea and Guinea Bissau in 2008. See Agencia Española de Cooperación Internacional para el Desarrollo - Ministerio de Asuntos Exteriores y de Cooperación, *Plan África 2009-2012*, 2009, p. 60 and 81.

[61] Text available at *Acuerdo entre el Reino de España y el Reino de Marruecos sobre la circulación de personas, el tránsito y la readmisión de extranjeros entrados ilegalmente*, in *Boletín Oficial del Estado* no. 100, 25 April 1992, no. 130, 30 May 1992, article 3, par. d.

[62] United Nations News Service, *Annan urges humane treatment of migrants trying to cross Morocco-Spain border*, 7 October 2005.

[63] García Andrade, *Extraterritorial Strategies to Tackle Irregular Immigration by Sea: A Spanish Perspective*, in Ryan, Mitsilegas (ed.), *Extraterritorial Immigration Control. Legal Challenges*, *op. cit.*, p. 316.

that arrived by sea from Morocco most likely fled from other African countries where they were subject to serious violations of human rights.

Spain was the first European State of which the *Committee against Torture*, an international body of the United Nations mandated to oversee the application of the *Convention against torture and other cruel, inhuman or degrading treatment or punishment*.[64] The Committee held Spain accountable for failing to comply with the obligations concerning the protection of the human rights of migrants who have been intercepted and rescued at sea, then conducted on the territory of a third State considered unsafe.[65] The case before the Committee concerns the rescue by the Spanish coast guard of the *Marine I* ship, which was found in international waters off the African coast. At the time of the incident, it was not clear what nationality the ship was. It was carrying 369 migrants of African and Asian origin, boarded in Guinea.[66] Although the ship was in the Senegalese search and rescue region, the authorities of the latter State requested assistance from the Spanish coast guard because they claimed that they did not have the means to conduct the rescue operation. The Senegalese authorities then informed Mauritania of the situation, since the Mauritanian port of Nouadhibou was the closest to the emergency site. The Spanish ship *Luz de Mar* arrived at the place of the incident and the diplomatic negotiations between Spain, Senegal and Mauritania started, mainly to decide on the measures to be taken in regard to the *Marine I* ship and its passengers. Meanwhile the two ships were joined by the Spanish Coastguard, *Guardia Civil*, with members of the non-governmental organization *Médecins du monde* and the Spanish Red Cross on board to provide medical assistance, along with a representative of the Government of the Republic of Guinea. After eight days, Mauritania consented to the disembarkation of migrants in the port of Nouadhibou, from which all migrants would be repatriated. Once they reached the Mauritanian territory, migrants were placed under the custody of the Spanish authorities to proceed with the identification and repatriation. Among the migrants, 35 of Asian origin were transferred to the Canary Islands to request for asylum, other 35 of African origin were instead conducted to Cape Verde. The operations took place with the support of the International Organization for Migration (IOM) in order facilitate their movements to India and Pakistan. Based on the information received by

[64] Adopted by General Assembly Resolution 34/46 of 10 December 1984 and entered into force on 26 June 1987, of which 166 States are party. Text in United Nations, *Treaty Series*, vol. 1465, p. 85.

[65] Wouters, Den Heijer, *The* Marine *Case: a Comment*, in the *International Journal of Refugee Law*, 2010, p. 1

[66] *J.H.A. v. Spain*, CAT/C/41/D/323/2007, UN Committee Against Torture (CAT), 21 November 2008

the *Committee against Torture*, it was not clear whether migrants while being identified were also informed about their possibility to claim for asylum should their conditions allowed so. The 23 people who refused voluntary repatriation were held in Mauritania under the control of the Spanish authorities, until they were transferred to third countries, including Morocco, Senegal, Mali, Egypt and South Africa. After having declared the inadmissibility of the case on the ground of not having exhausted the internal judicial remedies before, the Committee affirmed the existence of the jurisdiction of Spain in the extraterritorial context since, even though it came to a space outside the sovereign territory, Spain has controlled migrants and exercised authoritative powers over them. This element was sufficient to activate the responsibility of the State in case of violation of the obligations related to the treatment of migrants and asylum seekers.[67]

In light of the episode involving Spain's responsibility, the importance of respecting the protection obligations deriving from human rights and refugee law must be reiterated. According to the Law of the Sea, a rescue operation is concluded when people are accompanied to a safe place. In the particular case in which there are also asylum seekers among the migrants, it is necessary that the intervening State takes into account the needs of the latter and therefore takes active measures to ensure that they are treated with humanity and are not pushed back towards countries where their integrity is threatened.

The decision of the *Committee against Torture* represented an important signal for States engaged in interception and rescue activities, especially in the Mediterranean region where these incidents occur frequently, delaying rescue operations due to the lack of prompt action by States, and affecting the protection needs of migrants, asylum seekers and refugees.

[67] "The Committee takes note of the State party's argument that the complainant lacks competence to represent the alleged victims because the incidents forming the substance of the complaint occurred outside Spanish territory. Nevertheless, the Committee recalls its general comment No. 2, in which it states that the jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. [3] In particular, it considers that such jurisdiction must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention. This interpretation of the concept of jurisdiction is applicable in respect not only of article 2, but of all provisions of the Convention, including article 22. In the present case, the Committee observes that the State-party maintained control over the persons on board the Marine I from the time the vessel was rescued and throughout the identification and repatriation process that took place at Nouadhibou. In particular, the State party exercised, by virtue of a diplomatic agreement concluded with Mauritania, constant de facto control over the alleged victims during their detention in Nouadhibou. Consequently, the Committee considers that the alleged victims are subject to Spanish jurisdiction insofar as the complaint that forms the subject of the present communication is concerned." (par. 8.2).

4.2. Italy

Starting in May 2009, Italy began a policy of maritime interceptions of migrants by stopping them at sea and pushing them back to the countries from which they left, especially Algeria and Libya.

On 30 August 2008 Italy concluded the *Treaty of Friendship, Partnership and Cooperation between the Italian Republic and the Great Socialist Libyan Arab Jamahiriya*,[68] which entered into force in February 2009, following a series of agreements between the two countries.[69] Before that, various cooperation agreements between Italy and Libya were concluded in order to regulate the fight against irregular immigration. One of these is the Protocol of 29 December 2007,[70] which refers to a previous programmatic agreement concluded in Rome in 2000 and in force in 2002.[71] Through these last two instruments, the two States Parties promoted collaboration against terrorism, organised crime, drug trafficking and irregular immigration. The 2007 Protocol committed the Parties to the fight against irregular immigration, regulating the provision of training activities and organising joint patrols at sea, for which Italy ensured the temporary transfer of six Italian patrol boats to Libya.

According to the Protocol, the surveillance and search and rescue operations can take place both in the departure or transit points for vessels and boats transporting irregular migrants, as well as in the Libyan territorial waters and on the high seas, thus remaining unclear whether authoritative powers can be exercised also over ships flying the flag of third States. In addition, certain clauses of the aforementioned Protocol of 2007 were supplemented by the subsequent Protocol, which entered into force on 4 February 2009. This Supplement allows starting joint patrolling operations using Italian ships both on the high seas and in territorial waters of Italy and Libya. Though these operations, the presence of a Libyan officer and coordination from Libyan authorities is required. Yet,

[68] Law of authorization for ratification and execution of 6 February 2009 n. 7, in *the Official Journal of the* Italian *Republic*, n. 40, 18 February 2009.

[69] See the *Preamble*: "(...) taking into account the important initiatives already implemented by Italy in implementing the previous bilateral agreements; (...) considering to definitively close the painful "chapter of the past", for which Italy has already expressed in the 1998 Joint Communiqué, its own regret for the suffering caused to the Libyan people following the Italian colonization, with the solution of all bilateral disputes and underlining the firm will to build a new phase of bilateral relations, based on mutual respect, equal dignity, full cooperation and on a fully equal and balanced relationship (...)"

[70] The Protocol was not published in the *Official Journal*, in violation of national legislation on the publication of treaties.

[71] The text in the *Supplement to the Official Journal of the Italian Republic*, no. 111, May 15, 2003, p. 53.

this instrument does not provide adequate clarification nor legal basis on the possibility to establish the Italian or Libyan jurisdiction over third States' vessels, which would be otherwise illegitimate. In fact, on the basis of the principle of consensus, the Italo-Libyan agreement can explain effects on both territories and maritime areas subject to their respective jurisdiction, but not towards third parties.[72] With regard to vessels without nationality, Italian ships may exercise the right to visit in accordance with the Law of the Sea (article 110) and the Palermo Protocol (article 8).[73] Italy can thus exercise coercive powers in compliance with international obligations to protect human rights of individuals and refugees. In this sense, the seizure of boats with migrants on board and their repatriation through the conclusion of agreements with the countries of origin cannot be considered legitimate, without the intercepting authorities first proceeding to identify the persons on board and their eventual need for international protection.

No provision in this treaty refers expressly to treatment to refugees, since Libya is not a party to the 1951 *Convention relating to the status of Refugees*.[74] However, a general invite to both parties to respect human rights derives from the provision contained in Article 6, stating that "[t]he Parties, by mutual agreement, act in accordance with their respective legislation, the objectives and principles of the United Nations Charter and the Universal Declaration of Human Rights". [75] Despite this generic clause relating to respect for human rights, the lack of means of control over the effective compliance with the obligations of protection in Libya constitutes a risk for migrants and asylum seekers that, if intercepted by the Italian authorities and pushed back and handed over to the Libyan authorities. If so, there is a bid chance that migrants suffer abuses, torture and inhuman

[72] Article 34 of the *Vienna Convention on the Law of Treaties*: "A treaty does not create either obligations or rights for a third State without its consent."

[73] Article 12, par. 9 *quater* of the Italian Consolidated Text on Immigration, *Law 286/*1998 provides: "The powers referred to in paragraph 9-bis [detention, inspection and seizure, conducting the ship in a port of the Italian State] may be exercised outside territorial waters, as well as by ships of the Navy, including by ships in police service, within the limits allowed by law, international law or bilateral or multilateral agreements, if the ship flies the national flag or even that of another State, or yes sections of a ship without a flag or flag of convenience." Considering the reference to the limits deriving from international law, contained in the same article, in accordance with the law of the sea, Italy can act in the exercise of coercive powers only with respect to ships without nationality. Indeed, to proceed against a ship flying the flag of a third State it is necessary to request the authorization to it. National Legislative Bodies / National Authorities, *Italy: Legislative Decree No. 286 of 1998, Testo Unico sull'Immigrazione*, 25 July 1998, available at https://www.refworld.org/docid/54a2c23a4.html, last accessed 24 October 2019.

[74] However, since 1981 Libya is party to the *Convention governing certain aspects of the refugee problem in Africa* (1969), within the framework of the Organization of the African Union (OUA) whose article 8 provides for collaboration with the UNHCR. According to the aforementioned article, this instrument complements the *Convention relating to the status of refugees* of 1951 in the region.

[75] The Universal Declaration of Human Rights was adopted by the General Assembly with Resolution 217 (III) A in 1948. Not having a binding nature, it rather assumes the value of proclamation of rights.

or degrading treatment, in violation with Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[76]

It is no coincidence that the policy of push-backs at sea was condemned by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), a body of the Council of Europe established by the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Strasbourg, 1987). [77] The Committee stated that Italy, by intercepting irregular migrants heading towards the southern Italian coasts and taking them back to Libya and Algeria, did not adopt adequate guarantees against those who had serious reasons to believe that they would run a real risk of being subjected to torture or other ill-treatment, if sent back to a particular country.

5. The turning point on operations at sea: the *Hirsi Jamaa and others c. Italy* case

The question on the legality of such operations at sea has been addressed by the European Court of Human Rights, in relation of the protection of human rights at sea. The case before the Grand Chamber of the European Court of Human Rights, *Hirsi Jamaa and others c. Italy*[78] is the turning point for operations at sea involving migrants since it finally shed light on the issue of protecting human rights and international protection of refugees at sea and the compatibility of the immigration control measures and border surveillance with international law.

The application before the European Court was presented by 11 Somali and 13 Eritrean citizens who, at the time of the facts, were on 3 boats with other around two hundred migrants departed from Libya and headed for the Italian coasts. They were intercepted by Italian patrol boats at around 35 nautical miles from the southern coast of Lampedusa. They were promptly embarked on Italian ships and, without being informed, transferred back to Libya. The victims therefore claimed the violation of Article 3 of the ECHR for having been rejected by the Italian authorities, without having had the opportunity to oppose to the return to Libya, nor request international protection not to

[76] European Convention on Human Rights (Rome, 1950), article 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[77] Council of Europe, *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*, Doc. CPT / Inf (2010) 14, 28 April 2010.

[78] European Court of Human Rights, Grand Chamber, *Hirsi Jamaa and Others v. Italy*, *Application no. 27765/09*, 23 February 2012.

be repatriated to their countries of origin, in which, moreover, they could have been suffered torture or inhuman and degrading treatment. The applicants also claimed violation of Article 4 of Protocol No. 4, against the prohibition of collective expulsion, and Article 13 of the ECHR, providing the right to an effective judicial remedy.

The Court unanimously decided that the interception policy implemented by Italy not only violates the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), but also the relevant international law, in particular the principle of *non-refoulement*. Regarding the legal ground on which Italy undertook these operations, particularly the bilateral treaty with Libya, the Court reaffirmed the prevalence of the protection guarantees of the Convention, thus making every agreement void, if incompatible with the provisions contained thereto.[79] The Court also considered that the Italian authorities acted in violation of Article 13, in conjunction with Articles 3 and 4 of Protocol No. 4 of the ECHR, since the applicants once aboard the Italian ships were not informed by the Italian authorities both about the destination to which they were heading to nor on the existing procedures to prevent their return to Libya.[80] In fact, the way in which the refoulement was carried out, embarking the applicants rescued on the high seas and leading them back to the place of departure, hardly allowed access to Italian justice and an individual and rigorous examination of the circumstances.[81] The Court established the existence of the Italian jurisdiction in case of interceptions taking place on the high seas. It also declared the responsibility of Italy for putting the individuals in danger by accompanying them back to Libya, instead of taking them to a place of safety on Italian territory. The Court therefore based its decision on the existence of exceptional circumstances according to which the exercise of the jurisdiction of a State, which is normally exercised in the sovereign territory, can have its effects even outside it, by virtue of the effective control exercised on the individuals.[82]

Consequently, if a person (or, as in this case, a ship) acting as an organ of the State is outside the territory, international law obligations of protection always apply.

[79] Paragraph 129 of the decision.
[80] Paragraph 203 of the decision.
[81] Paragraph 185 of the decision.
[82] Paragraphs 72 and 74 of the decision. The Court expressly refers to two cases. The first is a case of extradition, *Soering v. United Kindgom Application* 14038/88, 7 July 1989, which in paragraph 86. The second is a decision on the admissibility before the Grand Chamber, *Banković and Others v. Belgique and 16 Other States Parties, Application* 52207/99, 12 December 2001, paragraph 67. In the *Hirsi* decision it appears that the Court has finally overcome this worrying position on the merely regional application of the Convention.

6. Conclusion

This analysis shows that despite the subtile line between smuggling and rescuing migrants at sea may appear blurred at a first glance, the applicable Law of the Sea is clear enough in defining States' responsibility to comply with international obligations, including the fundamental duty to render assistance at sea. This obligation implies the erosion of their jurisdiction when it comes to protect internal and international security-related interests, including combating transnational organised crimes. Among States' priorities to combat crime, there is the practice of smuggling of migrants, which is always transnational in nature, unlike trafficking in person. If interception operations are measures used by coastal States with the aim, among others, to combat these two heinous practices, they cannot prevail over the duty to save migrants' lives in danger at sea, which requires adequate search and rescue operations instead. Unlike the case of interception, rescuing migrants to be taken to a place of safety is the sole exception allowing a temporary compression of the sovereign powers of the coastal State to control the entry to its territory.

From this study it can be deduced that, whenever the coastal States prevent NGOs to disembark rescued migrants or prosecute them on the ground that they are aiding illegal migration or are colluded or involved in smuggling practices, such States are contravening their obligations deriving by international law, particularly the duty to render assistance in case of distress at sea, which prevails over any other security interests. Based on that, if NGOs are engaged in search and rescue operations, they should not be prevented to enter territorial waters to seek the cooperation of the coastal State in providing assistance.[83] This rule prevails over all other national measures, including those national laws that fine NGOs rescuing migrants at sea. In this sense, this study has argued that the right to life and the principle of non-refoulement should always prevail over national legislation or other measures purportedly adopted in the name of national security.

It can be thus concluded that current restrictive migration policies contribute to exacerbating migrants' vulnerabilities and only serve to increase trafficking in persons. Moreover, stigmatising migrants as "possible terrorists, traffickers and smugglers", without providing evidence, can foster the perception of migration as a threat. This

[83] See on this the Decree issued by the Regional Administrative Court for Latium (TAR), N. 10780/2019 REG.RIC, 14 August 2019, on the mistrial of the provision by the Italian authorities on the prohibition of navigation of the ship *Open Arms* in Italian territorial waters.

conception ultimately increases the climate of hatred and xenophobia against migrants and refugees, instead of emphasising the positive countribution they can give to the host communities and destination countries.

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