

The European operations in the Mediterranean Sea to deal with migration as a symptom: from the Italian operation *Mare Nostrum* to Frontex operations *Triton* and *Posseidon*, EUNAVFOR-MED and NATO's assistance in the Aegean Sea

Félix VACAS FERNÁNDEZ*

Abstract: The EU operations launched in 2014 and 2015 in the Mediterranean Sea to deal with the so-called migrant and refugee crisis are the main operative answer taken at EU level. They are a clear symptom of the road the EU and its Member States are taking on trying to deal with the migration challenge: is it the road mapped by the European Migration Law based on the International and European Law on Human Rights and on the EU values or, on the contrary, by an exceptional legal regime, for migrants alone, where (supposed) security and (real) egoistic States interests prevail?

Keywords: European Migration Law — rescue of people at sea Law — international protection of people at the high seas — asylum — principle of *non-refoulement* — EU values — EU Migration Policies — Frontex — NATO — search and rescue operations — crisis management operations.

(A) INTRODUCTION

One of the most crucial structural global challenges of our world is, without any doubt, migrations. In the words of the Secretary General of the United Nations, we live in a *Second Age of Migration*.¹ And even though this is a global phenomenon,² the European Union (EU) has a special interest on it for a good number of reasons.³ In spite of the fact that the general perception in Europe that the EU

* Associate professor of Public International Law and International Relations in Universidad Carlos III de Madrid. E.mail: fvacas@der-pu.uc3m.es. This article was undertaken within the framework of the Jean Monet Research Project “Modern challenges to the European integration: international policy and legal aspects” –Ref. 565663-EPP-I-2015-I-RU-EPPJMO-PROJECT- developed by North-West Institute of Management – Branch of Ranepa, Saint Petesburg (Russia) and Universidad Carlos III de Madrid (Spain).

¹ Report of UN Secretary-General, *International migration and development*, doc. A/60/871, 18 May 2006, par. 2.

² In 2015 there were more than 244 million migrants in the world –in 2000 there were 173 million, an increase of 2.5 % per year-. See *International Migration Report 2015*, United Nations, New York, 2016, at 5. (For all web pages quoted, last visit 4th July 2016).

Of them, on 31 December 2014, there were 19.5 million refugees and 1.8 million asylum seekers, from a total of 59.5 forcibly displaced people worldwide, the highest level since the end of the Second World War: 38.2 million of internal displaced, 14.4 million refugees under UNHCR and 5.1 million of Palestinian refugees under UNRWA. UNHCR, *Global Trends. Forced Displacement in 2014*, at 2.

³ Among them, the European Commission has long ago underlined the need of immigrants for the EU economy to grow and make its social, economic and political system sustainable in the face of the serious demographic challenges that most of its member States already suffer. This strictly economic and, by the way, egoistic approach –wrong as it is both in moral and real terms; in the well known words of Max Frisch: “We asked for workers. We got people instead”- is well summarized by the Commission on a recent Communication: “(T)he EU needs a more proactive labour migration policy to attract the skills and talents it needs to address demographic challenges and skills shortages, thereby contributing to economic growth and the sustainability of our welfare system. (...). If we want to improve our way of managing migration, we have to become better at attracting the skills and talents that we will need in the future (...)”. Communication from the

countries are nowadays the main destination of migrants is mainly wrong and very much overstated⁴—especially if we take into account refugees and asylum seekers—,⁵ the size of the global phenomenon of migration, no doubt, affects Europe both in terms of global figures of migrants trying to reach European soil and of the consequences, in different fields, of their arrival into a region without internal borders as the Schengen Area.⁶

How is the EU facing this global challenge which affects it so especially? The future of the EU itself depends on the answer to this question and, above all, on the success or failure—measured in moral and legal terms as well as in terms of effectiveness— of the policies the EU is trying to implement to deal with this complex phenomenon.⁷

In fact, on this field, the EU operations launched in 2014 and 2015 in the Mediterranean Sea to deal with the so-called migrant, and humanitarian, crisis are the main, almost unique, operative answer taken and really implemented at EU level. That is why they are a clear symptom, an unmistakable sign

Commission, *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM(2016) 197 final, 6 April 2016, at 14 and 3.

⁴ In fact, among other data, we should remember that even though a majority of migrants live in high-income States, almost 1/3 of the total migrants -29%, that is to say, 71 million- live in low and middle-income States: it is the so called South-South migration, which is much higher than the Western perception of it. Moreover, not all the highest-income States are OECD members. In fact, in the OECD countries live just 50% of all migrants -124 million-. In the same way, if we use geographical criteria, we also find interesting figures: in Europe live as much migrants as in Asia -76 and 75 million respectively-; while in Africa live 21 million. And what is more, in the period 2000-2015, the continent where the arrival of migrants has grown faster has been Asia -26 million new migrants-, followed by Europe -20 million-; which points out that sooner than later Asia will be, by far, the preferred destination of migrants.

The same happens if we have a look at country by country data. Of course, the United States keeps on being, by far, the country where more migrants live -47 million-, but the second position is shared by Russia and Germany -12 million each-, the fourth is Saudi Arabia -with 10 million, and the fastest growing trend in the last 15 years, which will possibly place it second in a very few years-. In fact, among the 6 countries where more migrants live, only 3 are Western countries and of those just 2 are EU members -Germany and the United Kingdom (9 million)-; while, together with Russia and Saudi Arabia, the Arab Emirates are the sixth host State. In fact, among the 20 States hosting the largest numbers of migrants 9 are in Asia and 7 in Europe -only 5 of them are EU members-. *International Migration Report 2015*, United Nations, New York, 2016, at 5-8.

⁵ If we focus on refugees, data on 31 December 2014 is even more striking; much more if we take into account the Western, and more clearly, the wrong European perception that EU countries are the overwhelmingly preferred destiny among refugees: Developing regions in the world host 86 % of all refugees!; and, what is more, 25 % of refugees live in the so called less developed countries. In fact, at the end of 2014 Europe -even after an important growth of 74.3% of refugees in the year- hosted 3.1 million refugees; while Sub-Saharan Africa hosted 3.7 million, Asia 3.85 million and North Africa and Middle East 3 million. In fact, among the 4 countries that host and protect more than 1 million refugees each, none is a Western country: Turkey, Pakistan, Lebanon and Iran. *The first two host as much refugees as the EU as a whole*. Vid. UNHCR, *Global Trends. Forced Displacement in 2014*, at 10-12.

⁶ See, *inter alia*, Communication from the Commission, *5th Annual Report on Immigration and Asylum* (2013), COM(2014) 288 final, 22 May 2014; P. García Andrade, "The Legal Feasibility of the EU's External Action on Legal Migration: The Internal and the External Intertwined", 15 *European Journal of Migration and Law* (2013) pp. 263-281; J. Harding, *Border Vigils: Keeping Migrants out of the Rich World* (Verso, London, 2012); N. Rogers, R. Scannell & J. Walsh, *Free movement of persons in the enlarged European Union* (2^a ed., Sweet & Maxwell, London, 2012); G. Pinyol (ed.), *Immigration Flows and the Management of the EU's Southern Maritime Borders*, (Documentos CIDOB, serie Migraciones, No. 17, Barcelona, 2008); J. Salt, *Current trends in international migration in Europe* (Council of Europe, Strasbourg, 2005).

⁷ See Council of the European Union, *European Pact on Migration and Asylum*, doc. 13189/09 ASIM 68, 24 September 2008; Communication from the Commission, *The Global Approach to Migration and Mobility*, COM(2011) 743 final, 18 November 2011; Communication from the Commission, *A European Agenda on Migration*, COM(2015) 240 final, 13 May 2015; Communication from the Commission, *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM(2016) 197 final, 6 April 2016.

of the path the EU, and above all, its Member States, are taking on trying to tackle with the migration challenge. That is why we are going to focus on them, on the one hand, trying to find the answer to the above question; on the other hand, drawing the international legal framework of maritime operations, both on rescue of human beings and on the international protection of people, applicable to these operations and, thus, to which they should abide in any case.

As a matter of fact, it is important to take into account that these European operations were preceded by a single State operation, launched by Italy in the Centre Mediterranean area —the Sicily Channel up to the Libyan coast-. It was established at the very beginning of the so-called migrant crisis in 2013, as a reaction —not as a pre-emptive measure in any case- to a shipwreck that on 3 October 2013 left more than 360 migrants dead, tens of them children. This is the context within which these operations have been launched, we should remember, always as a reaction to, never as a pre-emptive measure trying to avoid human tragedy. A human tragedy, by the way, that began long ago: since the beginning of the XXI Century hundreds of human beings have died in the Mediterranean Sea every year.⁸

Actually, *the human tragedy in the Mediterranean Sea is not a “crisis”, is not “unexpected” neither “temporary”*. It was clearly foreseeable: in fact, as I said, there were clear symptoms, based in data, of it at least since 2000; they were so clear for the EU and its Member States that Frontex was established in 2004. As it was also clearly foreseeable the increasing, and very fast growing, figures of migrant flows trying to reach Europe: first, the continuity of wars, and the start of new ones, in Africa —above all in the Sahel fringe: Darfur, South Sudan, Mali; together with the Horn of Africa: Eritrea, Somalia—; second, the consequences of what so optimistically was called the “Arab Spring”; and, above all, the deconstruction of stable States next to Europe, directly produced by Western interventions —Iraq, since 2003, Libya, in 2011— or indirectly caused through the political prop from EU countries and the United States, or through direct economic and military aid from Western allies in the Middle East —mainly Saudi Arabia, Qatar and Turkey-, to the so-called “rebels” in Syria. This deconstruction turned these countries in failed States victims of horrific civil wars —true hells on Earth- from where millions of people are trying to flee; behaving themselves, by the way, as true human beings: just trying to survive.

Thus, the so-called “refugee crisis” was foreseeable and is likely to endure for a long time, if we talk exclusively of refugees and asylum seekers. But this is not just a refugee matter: it is a *mixed migration phenomenon*, as the International Organisation for Migration (IOM) and the United Nations Refugee Agency (UNHCR)⁹ call it. Nowadays it is not possible to distinguish between types of migrants; there is not a clear cut between those fleeing from persecution and those looking for a

⁸ See UNHCR, *Central Mediterranean Sea Initiative. Action Plan*, March 2015.

⁹ See IOM, *Irregular Migration and Mixed Flows: IOM's Approach*, doc. MC/INF/297, 19 October 2009; IOM, *Migration Initiatives 2015. Regional Strategies*, at 217-218; UNHCR, *Mixed Migration. 10 Point Action Plan Project* and UNHCR, *Mixed Migration into Europe*; N. Van Hear, *Managing mobility for human development: the growing salience of mixed migration* (United Nations Development Programme, Human Development Reports, Research Paper 2009/20, June 2009).

better economic and social life¹⁰ —certainly, also a very human behaviour: just trying to improve their own life conditions-. And so, placed the issue in terms of migration as a whole, this is not a temporary phenomenon in any way: it is a structural feature of our global International Society, probably one of the most clearly attached to it and thus likely to endure and deeply develop as globalization endures and develops itself.

That is why this is not a temporary crisis, but a structural and permanent phenomenon the EU and its Member States have to deal with. That is why a real and effective European Migratory Policy is very much needed. At the same time, in the words of the Secretary General of the United Nations, “migration is a fundamentally human process involving the often precarious movement of some 215 million people. It is not merely an anonymous megatrend.”¹¹

That is why *the correctness of this Policy should not only be measured in terms of effectiveness but of morality and legality as well*. And so, what kind of European Common Policy? With what contents? And, above all, on what basis, principles, values and interests, is it going to be built? Will it be built within the framework drawn by the European Migration Law¹² based on the International and European Laws on Human Rights and on the EU values and principles enshrined on article 2 of the Treaty of the European Union¹³ or, on the contrary, will it be a *droit d'exception ou état de siege*¹⁴ -an exceptional legal system, *on a permanent basis*, for migrants alone- that ignores that legal framework and where supposed security and real egoistic States interests prevail?

¹⁰ As the Secretary General of United Nations says: “Contemporary migration is an increasingly complex phenomenon. Technological advances have enabled faster travel and the rapid spread of information through the Internet and social media. Rising inequalities, demographic changes and global labour markets often draw migrants to work in gruelling and precarious conditions. The motives for undertaking migration are frequently many-sided and can change, particularly as migrants make long and often difficult journeys to countries of destination. (...)”

As human mobility has increased and become more global, the traditional distinctions between voluntary and forced, regular and irregular, and temporary, seasonal, long-term and permanent migration have become less clear-cut”. Report of UN Secretary-General, *Promotion and protection of human rights, including ways and means to promote the human rights of migrants*, doc. A/68/292, 9 August 2013, par. 5 y 6.

¹¹ *Ibid*, par. 7. Emphasis added.

¹² See, *inter alia*, A. G. Chueca Sancho (coord.), *Derechos humanos, inmigrantes en situación irregular y Unión Europea* (Lex Nova, Valladolid, 2010); Council of Europe & European Union Agency for Fundamental Rights, *Handbook on European law relating to asylum, borders and immigration* (2015); M. Frigo et al., *Migration and international human rights law: practitioners guide no. 6* (International Commission of Jurists, Ginebra, 2011); E. García Costa, *La regulación de la inmigración irregular: Derechos humanos y el control de fronteras en la Unión Europea* (Thomson Reuters/Aranzadi, Cizur Menor, 2014); J. M. Goig Martínez, “¿Una política común de inmigración en la Unión Europea? Evolución, retos y realidades”, 29 *Revista de Derecho de la Unión Europea* (2015) 191-222; Y. Ktistakis, *Protecting migrants under the European Convention on Human Rights and the European Social Charter* (Council of Europe, Strasbourg, 2013); A. Olesti Rayo, “La Unión Europea y la progresiva creación de un régimen comunitario de extranjería”, 40 *Revista catalana de dret public* (2010) 1-19; J. M. Pérez de Nanclares (ed.), *La Dimensión Exterior del Espacio de Libertad, Seguridad y Justicia de la Unión Europea* (Iustel, Madrid, 2012).

¹³ Article 2 of the EU Treaty states: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

¹⁴ As Danièle Lochak first maintained. *Vid.* D. Lochak, *Face aux migrations, Etat de Droit ou état de siège* (Textuel, Paris, 2007).

(B) EVOLUTION ON THE NATURE AND FUNCTIONS OF EUROPEAN OPERATIONS IN THE MEDITERRANEAN SEA TO DEAL WITH MIGRATION SINCE 2013

In order to answer those questions, it is important to distinguish the different possible natures of the maritime operations that can be established. Even though the general international legal framework applied to them is the same, especially on rescue of human beings in the high seas and on the international protection of people, and thus they are obliged to comply with it —as we are going to see in the second part of this article—; their different nature in terms of functions, composition and final objectives, is basic to determine both their real scope and aims pursued with them.

As the UNHCR explains, we should distinguish between *search and rescue* operations, on the one hand, and *border control and surveillance* operations, on the other.¹⁵ Both can save lives on the sea: in fact, this is not an option, but a legal obligation they all should accomplish. But whereas the first ones are designed primary to save lives at sea, the second ones are designed to assure the control and surveillance of borders and to stop those who try to get into irregularly. In the words of the UNHCR: “The collective response needs to maintain a strong capacity to rescue people at sea. It is critical that the long-established tradition of rescue at sea is upheld by all.”¹⁶

(1) The Italian Search and Rescue Operation *Mare Nostrum* (2013-2014)

Since 2013, the great increase in the number of migrants drowned in the Mediterranean Sea made it impossible to continue to ignore, because it was impossible to hide any more, the human tragedy that was happening in the, in times known as *Mare Nostrum* and from those days onward called the *Sea of Death*. The already mentioned shipwreck that occurred on 3 October 2013 in Lampedusa meant the end of innocence of Europe and the European citizens over what was going on in the Mediterranean for so long; and so, it was the starting point of the reaction: a reactive process which has had an important, interesting and very significant evolution since then, the autumn of 2013, up to the present, 2016.

The Operation *Mare Nostrum* (OMN) was established by the Italian Government on 18 October 2013 to tackle the dramatic increase of migratory flows during the second half of the year and consequent tragic ship wreckages off the island of Lampedusa.¹⁷ As it is written on its official web page: “The naval and air units deployed to Mare Nostrum was necessary to improve maritime security, patrol sea lanes, combat illegal activities, especially human trafficking, and tackle the Mediterranean humanitarian emergency in the Sicily Straits, averaging 5 Italian Navy ships and their air units at any given time.”¹⁸

As it can be see, it was essentially a humanitarian operation, created mainly, even though not only, to rescue and save the lives of as much migrants as possible, trying to impede a new tragedy as those that

¹⁵ See UNHCR, *Central Mediterranean Sea Initiative. Action Plan*, March 2015.

¹⁶ UNHCR, *So close yet so far from safety*, 1 December 2014, at 5.

¹⁷ See A. Busonero, “Operazione ‘Mare Nostrum’: una grande operazione umanitaria” *Informazioni della Difesa* (4/2014) 12-23.

¹⁸ Marina Militare, *Mare Nostrum Operation*.

occurred in October 2013. It was deployed in the Straits of Sicily up to the Libyan coast through more than 70.000 km². Both the military units deployed and the budget approved to carry on the operation meant an important effort to Italy; to which it should be added that Italy alone had to take care of those migrants rescued, in legal,¹⁹ economic and social terms.²⁰

Its outcome was impressive during the year it was in force: “During the last 364 days of relentless activity in all weather conditions, the units of the Italian Navy have engaged in 421 operations and rescued 150.810 migrants; 5 mother ships have been seized and 330 alleged smugglers have been brought to justice.”²¹

But this really important effort —in economic, political and social terms- could not be kept much longer by Italy alone. As a consequence, its government asked the EU for cooperation. A cooperation that was meaningfully channelled through Frontex.

(2) Frontex Operations *Triton* and *Posseidon* (2014- ...)

The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Frontex,²² was created in 2004 by the European Council Regulation (EC) N° 2007/2004. According to its Preamble:

“Community policy in the field of the EU external borders aims at an integrated management ensuring a uniform and high level of control and surveillance [...],

¹⁹ As we'll see in the second part of this article, this was clearly stated by the European Court of Human Rights on the judgement *Hirsi Jamaa and Others v. Italy* [GC], ECHR, No. 27765/09, 23 February 2012.

²⁰ As it has been established by the *Dublin Regulation*. Regulation (EU) No 604/2013 of the European Parliament and of the Council, *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*, OJ 2013 L 180/31.

²¹ Marina Militare, *Mare Nostrum Operation*.

²² On Frontex see, *inter alia*, K. F. Aas & H. O. I. Gundhus, “Policing Humanitarian Borderland: Frontex, Human Rights and the Precarioussness of Life”, 55 *British Journal of Criminology* (2015), pp. 1-18; G. Arias Fernández, “Frontex and Illegal Immigration in the European Union”, in J. M. Sobrino Heredia (ed.), *Sûreté Maritime et Violence en Mer = Maritime Security and Violence at Sea* (Bruxelles, Bruylant, 2011); Baldaccini, A., “Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea”, in B. Ryan & V. Mitsilegas (eds.), *Extraterritorial Immigration Control. Legal Challenges* (Martinus Nijhoff, 2010) 229-256; M. Beuving, “Frontex: Its Role and Organization”, in J. Monar (ed.), *The Institutional Dimension of the European Union's area of freedom, security and justice* (Cahiers du College d'Europe, vol. 11, Peter Lang, 2010) 217-232; S. Léonard, “EU Border Security and Migration into the European Union: FRONTEX and Securitisation through Practices”, in C. Kaunert & S. Léonard (eds.), *Developing European Internal Security Policy: After the Stockholm Summit and the Lisbon Treaty* (Routledge, London, 2012) 89-112; V. Moreno Lax, “The EU Regime on Interdiction, Search and Rescue, and Disembarkation: The Frontex Guidelines for Intervention at Sea”, 25 *International Journal of Marine and Coastal Law* (2010) pp. 621-635; A. W. Neal, “Securization and Risk at the EU Border: the Origins of Frontex”, 47 *Journal of Common Market Studies* (2009) pp. 333-56; E. Papastravidis, “‘Fortress Europe’ and FRONTEX: Within or Without International Law”, 1 *Nordic Journal of International Law* (2010) pp. 75-111; S. Puntischer- Riekmann, “Security, Freedom and Accountability: Europol and Frontex”, in E. Guild & F. Geyer (eds.), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate, 2008) 19-34; J. Y Santos Vara & S. R. Sánchez Tabernero, “In Deep Water: Towards a Greater Commitment for Human Rights in Sea Operations Coordinated by FRONTEX?”, 18 *European Journal of Migration and Law* (2016) pp. 65-87; M. Urrea Corres, “El Control de Fronteras de la Unión Europea y su Dimensión Exterior: Algunos Interrogantes sobre la Actuación de FRONTEX”, in J. Martín y Pérez de Nanclares (ed.), *La Dimensión Exterior del Espacio de Libertad, Seguridad y Justicia de la Unión Europea* (Iustel, Madrid, 2012) 235-254.

Effective control and surveillance of external borders is a matter of the utmost importance to Member States (...). The establishment of the Agency, assisting Member States with implementing the operational aspects of external border management, including return of third-country nationals illegally present in the Member States, constitutes an important step in this direction.”²³

To reach these aims, Frontex is established in article 1 “with a view to improving the integrated *management of the external borders* of the Member States of the European Union” and “contributing to an efficient, high and uniform level of *control on persons and surveillance of the external borders* of the Member States”,²⁴ on the essential basis that “the responsibility for the control and surveillance of external borders lies with the Member States”. Thus, on the one hand, those functions are not competences of the EU but of the Member States; and, on the other and as a consequence, Frontex is established as a support European Agency to Member States.²⁵

In 2007, this Council Regulation was amended by Regulation (EC) N° 863/2007, that “establishes a mechanism for the purposes of providing *rapid operational assistance* for a limited period to a requesting Member State facing a situation of urgent and exceptional pressure, especially the arrival at points of the external borders of large numbers of third-country nationals trying to enter the territory of the Member State illegally, in the form of *Rapid Border Intervention Teams*.”²⁶

Finally,²⁷ in 2011, a second amendment was approved for a “further enhancement of the role of the Agency” because an “(e)fficient management of the external borders through checks and surveillance contributes to combat illegal immigration and trafficking in human beings and to reduce the threats to the internal security, public policy, public health and international relations of the Member States.”²⁸ Accordingly, “*rapid interventions*” will be agreed “(a)t the request of a Member State faced

²³ Council Regulation (EC) N° 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 2004 L 349/1, Preamble.

²⁴ *Ibid*, article 1.1.

²⁵ In this way, “the Agency shall facilitate and render more effective the application of existing and future Community measures relating to the management of external borders. It shall do so by ensuring the coordination of Member States’ actions in the implementation of those measures, thereby contributing to an efficient, high and uniform level of control on persons and surveillance of the external borders of the Member States” and “shall also provide the Commission and the Member States with the necessary technical support and expertise in the management of the external borders and promote solidarity between Member States”. *Ibid*, article 1.2 and 1.3.

²⁶ Regulation (EC) n° 863/2007 of the European Parliament and of the Council, *establishing a mechanism for the creation of Rapid Border Intervention Teams*, OJ 2007 L 199/30, article 1. Emphasis added.

²⁷ There have been new reforms on Frontex after 2011. The most important one –even though without a direct operational effect on the Frontex Mediterranean operations created in 2014– has been the establishment of the *European Border and Coast Guard Agency*, that was finally launched the 6th October 2016, after it was announced by President Juncker in his *State of the Union Speech* on 9 September 2015, followed by the *Commission legislative proposal* presented on 15 December 2015, *agreed by the European Parliament, the Council and the Commission* on 22 June 2016 that approved Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 *on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC*, OJ 2016 L 251/1.

See, “European Border and Coast Guard Agency launches today”, available [here](#); and M. A. Acosta Sánchez, “La nueva Guardia Europea de Fronteras y Costas: una necesaria evolución de FRONTEX”, Documento de Opinión, Instituto Español de Estudios Estratégicos, 108/2016, 24 de octubre 2016.

²⁸ Regulation (EU) n° 1168/2011 of the European Parliament and of the Council, *amending Council Regulation (EC) No 2007/2004*, OJ 2011 L 304/1, Preamble.

with a situation of urgent and exceptional pressure, especially the arrival at points of the external borders of large numbers of third country nationals trying to enter the territory of that Member State illegally, the Agency may deploy for a limited period one or more *European Border Guard Teams* ('team(s)') on the territory of the requesting Member State for the appropriate duration in accordance with Article 4 of Regulation (EC) No 863/2007.²⁹

This is the legal basis within which Operations *Triton* and *Posseidon* were established. Thus, they are not search and rescue operations but control and surveillance of external borders operations. Their mandate is, in fact, to help Member States—in these cases, Italy and Greece—to control and survey the irregular migrant flows in the Sicily Channel and the Aegean Sea, respectively. According to their nature, the composition and staff of both operations are prepared to accomplish their mandate, not to rescue and save lives of human beings off-shore; which incidentally and as an International Law obligation in force they are obliged to accomplish anyway³⁰, as we'll see *infra*.

As a matter of fact, in the case of *Triton Operation*, it was launched on 1 November 2014, after the calling of the Italian government to its colleagues in the EU to share the burden, supported during a whole year by Italy alone through its *Mare Nostrum Operation*. The answer from the EU was positive, indeed; but not after some discussions that drove to change the nature, strength and scope of the new EU operation called to replace the Italian one. Actually, some EU leaders were really disappointed with the Italian operation, of strictly humanitarian nature as we have seen, because in their opinion it

²⁹ *Ibid*, article 8a. Emphasis added.

³⁰ Needless to say (or, perhaps, it needs to be said), Frontex operations ought to accomplish also the International and European Human Rights Law and the International and European Migration Law, as is recognized in *Frontex Fundamental Rights Strategy*, adopted on 31 March 2011. However, different NGOs and even the European Ombudsman have reported violations of the above mentioned applicable Law occurred in the context of border control activities under Frontex coordination. See, *Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex*, 12 November 2013; S. Keller, U. Lunacek, B. Lochbihler & H. Flautre, *Frontex Agency: Which Guarantees for Human Rights?*, Migreurop, March 2011.

Finally, the above mentioned Regulation (EU) 2016/1624, of 14 September 2016, that establishes the *European Border and Coast Guard* and also amends previous Frontex Regulations, introduces in article 34 "the protection of fundamental rights and a fundamental rights strategy" as follows:

"1. The European Border and Coast Guard shall guarantee the protection of fundamental rights in the performance of its tasks under this Regulation in accordance with relevant Union law, in particular the Charter, relevant international law—including the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol thereto and obligations related to access to international protection, in particular the principle of *non-refoulement*.

For that purpose, the Agency shall draw up, further develop and implement a fundamental rights strategy including an effective mechanism to monitor the respect for fundamental rights in all the activities of the Agency.

2. In performing of its tasks, the European Border and Coast Guard shall ensure that no person is disembarked in, forced to enter, conducted to, or otherwise handed over or returned to, the authorities of a country in contravention of the principle of *non-refoulement*, or from which there is a risk of expulsion or return to another country in contravention of that principle.

3. In performing of its tasks the European Border and Coast Guard shall take into account the special needs of children, unaccompanied minors, persons with disabilities, victims of trafficking in human beings, persons in need of medical assistance, persons in need of international protection, persons in distress at sea and other persons in a particularly vulnerable situation. The European Border and Coast Guard shall in all its activities pay particular attention to children's rights and ensure that the best interests of the child are respected."

was creating a “calling effect.”³¹ As a consequence, the nature of the operation was changed, choosing Frontex as the adequate Agency to organise and deploy it; being its aim fixed on its mandate “(t)o implement coordinated operational activities at the external sea borders of the Central Mediterranean region in order to control irregular migration flows towards the territory of the Member States of the European Union and to tackle cross-border crime.”³²

At the same time its composition, scope and budget were drastically reduced to a little more than 9 million € and a third of the maritime area under surveillance patrolled by *Mare Nostrum*.³³ The United Nations High Commission for Refugees, alerted in early March 2015 of the consequences this change could trigger:

“It is important to highlight the humanitarian nature of rescue at sea and that the principle of non-refoulement must be respected. International law of the sea establishes clear obligations to rescue those in distress at sea. UNHCR calls for robust and predictable SAR (search and rescue) operations along Mediterranean routes. UNHCR welcomed *Mare Nostrum* — the Italian Navy led rescue operation — and expressed concerns over its ending without a similar operation to replace it. SAR activities need to be initiated wherever there are indications that a vessel or the conditions of the people on board, do not allow for safe travel, creating a risk that people may perish at sea. On 1 November 2014, Frontex launched a new Operation, *Joint Operation Triton*, which is being carried out in the Central Mediterranean. While *Triton* has contributed to SAR operations, this border surveillance operation does not have the resources, scope, and mandate to carry out the SAR required. UNHCR calls for further concerted action by the EU and Member States on SAR operations based on solidarity and joint support with the objective of avoiding further loss of lives at sea.”³⁴

Alert that was simply ignored by the European authorities. As a direct consequence of the changes in nature and scope of the operation, the 13 April 2015 more than 400 migrants perished on a shipwreck, and 6 days later, more than 800 migrants died in the worst tragedy ever in the Mediterranean, both in the same area where until a few months ago the Italian operation was deployed.³⁵ Just a day later the Council concluded that there was a need for “more efficient efforts to save lives at sea by reinforcing Frontex activities, in particular the *Triton* and *Poseidon* operations in the Mediterranean. For this, further funds for Frontex, more assets for both operations as well as an enlargement of their operational area will be needed. A sustainable and more long-term approach should be taken to search and rescue obligations.”³⁶

As for *Posseidon Operation*, it was launched the 1 May 2014 to “implement coordinated operational activities at the external sea borders of the Eastern Mediterranean region in order to control irregular migration flows towards the territory of the Member States of the EU and to tackle cross-border crime”.³⁷

³¹ For instance, the British Prime Minister, David Cameron, the Spanish President, Mariano Rajoy, and their Home Affairs Ministers. See, for example, some of their interventions compiled in *The Guardian*, *The Independent*, the *International Business Times*, *El Diario*, *El Mundo* or *EuropaPress*.

³² Frontex, *EPN Triton*. Emphasis added.

³³ See Ch. Heller & L. Pezzani, *Death by Rescue. The Lethal Effects of the EU's Policies of Non-Assistance* (Forensic Oceanography/Forensic Architecture, 16 April 2016).

³⁴ UNHCR, *Central Mediterranean Sea Initiative. Action Plan*, March 2015. Emphasis added.

³⁵ See Heller, Ch. & Pezzani, L., *supra* n. 31.

³⁶ *Outcome of the Joint Council meeting of Foreign Affairs and Home Affairs*, 20 April 2015.

³⁷ Frontex, *Posseidon Sea*. Emphasis added.

In this case with a budget of 6.6 million € that, as is very well known, is not deterring the death of hundreds of migrants in the Aegean Sea.

(3) The Military Approach to Migration: the Crisis Management Operation EU-NAV-FOR-MED (2015-...) and NATO's Assistance in the Aegean Sea (2016-...)

As we should not confuse search and rescue from control and surveillance operations, to the same extent we should distinguish *search and rescue* operations from *military crisis management* operations. The latter ones, carried out by the army, have as a general aim to cope with crisis which endanger, or may endanger, peace and security. In the case of the EU, these operations are part of the Common Security and Defence Policy (CSDP) as article 42.1 of the Treaty of the European Union foresees:

“The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter.”

And article 43 defines:

“The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories”.

And, even though the CSDP, and its operations, is an integral part of the EU's *comprehensive approach towards crisis management*,³⁸ we should handle carefully this complex and broad concept, attractive as it is, indeed. Because, while a *comprehensive approach* to external conflict and crisis is very much needed,³⁹ we should not confuse, or allow to get confused on, this comprehensive approach concept with the aims and functions of a given CSDP operation: its structure, composition, instructions and operational rules; in brief, the way the operation functions and its real scope will be determined by the stated objectives and the concrete functions designed to be implemented by it.

³⁸ See European Commission Joint Communication to the European Parliament and the Council, *The EU's comprehensive approach to external conflict and crises*, JOIN(2013) 30 final, 11 December 2013.

³⁹ As the Council of the EU has concluded: “The European Union and its Member States can bring to the international stage the unique ability to combine, in a coherent and consistent manner, policies and tools ranging from diplomacy, security and defence to finance, trade, development and human rights, as well as justice and migration. (...) The Council stresses that the comprehensive approach is both a general working method and a set of concrete measures and processes to improve how the EU, based on a common strategic vision and drawing on its wide array of existing tools and instruments, collectively can develop, embed and deliver more coherent and more effective policies, working practices, actions and results. Its fundamental principles are relevant for the broad spectrum of EU external action. The need for such a comprehensive approach is most acute in crisis and conflict situations and in fragile states, enabling a rapid and effective EU response, including through conflict prevention”. Council of the European Union, *Council conclusions on the EU's comprehensive approach*, 12 May 2014, par. 1 and 2.

(a) *The Crisis Management Operation EU-NAV-FOR-MED (2015- ...)*

Under pressure of the mentioned shipwrecks occurred the 13th and 19th April 2015, when more than 1.200 people lost their lives in the Sicily Channel, on 20 April 2015, the Council “confirmed a strong commitment to act in order to prevent human tragedies like the recent events in the Mediterranean”;⁴⁰ and, on 23 April 2015, the European Council finally —after years of wreckages and thousands of deaths, let’s not forget it- concluded that “(t)he situation in the Mediterranean is a tragedy” and underlined that the Union “will mobilize all efforts at its disposal to prevent further loss of life at sea and to tackle the *root causes* of this human emergency, in cooperation with the countries of origin and transit”; solemnly stating: “Our immediate priority is to prevent more people from dying at sea.”⁴¹

The key expression here was “root causes”: what did they mean by “root causes”? Their own answer was: those who are smuggling migrants and trafficking with human beings are the root causes.⁴² Accordingly, the European Council committed to fighting the traffickers in accordance with international law, by disrupting “trafficking networks, bring the perpetrators to justice and seize their assets” and by undertaking “systematic efforts to identify, capture and destroy vessels before they are used by traffickers”, and invited the High Representative of the Union for Foreign Affairs and Security Policy “to immediately begin preparations for a possible CSDP operation to this effect.”⁴³ This Common Security and Defense Policy operation —because this is the nature of the operation: Security and Defense operation as if migration and refugee flows where a security and defense question— was created by Council Decision (on Common Foreign and Security Policy) 2015/778, adopted the 18 May 2015. Its mission is explained in article 1:

“The Union shall 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 (EUNAVFOR MED), 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 international law, including UNCLOS and any UN Security Council Resolution.”⁴⁴

Thus, EUNAVFOR MED is a military operation in composition and a CSDP operation in nature, whose mandate is to disrupt “the business model of human smuggling and trafficking networks in the Southern Central Mediterranean” by identifying, capturing and disposing “of vessels and assets used or suspected of being used by smugglers or traffickers”. As we can see, neither to search nor rescue and save the life of migrants are part of its mandate but an international obligation —emanating from the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1974 International Convention for the Safety of Life at Sea (SOLAS) and the 1979 International Convention on

⁴⁰ *Outcome of the Joint Council meeting of Foreign Affairs and Home Affairs*, 20 April 2015.

⁴¹ *Statement of the Special meeting of the European Council*, 23 April 2015, par. 1. Emphasis added.

⁴² See J. Traublinger, *Boat Refugees in the Mediterranean: Tackle the Root Causes Or Build Fortress Europe?* (Anchor Academic Publishing, Hamburg, 2013).

⁴³ *Statement of the Special meeting of the European Council*, 23 April 2015, par. 3.

⁴⁴ Council Decision (CFSP) 2015/778, of 18 May 2015, *on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED)*, article 1. Emphasis added.

Maritime Search and Rescue (SAR), as we'll see *infra*- the Operation ought to accomplish,⁴⁵ whether they like it or not, but to which it is neither shaped nor prepared.

From the point of view of its operability and the specific scope of its mandate, EUNAVFOR MED will be conducted in sequential phases and, of course, in accordance with the requirements of international law. In fact, three phases are foreseen:

“(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.”⁴⁶

EUNAVFOR MED was launched the 22 June 2015, in accordance with Council Decision (CFSP) 2015/972. In principle, it will “end no later than 12 months after having reached Full Operational Capability”;⁴⁷ level reached the 27 July 2015, so, in principle, it was due to finish no later than 27 July 2016.⁴⁸ Even though, as the situation in the Central Mediterranean has not improved⁴⁹ -as it was easily foreseeable as this is not a temporary situation but a structural one-, the Council has decided, on 23 May 2016, to extend its mandate one more year, up to July 2017.⁵⁰ This can easily be seen as an implicit recognition that this *crisis management operation* is starting to be a *long term military operation to manage permanently a structural situation*.

Moreover, by recognising “the need to enhance the capacity” of the Operation and welcoming “the expressed readiness of the (Libyan) President of the Presidency Council of the Government of

⁴⁵ See, *ibid*, Preamble, par. 6.

⁴⁶ *Ibid*, article 2. Emphasis added.

⁴⁷ *Ibid*, article 13.

⁴⁸ *Outcome of the Council Meeting*, Foreign Affairs, 23 May 2016, at 6.

⁴⁹ In fact, the situation in the Central Mediterranean area has rapidly deteriorated as a consequence of the agreement between the EU and Turkey of March 2016, which diverts once again the migratory flow of the Aegean Sea to the much more dangerous route from the Egyptian and Libyan coasts to Crete, Lampedusa and Sicily. As a consequence, since April 2016 more than 1.000 migrants have died –in just one week- in this area. As IOM updates: “The events of this past week (23-29 May 2016) –with at least 1,000 deaths- have obviously changed our assessment. The past eight days marks one of the deadliest periods yet in the migration crisis, which is now in its fourth year”. IOM, “*Mediterranean Migrant Arrivals in 2016: 204,311; Deaths 2,443*”.

⁵⁰ *Council conclusions on EUNAVFOR MED operation Sophia*, 23 May 2016.

National Accord, Mr Serraj,⁵¹ to cooperate with the EU on the basis of these conclusions”, the Council add two further supporting tasks to its mandate:

- “- capacity building and training of, and information sharing with, the Libyan Coastguard and Navy, based on a request by the legitimate Libyan authorities taking into account the need for Libyan ownership;
- contributing to information sharing, as well as implementation of the UN arms embargo on the High Seas off the coast of Libya on the basis of a new UNSC Resolution.”⁵²

From the point of view of its implementation and functioning, on 7 October 2015 EUNAVFOR MED entered phase 2 “in international waters”, as EU Ambassadors within the Political and Security Committee agreed.⁵³ To understand the limitation implicit in the words “in international waters” — which means that EUNAVFOR MED has its action limited to “conduct boarding, search, seizure and diversion *on the high seas* of vessels suspected of being used for human smuggling or trafficking”—, we have to take into account Resolution 2240 (2015); where UN Security Council, after “(a)ffirming the necessity to put an end to the recent proliferation of, and endangerment of lives by, the smuggling of migrants and trafficking of persons in the Mediterranean Sea off the coast of Libya, and, for these specific purposes, acting under Chapter VII of the Charter of the United Nations”:

“7. *Decides*, with a view to saving the threatened lives of migrants or of victims of human trafficking on board such vessels as mentioned above, *to authorise*, in these exceptional and specific circumstances, for a period of one year from the date of the adoption of this resolution, *Member States, acting nationally or through regional organisations* that are engaged in the fight against migrant smuggling and human trafficking, *to inspect on the high seas off the coast of Libya vessels that they have reasonable grounds to suspect are being used for migrant smuggling or human trafficking from Libya*, provided that such Member States and regional organisations make good faith efforts to obtain the consent of the vessel’s flag State prior to using the authority outlined in this paragraph;

8. *Decides to authorise* for a period of one year from the date of the adoption of this resolution, Member States acting nationally or through regional organisations *to seize vessels inspected under the authority of paragraph 7* that are confirmed as being used for migrant smuggling or human trafficking from Libya, and underscores that further action with regard to such vessels inspected under the authority of paragraph 7, including disposal, will be taken in accordance with applicable international law with due consideration of the interests of any third parties who have acted in good faith.”⁵⁴

Authorisation which is not legally needed to inspect and seize unflagged vessels on the high seas⁵⁵ neither if it is done with the consent of the flag State. Thus, by Resolution 2240 (2015) the Security Council *only authorizes de EU to inspect and seize flagged vessel if the flag State has not given*

⁵¹ After years of confrontation between the so called Governments of Tobruk and Tripoli, after months long negotiations under the aegis of the United Nations, on 17 December 2015 both parties reached an agreement, weak and minimum as it is, that has allowed to create the so-called Government of National Accord led by Prime Minister Fayez al-Sarraj. This government legally represents Libya on its foreign relations and, thus, it is legitimized to give the consent of the State to assume obligations or to allow other States or international organizations to act within its domestic jurisdiction according to International Law.

⁵² *Council conclusions on EUNAVFOR MED operation Sophia*, 23 May 2016.

⁵³ EU External Action, *EUNAVFOR MED – Operation Sophia enters Phase 2*, Press Release, 7 October 2015.

⁵⁴ SC Res. 2240 (2015), 9 October 2015. Emphasis added.

⁵⁵ Article 92 and ss. of United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.

authorization, and only in the case the EU had made “good faith efforts to obtain the consent of the vessel’s flag State prior to using the authority”. So, if the EU wants EUNAVFOR MED to active phase 2 of its mandate “in Libyan territorial or internal waters”, or phase 3, in Libyan territory, either a new Chapter VII Security Council resolution authorizing it or the consent of the Libyan government will be needed: option already feasible as there is an internationally recognized Government of National Accord, as the Council of 23 May 2016 recalls.

(b) *NATO’s Assistance in the Aegean Sea (2016 - ...)*

At the same time, when refugees, mainly from Syria and Iraq, started to arrive massively to the Schengen area through Turkey, the attention focused also on the Aegean Sea. As we have already seen, in 2014 *Posseidon Operation* was launched by Frontex in this area in order to help Greece to carry on its *responsibility on the control and surveillance of its external borders*. But, as the situation worsen during 2015 and the first months of 2016, new, more effective answers where needed. Answers that followed the same pattern already adopted in the Central Mediterranean area, as we come to see.

In February 2016, the German Chancellor, Angela Merkel, and the Turkish President, Tayyip Erdogan, requested in this case NATO —as Turkey and Greece are members of the North Atlantic Organization-, to help Frontex, Greece and Turkey to survey and control its Aegean borders *with its military might*; request that was very soon answered positively by NATO when the 11 February 2016 its Defence Ministers agreed that “NATO will provide support to assist with the refugee and migrant crisis”. Two days later NATO’s Standing Maritime Group 2 was deployed in the region.⁵⁶ The objective of the Operation is “to support Greece and Turkey, as well as the European Union’s border agency Frontex, in their efforts *to tackle the refugee and migrant crisis*”, through cutting “the lines of human trafficking and illegal migration.”⁵⁷

To reach that aim, NATO’s Standing Maritime Group 2 is tasked to conduct “reconnaissance, monitoring and surveillance of illegal crossings in the Aegean”. As its Secretary General, Jens Stoltenberg, has declared: “NATO’s task is not to turn back the boats. We will provide critical information. To enable the Greek and Turkish coastguards, as well as Frontex, to do their job even more effectively.”⁵⁸ Thus, NATO’s Operation in the Aegean Sea is limited, at least on its first steps, to assist Greece, Turkey and Frontex on their efforts to stop the migratory flow to Europe in that maritime area by obtaining and sharing information, without any kind of direct action to detain or push migrant boats back, which are the job and the responsibility of Greek and Turkish authorities.

In this context, we should remember that there is an international general obligation in force to everybody, including NATO warships, to rescue distress people at sea; and thus, action is required for NATO’s warships to rescue shipwrecked people and, more generally, people in danger at sea. As Secretary General Stoltenberg has publicly recognized: “*The obligation to help people in distress at sea*

⁵⁶ As Zhukov underlines, “Perhaps the most remarkable thing about NATO’s Aegean operation is how quickly it came into existence”. Y. M. Zhukov, “NATO’S Mediterranean Mission. What the Alliance is doing in the Aegean Sea”, *Foreign Affairs* (February 2016).

⁵⁷ NATO, “NATO’s Deployment in the Aegean Sea”, *Fact Sheet*, May 2016.

⁵⁸ Statement by the NATO Secretary General on NATO support to assist with the refugee and migrant crisis, 25 February 2016.

is a general, universal responsibility. It applies to all vessels. Regardless of whether they are part of a NATO or national mission. *If Allied vessels encounter people in distress at sea, they have to live up to their national responsibility to assist.*⁵⁹

But, much more doubtfully in terms of legality, NATO's Secretary General immediately added: "In case of rescue of persons coming via Turkey, *they will be taken back to Turkey*". And, as if he were well aware of the legal doubts cast by this announcement, he stressed afterwards: "In carrying out their tasks, our nations will abide by national and international law."⁶⁰ As we'll see immediately, NATO's Secretary General last assertion does not fit with the international legal framework applicable in Europe to European ships both in terms of search and rescue of people at sea and, more relevant in this case, in terms of the obligations applied to European States that stem from the *principle of non-refoulement*.

Be that as it may, the announcement made by NATO's Secretary General to take back to Turkey migrants rescued at the Aegean Sea by NATO's war ships shows very clear the real objective of its assistance mission in the Aegean: it is not a search and rescue but *a control and surveillance operation*, which is *designed to avoid the arrival of migrants in general and refugees in particular to European soil*.

(B) THE INTERNATIONAL LEGAL FRAMEWORK ON RESCUE AND INTERNATIONAL PROTECTION OF PEOPLE IN THE HIGH SEAS

In the field of migratory flows a distinct area, with its own important characteristics, both from the legal and factual points of view, is the maritime space. On the one hand, the southern border of the EU is drawn by the Mediterranean Sea and, as it is well known, more and more migrants try to reach European soil venturing to cross it using irregular means; as the regular, legal ones do not exist or are blocked. This fact turns the journey into an extremely dangerous experience that leads to the death of thousands of human beings drawn in the Mediterranean waters among the tens of thousands that sunk every year trying to reach their aim using precarious and overcrowded boats⁶¹. As the European Commission itself has recently recognized, "*more legal channels are needed to enable people in need of international protection to arrive in the EU in an orderly, managed, safe and dignified manner and to contribute to saving lives whilst reducing irregular migration and destroying the business model of people smugglers.*"⁶²

On the other hand, the maritime space raises significant legal questions, solved both by the International and the European Law; but, as we come to see with NATO's Secretary General position,

⁵⁹ *Ibid.* Emphasis added.

⁶⁰ *Ibid.* Emphasis added.

⁶¹ IOM refers that since 2014 the number of migrants trying to cross the Mediterranean Sea has grown significantly: 1,004,356 migrants in 2015, 219,000 in 2014 in comparison with 22,500 in 2012 and 60,000 in 2013. Of them, as we have already said, more than 3,000 died drawn in 2014 and 3,770 in 2015. Figures that are worsening in 2016: in less than six months, up to 19 June 2016, 2,861 migrants have died in the Mediterranean Sea. See IOM, *Migration Flows - Europe*.

⁶² Communication from the Commission, *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM(2016) 197 final, 6 April 2016, at 14. Emphasis added.

it seems necessary to recall and explain this legal framework given the important limits it sets up and the relevant obligations it establishes to the European States. And that, both in terms of *search and rescue of people at sea* and of the *international protection of people* and the obligations that stem for the European States from the *principle of non-refoulement* as established by the European Court of Human Rights (ECHR) jurisprudence.

(1) The International Legal obligations on Rescue of People at Sea

The Law of the Sea establishes the legal obligations on search and rescue of people at sea:⁶³ Together with the relevant articles of UNCLOS, SOLAS and SAR are also applicable. According to them *there is a general international obligation in force, binding both States and individuals, consisting in the search, assistance and rescue of people in distress at sea; together with taking them to a safe place when rescued.*

In particular, Article 98 of UNCLOS, under the significant title “Duty to render assistance”, establishes:

“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.”⁶⁴

On its part, SOLAS Convention rules on its Regulation 33 of Chapter V, “Safety of navigation”, the following “Obligations and procedures before distress messages”:

⁶³ On this topic see, *inter alia*, R. Barnes, “The International Law of the Sea and Migration Control”, in B. Ryan & V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (Nijhoff, Leiden, 2010) 103-149; T. Basaran, “Saving Lives at Sea: Security, Law and Adverse Effects”, 16 *European Journal of Migration and Law* (2014) 365-387; F. Baxewanos, *Defending Refugee Rights: International Law and Europe's Offshored Immigration Control* (NWV Neuer Wissenschaftlicher Verlag, Wien/Graz, 2015); Di Filippo, M., “Irregular Migration across the Mediterranean Sea: Problematic Issues Concerning the International Rules on Safeguard of Life at Sea”, 1 *Paix et Sécurité Internationales* (2013) 53-76; N. Klein, “A Case for Harmonizing Laws on Maritime Interceptions of Irregular Migrants”, 63 *International & Comparative Law Quarterly* (2014) 787-814; D. Oliva Martínez, “Derecho del mar e inmigración irregular”, 17 *Revista de Derecho Migratorio y Extranjería* (2008) 265-289; E. Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart Publishing, Oxford, 2013); L. Salamone, *La disciplina giuridica dell'immigrazione clandestina via mare, nel diritto interno, europeo ed internazionale* (Torino, Giappichelli, 2011); J. M. Sobrino Heredia (ed.), *Sûreté Maritime et Violence en Mer = Maritime Security and Violence at Sea* (Bruylant, Bruxelles, 2011); S. Trevisanut, *Immigrazione irregolare via mare, diritto internazionale e diritto dell'Unione Europea* (Jovene, Napoli, 2012); A. del Vecchio (ed.), *International Law of the Sea: Current Trends and Controversial Issues* (Eleven International Publishing, The Hague, 2014).

⁶⁴ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397, art. 98. Emphasis added.

“The master of a ship at sea which is in a position to be able to provide assistance on receiving information from any source that persons are in distress at sea, is *bound to proceed with all speed to their assistance*, if possible informing them or the search and rescue service that the ship is doing so. This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found.”⁶⁵

While SAR Convention reiterates these obligations on points 2.1.9 and 2.1.10:

“2.1.9 On receiving information that a person is in distress at sea in an area within which a Party provides for the overall co-ordination of search and rescue operations, the responsible authorities of that Party *shall take urgent steps to provide the most appropriate assistance available*.

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.”⁶⁶

On this basis, one of the most problematic questions is where the migrants rescued or intercepted in the Mediterranean Sea by European boats—whether State boats (both from the Army or the Police) or private ones—should be disembarked. In 2010 the Council adopted a Decision that contained the guidelines for Frontex operations at sea.⁶⁷ A Decision that, even annulled by the Court of Justice of the European Union (CJEU) based on procedural grounds,⁶⁸ maintained its legal effects until it was replaced by a new decision;⁶⁹ this time a *Regulation of the European Parliament and of the Council*, as required by the CJEU, approved on 15 May 2014.⁷⁰ Articles 3 and 4 of this Regulation, now in force, recall the requirements imposed by International Law:

Article 3
Safety at sea

⁶⁵ *International Convention for the Safety of Life at Sea* (adopted 1 November 1974, Chapter V, Regulation 33.1 – according with its 2007 Revision-, entered into force 25 May 1980) 1184 UNTS 276. Emphasis added.

⁶⁶ *International Convention on Maritime Search and Rescue* (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 118. Emphasis added.

⁶⁷ Council Decision 2010/252/UE, *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 2010 L 111/20.

⁶⁸ The Decision that contained the guidelines was adopted under the comitology procedure regulated in Article 5 of Decision 1999/468/EC; thus without the full involvement of the European Parliament. The CJEU pointed out that the adopted rules contained essential elements of external maritime border surveillance and thus entailed political choices, which must be made following the ordinary legislative procedure with the Parliament as co-legislator. Moreover, the Court noticed that the new measures contained in the contested decision were likely to affect individuals’ personal freedoms and fundamental rights and therefore these measures again required the ordinary procedure to be followed. See the judgment in *European Parliament versus Council of the European Union*, C-355/10 [2012], ECLI:EU:C:2012:516, par. 63 to 85.

⁶⁹ In the words of the Court: “The annulment of the contested decision without maintaining its effects on a provisional basis could compromise the smooth functioning of the current and future operations coordinated by the Agency and, consequently, the surveillance of the sea external borders of the Member States.

In those circumstances, there are important grounds of legal certainty which justify the Court exercising the power conferred on it by the second paragraph of Article 264 TFEU. In the present case, the effects of the contested decision must be maintained until the entry into force, within a reasonable time, of new rules intended to replace the contested decision annulled by the present judgment”. *Ibid*, par. 89 and 90.

⁷⁰ Regulation (EU) No 656/2014 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*, OJ 2014 L 189/93.

Measures taken for the purpose of a sea operation shall be conducted in a way that, in all instances, ensures the safety of the persons intercepted or rescued, the safety of the participating units or that of third parties.

Article 4

Protection of fundamental rights and the principle of non-refoulement

1. No person shall, in contravention of the principle of non-refoulement, be disembarked in, forced to enter, conducted 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.
2. When considering the possibility of disembarkation in a third country, in the context of planning a sea operation, the host Member State, in coordination with participating Member States and the Agency, shall take into account the general situation in that third country”.

It is a Regulation that, apart from having into account the appropriate International Law in the field, observes the jurisprudence of the ECHR. After all, the European Convention of Human Rights is applicable to these cases, because, as the Strasbourg Court has maintained in several occasions, migrants rescued at sea are under its jurisdiction when a State Party to the European Convention exercises plain control over them, even in the high seas.⁷¹ On this basis, the ECHR, on its very much relevant Judgment *Hirsi Jamaa and Others v. Italy*,⁷² clearly establishes the jurisdiction of a European

⁷¹ See judgments in *Xhavara and Others v. Italy and Albania* (dec.), ECHR, No. 39473/98, 11 January 2001; *Medvedyev and Others v. France* [GC], ECHR, No. 3394/03, 29 March 2010. In the last case, the Court argues:

“66. In the instant case, the Court notes that a French warship, the frigate *Lieutenant de vaisseau Le Hénaff*, was specially instructed by the French naval authorities to intercept the *Winner*, and that the frigate sailed out of Brest harbour on that mission carrying on board the French navy commando unit *Jaubert*, a special forces team specialised in boarding vessels at sea. When the *Winner* was spotted off Cape Verde on 13 June 2002, the frigate issued several warnings and fired warning shots, before firing directly at the merchant ship, under orders from France’s maritime prefect for the Atlantic. When they boarded the *Winner*, the French commando team were obliged to use their weapons to defend themselves, and subsequently kept the crew members under their exclusive guard and confined them to their cabins during the journey to France, where they arrived on 26 June 2002. The rerouting of the *Winner* to France, by a decision of the French authorities, was made possible by sending a tug out of Brest harbour to tow the ship back to the French port, escorted by another warship, the frigate *Commandant Bouan*, all under orders from the maritime prefect and at the request of the Brest public prosecutor.

67. That being so, the Court considers that, as this was a case of *France having exercised full and exclusive control over the Winner and its crew*, at least de facto, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, *the applicants were effectively within France’s jurisdiction for the purposes of Article 1 of the Convention*”. Emphasis added.

⁷² See R. Amicolo, *The Case of Hirsi Jamaa et al. v. Italy: The Trend of Irregular Immigration Taking Place in the Mediterranean Sea* (LAP Lambert Academic Publishing, Saarbrücken, 2013); S. Borelli & B. Stanford, “Troubled Waters in the Mare Nostrum: Interception and Pushbacks of Migrants in the Mediterranean and the European Convention on Human Rights”, 10 *Review of International Law and Politics* (2014) 29-70; J. A. Carrillo Salcedo, “Reflexiones a la luz de la sentencia del Tribunal Europeo de Derechos Humanos en el caso *Hirsi Jamaa* y otros contra Italia: (sentencia de 23 de febrero de 2012), derechos de los inmigrantes en situación irregular en España”, 32 *Teoría y Realidad Constitucional* (2013) 285-291; J. Coppens, “Interception of Seaborne Migrants: the Applicability of the Non-Refoulement Principle at Sea”, 56 *German Yearbook of International Law* (2013) 425-455; C. de Castro Sánchez, “TEDH – SENTENCIA DE 23.02.2012 (GRAN SALA), *HIRSI JAMAA E.A. C. ITALIA*, 27765/09 – El CEDH como límite de las políticas migratorias europeas”, 46 *Revista de Derecho Comunitario Europeo* (2013) 1119-1135; A. Liguori, “La Corte Europea dei Diritti dell’Uomo Condanna l’Italia per i Respingimenti verso la Libia del 2009: Il caso *Hirsi*”, 95 *Rivista di diritto internazionale* (2012) 415-443; V. Moreno Lax, “*Hirsi Jamaa* and others v Italy or the Strasbourg Court versus Extraterritorial Migration Control”, 12 *Human Rights Law*

State whose boats have rescued people on the high seas and, as a consequence, states that the rights recognized on the Convention should be applied to those people, according to article 1 of the ECHR:⁷³

“77. The Court observes that, by virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying. This principle of international law has led the Court to recognise, in cases concerning acts carried out on board vessels flying a State’s flag, in the same way as registered aircraft, cases of extraterritorial exercise of the jurisdiction of that State (see paragraph 75 above). Where there is control over another, this is *de jure* control exercised by the State in question over the individuals concerned [...]

79. Moreover, Italy cannot circumvent its ‘jurisdiction’ under the Convention by describing the events in issue as rescue operations on the high seas. In particular, the Court cannot subscribe to the Government’s argument that Italy was not responsible for the fate of the applicants on account of the allegedly minimal control exercised by the authorities over the parties concerned at the material time.”⁷⁴

Argument that is obviously applicable to all the maritime operations established by the EU, both in the framework of Frontex or the CSDP, or by NATO —and carried on by boats of its European Member States— in the Central Mediterranean Sea or in the Aegean Sea, respectively. That is why *the rescue of migrants at sea is not an additional optional activity, a plus that has to be valued as a humanitarian extra effort carried out by those operations, but as a must they ought to accomplish by law and thus a duty these operations are obliged to fulfill* whether they like it or not. And if they don’t, that will mean a serious breach of the international law in force: both the general International Law and the European Law —on Human Rights and the European Union Law—.

(2) The European Legal Regime on International Protection of People Applicable at the High Seas

Under EU law, the EU Charter of Fundamental Rights proclaims the right to asylum in article 18 and the principle of *non refoulement* in article 19. Accordingly, article 78 of the TFEU⁷⁵ provides for the creation of a Common European Asylum System⁷⁶ which must respect states’ obligations under the Convention relating to the Status of Refugees, including the protection from *refoulement*

Review (2012) 574– 598; S. Trevisanut, “The Principle of ‘Non-Refoulement’ and the De-Territorialization of Border Control at Sea”, 27 *Leiden Journal of International Law* (2014) 661–675.

⁷³ Article 1 of the ECHR states: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.”

⁷⁴ *Hirsi Jamaa and Others v. Italy* [GC], ECHR, No. 27765/09, 23 February 2012, par. 77–79. Emphasis added.

⁷⁵ Article 78 of TFEU states: “The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”.

⁷⁶ On asylum and, more generally, the international protection of people in Europe see, *inter alia*, Council of Europe & European Union Agency for Fundamental Rights, *supra*, n. 13; F. Goudappel & H. S. Raulus (ed.), *The Future of Asylum in the European Union: Problems, Proposals and Human Rights* (T.M.C. Asser Press, The Hague, 2011); K. Hailbronner (ed.), *EU Immigration and Asylum Law. Commentary on EU Regulations and Directives* (C.H. Beck, Munich, 2010); M. den Heijer, *Europe and Extraterritorial Asylum* (Oxford, Hart, 2012); M. Maes (ed.), *External Dimensions of EU Migration and Asylum Law and Policy = Dimensions Externes du Droit et de la Politique d’Immigration et d’Asile de l’UE* (Bruxelles, Bruylant, 2011).

contained on its article 33. As a consequence, several legislative instruments have been adopted to implement this provision: it is the EU *asylum acquis* which is formed by the following legal instruments:

- Directive 2011/95/EU of the European Parliament and of the Council, of 13 December 2011, *on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*, OJ 2011 L 337/9 (Qualification Directive).
- Directive 2013/32/UE of the European Parliament and of the Council, of 26 June 2013, *on common procedures for granting and withdrawing international protection*, OJ 2013 L 180/60 (Asylum Procedures Directive).
- Directive 2013/33/UE of the European Parliament and of the Council, of 26 June 2013, *laying down standards for the reception of applicants for international protection*, OJ 2013 L 180/96 (Reception Conditions Directive).
- 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*, OJ 2013 L 180/31 (Dublin Regulation).

Nevertheless, as the Council of Europe and the European Union Agency for Fundamental Rights recognize: “Although Article 18 of the Charter guarantees the right to asylum, EU law does not provide for ways to facilitate the arrival of asylum seekers. Individuals who wish to seek asylum in the EU are primarily nationals of countries requiring a visa to enter the EU. As these individuals often do not qualify for an ordinary visa, they may have to cross the border in an irregular manner”;⁷⁷ with the horrible consequences in terms of human suffering and human lives that stem from it, as we have already seen.

As a matter of fact, Article 3 (1) of *Dublin Regulation* requires that EU Member States examine any application for international protection lodged by a third-country national or a stateless person and that such application be examined by one single Member State. Actually, the EU *asylum acquis* only applies from the moment an individual has reached the territory of the State, including the border, its territorial waters and transit zones:

“Member States shall examine any application for international protection by a third-country national or a stateless person who applies *on the territory of any one of them, including at the border or in the transit zones*.”⁷⁸

In the same line, the *Asylum Procedures Directive* states that it “shall apply to all applications for international protection made in the territory, *including at the border, in the territorial waters or in the*

⁷⁷ Council of Europe & European Union Agency for Fundamental Rights, *supra*, n. 12, at 35.

⁷⁸ Regulation (EU) No 604/2013 of the European Parliament and of the Council, *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* (Dublin Regulation), article 3.1. Emphasis added.

transit zones of the Member States.”⁷⁹ And so, the border, which, according to International Law, is a line that draws the limits between two sovereign States,⁸⁰ cannot legally be a broad buffer zone tens of meters wide where a person would find himself/herself in a limbic place under the jurisdiction of no State at all: *a State ought to apply all its legal obligations in the whole of its territory and in any place where it has effective jurisdiction.*

The first remark applies to those States —including Spain and its borders in Ceuta and Melilla—that expels immigrants without letting them to apply for international protection —the so-called *hot returns*⁸¹ as it is their right and, correlatively, the State obligation to proceed accordingly by receiving, studying and answering the application.⁸²

As far as the second one —a State ought to apply all its legal obligations in any place where it has effective jurisdiction—, as we come to see in the judgment *Hirsi Jamaa and Others v. Italy*, in the case of the migrants rescued or intercepted in the high seas by boats with a European State flag —especially State boats, whether from the police or the army—, the principle of *effective control* over them is essential to determine the *effective jurisdiction* of the European State and thus its legal obligations that stem from the international protection of people regime and from *the principle of non-refoulement*. Legal obligations that, on the unquestionable basis of the effective jurisdiction, the ECHR clearly underlined on the *Hirsi Jamaa and Others v. Italy* judgment:

“156. In view of the foregoing, the Court considers that, when the applicants were transferred to Libya, the Italian authorities knew or should have known that *there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin*, having regard in particular to the lack of any asylum procedure and the impossibility of making the Libyan authorities recognise the refugee status granted by UNHCR. [...]

185. In the instant case, the Court can only find that the transfer of the applicants to Libya was carried out without any form of *examination of each applicant’s individual situation*. It has not been disputed that *the applicants were not subjected to any identification procedure* by the Italian authorities, which restricted themselves to embarking all the intercepted migrants onto military ships and disembarking them on Libyan soil. Moreover, the Court notes that the personnel aboard the military ships were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers.

That is sufficient for the Court to rule out the existence of sufficient guarantees ensuring that the individual circumstances of each of those concerned were actually the subject of a detailed examination.”⁸³

⁷⁹ Directive 2013/32/EU of the European Parliament and of the Council, *on common procedures for granting and withdrawing international protection*, article 3.1. Emphasis added.

⁸⁰ See, *inter alia*, M. Benhenda, *La frontière en droit international publique* (Lille, 2003); J. R. V. Prescott, *Political Frontiers and Boundaries* (Routledge, London, 2nd ed., 1990); J. R. Remacha, “Las fronteras de Ceuta y Melilla”, 10 *Anuario de Derecho Internacional* (1994) 195-237; Ch. de Visscher, *Problèmes de confins en droit international public* (Pedone, Paris, 1979).

⁸¹ See M. Martínez Escamilla *et al.*, ‘*Hot returns*’: *when the State acts outside the law* (27 June 2014)

⁸² On Ceuta and Melilla see, *inter alia*, M. Acosta Sánchez & M. R. Njiki (eds.), *Inmigración, Seguridad y Fronteras: Problemáticas de España, Marruecos y la Unión Europea en el Área del Estrecho* (Dykinson, Madrid, 2012); M. C. Burgos Goye, “La errática política migratoria española de la inmigración africana en las ciudades autónomas de Ceuta y Melilla”, 37 *Revista de Derecho Migratorio y Extranjería* (2014) 301-328; J. Carling, “Migration Control and Migrant Fatalities at the Spanish-African Borders”, 41 *International Migration Review* (2007) 316-343.

⁸³ *Hirsi Jamaa and Others v. Italy* [GC], ECHR, No. 27765/09, 23 February 2012, par. 156 and 185. Emphasis added.

Last but not least, the ECHR also underlines the importance of article 13 in connection with articles 3 of the Rome Convention —which forbids torture and other inhuman or degrading treatment— and article 4 of its Protocol n° 4 —according to which “collective expulsion of aliens is prohibited”—. Article 13 of the European Convention of Human Rights states:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have *an effective remedy before a national authority* notwithstanding that the violation has been committed by persons acting in an official capacity.”⁸⁴

As a consequence, the ECHR precludes the execution of the measures adopted by the authorities—in this case, the expulsion of immigrants rescued at sea by European boats—until those measures had been reviewed by a national authority—which, by the way and according to the EU Law, should be a court or tribunal—⁸⁵; proclaiming in this way *the suspensive effect of the article over the decision of expulsion*. As the ECHR explains in the *Çonka* judgement:

“The Court considers that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible (...). Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision.”⁸⁶

Thus, applying article 13 to the expulsion or devolution of migrants rescued at sea by European boats, the Court concludes on *Hirsi Jamaa and Others v. Italy* judgment:

“In view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the Court has ruled that the suspensive effect should also apply to cases in which a State Party decides to remove an alien to a country where there are substantial grounds for believing that he or she faces a risk of that nature.”⁸⁷

In short, *European States*, following their obligations enshrined in the European Convention on Human Rights, as established by ECHR jurisprudence—both in terms of the reach of their jurisdiction and on their substantive obligations—, *have jurisdiction on the migrants rescued at sea*—even more so over those detained at their borders—. And thus, *those migrants have the right to ask for asylum and correlatively States have the legal obligation to open an individual procedure on each one of them, which means that collective expulsions are completely forbidden and that it is an obligation of the*

⁸⁴ Emphasis added.

⁸⁵ Article 46 of the *Asylum Procedures Directive* provides the right to an effective remedy before a court or tribunal: “Member States shall ensure that applicants have *the right to an effective remedy before a court or tribunal*, against the following:

(a) a decision taken on their application for international protection,
(i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status;
(ii) considering an application to be inadmissible pursuant to Article 33(2);
(iii) taken at the border or in the transit zones of a Member State as described in Article 43(1)”. Directive 2013/32/UE of the European Parliament and of the Council, *on common procedures for granting and withdrawing international protection*. Emphasis added.

⁸⁶ *Çonka v. Belgium* [GC], ECHR, No. 51564/99, 5 February 2002, par. 79. Emphasis added.

⁸⁷ *Hirsi Jamaa and Others v. Italy* [GC], ECtHR, No. 27765/09, 23 February 2012, par. 200. Emphasis added.

State, under whose jurisdiction migrants are, to *guarantee their security* and, thus, to apply fully the principle of *non refoulement*;⁸⁸ which includes to allow them to use an effective remedy before a national authority—that is to say, *the effective possibility to appeal the decision of expulsion before a court or tribunal*, according to EU Law—, a remedy that, to be effective, should have a *suspensive effect over the expulsion*.

(C) CONCLUDING REMARKS

European operations in the Mediterranean Sea started in 2013, in the middle of the horrific images of hundreds of dead migrants in Lampedusa, with the Italian operation *Mare Nostrum*, a typical *search and rescue* operation that soon, in 2014, was replaced by a EU operation, *Triton*, with a very different nature, according to the agency that was chosen to establish and develop it, Frontex: *a control and surveillance of external borders operation*. It was followed by a *military crisis management operation* of the EU established in the second half of 2015, EU-NAV-FOR-MED Operation *Sofia*. In the case of the Aegean Sea, the pattern followed is similar: Frontex Posseidon Operation, established in 2014, is backed, since Mars 2016, by a NATO's assistance operation in the Aegean Sea.

This evolution on both hot areas of the Mediterranean Sea, from a *search and rescue* operation to a *control and surveillance of external borders* one, backed by pure military security operations—one of them of NATO!-, shows very clearly the path the EU and, above all, its Member States have chosen to deal with what they blindly, or cynically, keep on calling “the refugee and migrant crisis”: the way of sealing up the EU even more than it was in the past, now using the military might of the European States.

And, what is even worst, this is done not by following a wrong approach or a misleading understanding of the real meaning and scope of migratory flows in a global international society, neither on an erroneous interpretation of their own responsibility on the inhuman and inefficient consequences of the present European migration and asylum policy; but, on the contrary, well aware of it all. Actually, President Juncker set as a priority that “Europe needs to manage migration better, in all aspects”: from the humanitarian imperative, the need for solidarity and the demographic and skills challenge.⁸⁹ Because, as the Commission has plainly—and boldly, we should concede—recognized in April 2016, “it is time for progress to be made in *reforming the EU's existing framework so as to ensure a humane and efficient asylum policy*. There are significant structural weaknesses and shortcomings in the design and implementation of European asylum and migration policy, which the crisis has exposed.”⁹⁰

Going even forward by admitting the EU's responsibility on the worst consequences of the present situation: the exponential growth of migrants dead at sea and the spread and strength of smuggling

⁸⁸ Obligations also stated by the International Law Commission (ILC) on its *Draft articles on the expulsion of aliens*. ILC, *Draft articles on the expulsion of aliens*, doc. A/69/10, of 2014, par. 44.

⁸⁹ See Communication from the Commission to the European Parliament and the Council, *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM(2016) 197 final, 6 April 2016, p. 20.

⁹⁰ *Ibid*, p. 2. Emphasis added.

and trafficking on human beings networks: “The overall objective is to move from a system which (...) encourages uncontrolled and irregular migratory flows to a fairer system which provides orderly and safe pathways to the EU for third country nationals in need of protection or who can contribute to the EU's economic development.”⁹¹ Reaching, apparently, the conclusion that so many have been defending for so long to deal with migration *humanly, legally and efficiently*⁹²: “But reducing irregular flows to and within Europe, and protecting our external borders, can only happen effectively if we look at the migratory phenomenon in a broad and comprehensive perspective: this means that we need at the same time to enhance legal and safe pathways to Europe, to improve the use and implementation of existing legal migration instruments, to strengthen the Common European Asylum System as well as to continue tackling the root causes of migration.”⁹³ The real ones, not *smuggling and trafficking*, which are the consequence, not the cause, as the Commission itself admits.

However, at the end of its Communication, the Commission keeps itself clung to the traditional security and sovereign approach sustained by member States based on sealed frontiers: “There is no choice but to pursue the twin-track strategy of stabilizing the present situation through the full respect and application of the existing legal framework, whilst facing up to the need in a future perspective to reform the architecture of those rules. In the midst of the present crisis, the limitations of the present system and the common challenges we face have been laid bare. Therefore, it is precisely at this moment, when concerted action and strong solidarity are most called for, that this future perspective is needed to open a path towards a humane and efficient European migration and asylum policy based on a fair sharing of responsibilities.”⁹⁴

In other words, we, the EU, recognize that the present European migration and asylum policy is both inhumane and inefficient; but *there is no choice* —the so well known formula used in order to avoid discussion by denying the existence of real and feasible options to the one defended by Power: *we must apply the present inhumane and inefficient European migration and asylum policy and, by recognizing barely that this policy is inhuman and inefficient, we recommend member States to establish a new, humane and efficient, European migration and asylum policy ... in the future.*

But in our global world to fortify your frontiers, trying to isolate yourself from the rest of the world is not just illusory but cruel because it leads to a growing number and strength of smugglers and traffickers, and to endanger human lives. As the Secretary General of the UN affirms: “Insufficient opportunities to migrate legally add to the compulsion of migrants to rely on smugglers

⁹¹ Ibid. Emphasis added.

⁹² See, *The human tragedy in the Mediterranean: immediate action needed*, Report of the Committee on Migration, Refugees and Displaced Persons of the Council of Europe, Thierry Mariani rapporteur, doc. 13764, 21 April 2015; *Criminalisation of irregular migrants: a crime without a victim*, Report of the Committee on Migration, Refugees and Displaced Persons of the Council of Europe, Ionut Marian Stroe rapporteur, doc. 13788, 7 Mai 2015.

⁹³ Communication from the Commission to the European Parliament and the Council, *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM(2016) 197 final, 6 April 2016, p. 3. Emphasis added.

⁹⁴ Ibid, p. 20.

to facilitate their movement and can exacerbate the vulnerability of migrants to traffickers and other forms of exploitation.”⁹⁵

And what is even worst to Europe, it is a clear symptom, together with other developments within the EU and its Member States in terms of migration policy⁹⁶, of the path they are taken in terms of the interests chosen to be worth defend even if that means to sacrifice the main principles and values our own societies and the law that rules them are built from: *open and multicultural societies and the rule of law based on the equal dignity of all human beings and thus on non discrimination and equality of all before the law*. Instead of, in Sami NAIR words, “adopting a human vision of migration (...) with an ethic perspective of the humanity of migrants that, far from being ‘invaders’, are our fellow men asking for help”;⁹⁷ a negative image of migrants and migration —of *their* migrants, not of *ours*, of course- turned in a “problem-obstacle” has being built using fear and security as alibi.⁹⁸

The result is calamitous for migrants —thousands of drown people every year in the Mediterranean, hundreds of thousands (tens of thousands children) thrown in the hands of smugglers and mafias of human trafficking—; but also for Europe, because we are undermining the mainstay of our legal and societal systems —of which, by the way, we are so proud to put them as an example to others—. As Javier de Lucas maintains in his last book, this is not just the wreckage that migrants and refugees suffer —that, of course and primary, it is—; it is also “the wreckage of Europe” itself.⁹⁹ Because, as Mangas Martín maintains in relation with the values of the EU, proclaimed in article 2 of the Treaty of the European Union, which shows, if you allow me the license, the *titanic* level of the European wreckage: “The obligation to respect these values and to procure their active promotion is an explicit legal obligation since the Maastrich reform and *an essential condition of the success of the European project itself*”.¹⁰⁰

That is why I think it is appropriate at this point to remember the EU and its member States John Donne’s poem wrote in 1624:

“No man is an Iland, intire of it selfe; every man is a peece of the Continent, a part of the maine; if a Clod bee washed away by the Sea, Europe is the lesse, as well as if a Promontorie were, as well as if a Mannor of thy friends or of thine owne were; any man’s death diminishes me, because I am involved in Mankinde; And therefore never send to know for whom the bell tolls; It tolls for thee.”¹⁰¹

⁹⁵ Report of UN Secretary-General, *Promotion and protection of human rights, including ways and means to promote the human rights of migrants*, doc. A/68/292, 9 August 2013, par. 5.

⁹⁶ The agreement between the EU and Turkey signed on Mars 2016 is another landmark in this path to nowhere.

⁹⁷ S. Nair, “El deber de solidaridad”, in J. de Lucas, *Mediterráneo: el naufragio de Europa* (Tirant Humanidades, Valencia, 2015) at 12.

⁹⁸ See S. Nair, *La Europa mestiza* (Círculo de lectores/Galaxia Gutenberg, Madrid, 2013).

⁹⁹ J. de Lucas, *supra*, n. 95.

¹⁰⁰ A. Mangas Martín & D. J. Liñán Nogueras, *Instituciones y Derecho de la Unión Europea* (Tecnos, Madrid, 8ª ed., 2014) at 50. Emphasis added.

¹⁰¹ John Donne, *Devotions Upon Emergent Occasions*. n. XVII, 1624. Emphasis added. Modern English version: “No man is an island / Entire of itself / Every man is a piece of the continent / A part of the main. / If a clod be washed away by the sea, / Europe is the less. / As well as if a promontory were. / As well as if a manor of thy friend’s / Or of thine own were: / Any man’s death diminishes me, / Because I am involved in mankind, / And therefore never send to know for whom the bell tolls; / It tolls for thee”.