Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea

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Abstract

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

1. Introduction

Although both international and European law impose a number of obligations on the EU Member States regarding persons in distress at sea, their effective implementation is limited by the manner in which they are being construed. Recent events in the Mediterranean demonstrate the uneasiness with which EU Member States deal with boat migration. Urgency to reduce irregular movement has given rise to episodes of non-rescue, frequent disputes over responsibility, and diversion of ships to ports in third countries. The possibility that rescuees may seek asylum appears to constitute the main disincentive to compliance. The Italian

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push-backs to Libya since May 2009, a country with a doubtful human rights record and a non-Party to the 1951 Refugee Convention, are an example. The joint operations carried out under the aegis of Frontex further illustrate the point. The problem is arguably compounded by the fact that the law of the sea neither establishes precisely where rescues are to be disembarked, nor does it clearly allocate responsibility in their regard. According to the Maritime Conventions, as expounded below, it is for the shipmaster and the states partaking in the rescue operation to determine the appropriate 'place of safety', taking the relevant circumstances into account.

In the EU, the absence of a system that determines a default port of disembarkation, be it the geographically closest to the emergency, the next port of call, or that of intended destination, is perceived as an important lacuna. In 2007, an informal group, gathering experts from the EU Member States, Frontex, UNHCR, and IOM, was commissioned to draft minimum guidelines for joint maritime operations, but


2 Convention relating to the Status of Refugees, 189 UNTS 150 (Refugee Convention or CSR).


the participants failed to agree on such essential issues as the implications of human rights and refugee law, the role of Frontex, and the prior identification of places of disembarkation for the migrants. Some Member States feared that clarifying obligations and solving the question of concrete attribution of responsibility would produce a pull factor, encouraging migrants to come to the EU by sea. Nevertheless, based on those discussions, the European Commission issued a proposal for a Council Decision supplementing the Schengen Borders Code as regards the joint surveillance of the external maritime borders, which has recently been adopted by the Council. Allegedly, the purpose is to ensure that the international rules relevant to the maritime border surveillance operations coordinated by Frontex are uniformly applied by the participating Member States.

Meanwhile, search and rescue obligations are interpreted inconsistently. The European Commission has acknowledged a persistent 'disunity within the EU over which obligations arise from EU fundamental rights and international human rights and refugee law, and how these obligations relate to the law of the sea'. A fragmentary reading of the applicable norms is being followed, favouring minimum compliance with maritime rules over the 'bona fide' fulfilment of international protection obligations. Some EU Member States, as well as Frontex, unduly conflate interdiction

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7 European Union Committee of the House of Lords, ‘FRONTEX: the EU external borders agency’, 9th Report of Session 2007-8. Oral evidence by Mr Liam Byrne MP, Minister for Immigration, UK Home Office, para. 115: ‘The way in which we interpret burden sharing is that we do not think we should be moving people around. We think that would create an enormous pull factor that would compound the problem rather than resolve it’. Major Andrew Mallia, from the armed forces of Malta, concurred, expressing similar concerns.


11 Frontex Guidelines Proposal, above n. 6, para. 2.


with search and rescue operations, as if both measures were interchangeable and produce equivalent effects. As a result, vessels that are not in distress have been 'rescued', whereas vessels genuinely in distress have been ignored or diverted. Yet, Frontex officials have commented favourably on the effect of maritime interventions, stating that '[o]n the humanitarian level, fewer lives have been put at risk, due to fewer departures'. Search and rescue obligations are understood as operating independently from other international obligations arising from refugee law and human rights, the observance of which is rendered uncertain. Often, minimal intervention is undertaken to prevent loss of life. Food, water, and fuel are provided, but without engaging in actual rescue so that responsibility for the migrants concerned is avoided. However, equating the humanitarian benefits of interdiction to rescue is a flawed position with no legal standing in international law.

When interception/rescue is performed in the territorial waters of third countries with which the EU Member States and Frontex collaborate, it seems to be assumed that the responsibility for the persons recovered belongs by default to those other countries. International co-operation is wrongly construed as releasing EU Member States from their obligations in relation to those intercepted in the territorial sea of the third countries in question.

Against this background and in light of the recently adopted EU Guidelines for joint maritime operations, this article aims to contribute to the clarification of the content of the main obligations binding upon the EU Member States when they operate at sea, whether alone or under the auspices of Frontex. Section 2 introduces the Agency and the main maritime operations it has coordinated thus far. Sections 3 to 6 analyse the rights of seaborne migrants and refugees in a holistic fashion, avoiding fragmentation.

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17 See, below, the description of maritime operations.
between the different legal systems applicable at sea. The interpretative rule applied is that inscribed in the 1969 Convention on the Law of Treaties. Particular attention is drawn to the principle of systemic integration enshrined in article 31(3)(c) thereof, according to which subsequent agreements, uniform practice, and every relevant norm of international law applicable between the parties to a treaty are pertinent to its interpretation. Search and rescue obligations, interdiction powers, and the issue of disembarkation are hence discussed on account of the requirements of human rights and refugee law. The principle of non-refoulment and concomitant entitlements to procedures and judicial protection are also examined, insofar as they follow from international and European law. A number of conclusions are drawn at the end.

2. Frontex and joint operations at sea

Since the abolition of internal border controls, the EU has committed itself to build up a system of 'integrated border management' for checks at the external borders of the EU Member States. The concept was first introduced by the European Commission and further echoed in subsequent discussions. Today, it constitutes a key policy objective of the Union, inscribed in the Lisbon Treaty.

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19 ICJ, 'Namibia Advisory Opinion', [1971] ICJ Rep. 16, para. 31; Aquac Sea Continental Shelf Case, [1976] ICJ Rep. 5, para. 82-3; Oil Platforms Case, [2003] ICJ Rep. 1, para. 40-1. For analysis, see, C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279-320. Within the framework of the Law of the Sea Convention, below n. 72, art. 293 requires all courts and tribunals called to settle disputes related to the Convention to take account not only of the applicable provisions therein, but also of 'other rules of international law not incompatible' with it. In the context of the European Convention of Human Rights, the Strasbourg Court, referring to art. 31(3)(c) VCLT, has recently recalled that 'the principles underlying the Convention cannot be interpreted and applied in a vacuum', holding that '[t]he Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part' in [GC] Al-Saadi and Al-omar v UK, Appl. No. 61498/08, 2 Mar. 2010, para. 126 (final on 4 Oct. 2010).
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A full definition of the concept was only articulated in 2006, when the Council established that it consisted of ‘multiple dimensions’, encompassing border control, crime prevention, inter-agency cooperation, and coordination of the activities carried out in this realm by the Member States and the EU. Three specific components were identified through which the different dimensions of the strategy would be realized: a ‘common corpus of legislation’, embodied in the Schengen Borders Code; operational cooperation between the Member States, including cooperation undertaken under Frontex; and solidarity, through the creation of an External Borders Fund.23

Reflecting the goals of the strategy, Frontex has been assigned the mission of improving ‘the integrated management of the external borders of the Member States of the Union’ in order to ensure both ‘a uniform and high level of control and surveillance’ and the ‘efficient implementation of common rules’24 in accordance with the fundamental principles of EU law.25 Regulation 863/2007 has amended the Frontex instrument,26 establishing the RABIT mechanism for mass influx situations at the external borders and regulating the powers of guest officers.27 The amendment insists on compliance with fundamental rights, mentioning that the Regulation should be carried out ‘in accordance with Member States’ obligations as regards international protection and non-refoulement’ and laying special emphasis on the ‘obligations arising under the international law of the sea, in particular as regards search and rescue’.28

The Agency has been entrusted with a variety of tasks.29 It has to coordinate operational cooperation between the Member States in relation to the joint management of the EU external borders; assist in the training of national border guards; carry out risk analyses; follow up on the development of research relevant for the control and surveillance of the external borders; assist the Member States in circumstances requiring increased technical and operational assistance; provide them with the necessary

24 Art. 1 and Recitals 1, 2, 4 and 21 of the Frontex Regulation, above n. 3.
26 RABIT Regulation, above n. 3.
27 According to art. 12(2) of the RABIT Regulation ‘guest officer’ means: ‘the officers of border guard services of Member States other than the host Member State participating in the joint operations and pilot projects’.
28 Recitals 16-18 of the RABIT Regulation.
support in organizing joint return operations; and deploy Rapid Border Intervention Teams in accordance with the RABIT Regulation. Notably, Frontex has the capacity to launch joint operations and pilot projects at the request of the Members States or at its own initiative. Concrete deployment follows a risk analysis developed by the Risk Analysis Unit, according to a common integrated risk analysis model. In the case Member States require support in the form of increased technical and operational assistance, the Agency can provide coordination between Member States or deploy its own experts. Guest officers can exercise the powers related to ‘border checks’ in accordance with the Schengen Borders Code. Their executive authority is subject to EU law and to the national law of the Member State hosting the operation. In particular, they must perform their tasks under the instructions of the host Member State and, as a rule, in the presence of its border guards, who alone remain competent to refuse entry pursuant to article 13 of the Schengen Borders Code. To date, Frontex has carried out a number of joint missions at the external borders of the EU Member States. The Hera and Nautilus maritime operations constitute cases in point.

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

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30 Art. 2 of the Frontex Regulation, as amended by art. 12 of the RABIT Regulation.
31 Ibid., art. 3.
32 Ibid., arts. 3 and 4.
33 Ibid., art. 8.
34 Art. 2(10) SBC: “border checks” means the checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it.
35 Art. 10 of the RABIT Regulation, amending art. 10 of the Frontex Regulation.
increasing operational cooperation between participating Member States and third countries.

**Hera I**, carried out between July and October 2006, was concerned with the identification of irregular migrants. It thus involved the secondment of experts from participating Member States to support the Spanish authorities in establishing the identity of detected arrivals. A total of 18,987 migrants landed in the archipelago in the course of the operation. 6,076 were returned to the ports of departure. **Hera II** overlapped with the first operation, prolonging it until December. Its goal was to reinforce maritime surveillance of the area separating the Canaries from the Atlantic shore of Africa by dissuading *patas* and *cayucos* from sailing off the coasts of Senegal, Mauritania and Cape Verde. When the boats were at sea, the objective was to intercept them while in the territorial waters of the third country of embarkation. The Spanish Commander in chief declared in an interview that 'boats containing a total of 1,243 people had been intercepted and returned to shore', adding that when they were located 'within 24 miles off the coast they [were] immediately returned'. The boats were escorted to the Canary Islands only if they were found outside that zone. Apparently, the authorities of the third country concerned formally assumed responsibility for the returns, but available reports are inconclusive on this point. From April until November 2007, **Hera III** brought together the two dimensions of **Hera I** and **Hera II**. The explicit 'aim of these patrols, carried out with Senegalese authorities, [was] to stop migrants from leaving the shores on the long sea journey and thus reducing the danger of losses of human lives'. In the course of the operation 'more than 1,000 migrants were diverted back to their points of departure at ports at the West African coast'. Since then, **Hera** has become a permanent operation, carried on throughout the year according to the needs identified by Frontex. **Hera 2008** was thus operated from February till December 2008, diverting 5,969 migrants back to African countries. **Hera 2009** ran from March to December 2009, producing 'a notable reduction in the number of migrants arrived to Canary Islands (rounded 2,280/9,200)'.

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42 European Commission News, ‘EU immigration: Frontex Operation’, 12 Sept. 2006, Ref. 48181: ‘Normally Senegalese boats escort the migrants inshore, start the legal procedure and try to arrest the people that were paid for organizing the journey’ (emphasis added).
46 Frontex General Report 2009, at 43.
Although a series of Framework Agreements and Memoranda of Understanding exist between Spain and the African countries concerned, the particular legal basis underpinning these operations has not been specified. What Frontex has disclosed in this regard is that the 'agreements with Mauritania and Senegal allow diverting... would-be immigrants' boats back to their points of departure from a certain distance of the African coast line' and that '[a] Mauritanian or Senegalese law enforcement officer is always present on board of deployed Member States' assets and is always responsible for the diversion'. In spite of intensified patrolling, some migrants have managed to arrive in the Canary Islands. Frontex experts have interviewed a fraction of these people, in order to establish their nationalities, but 'for intelligence purposes only'. The Agency claims to ignore whether any asylum applications were submitted during the operations and it does not collect any data in this respect.

The objective of Nautilus is 'to strengthen the control of the Central Mediterranean maritime border... and also to support Maltese authorities in interviews with the immigrants'. Like Hera, Nautilus has also been carried out in phases with the participation of different EU Member States and has subsequently evolved into a permanent mission. The first stage took place in June-July 2007. 401 migrants were detected in the operational area, 63 outside it, and a total of 166 were rescued. Frontex experts interviewed 26 per cent of the arrivals to Malta. The main countries of origin established, 'as declared by the individuals themselves', were Eritrea, Somalia, Ethiopia and Nigeria, which are among the main countries of origin of asylum applicants that Malta registered in 2008, half of which received refugee or subsidiary protection status. Nautilus 2008 was launched after an agreement was eventually reached between the participating Member States on the responsibility for the migrants.


52 Letter to the Immigration Law Practitioners' Association, above n. 49.

saved at sea. After prolonged discussions, it was decided that migrants intercepted in the Libyan Search and Rescue Area would be returned to Libya or taken to the closest safe port if that were not possible. As Libya did not agree, no diversions were performed. 16,098 migrants managed to arrive in Italy, whereas 2,321 reached the shores of Malta. Persisting differences between Italy and Malta with regard to the country responsible for disembarkation delayed the start of Nautilus 2009. Ultimately, the 'closest safe port' rule was maintained.

On 30 August 2008, Italy and Libya concluded the Treaty of Friendship, Partnership and Cooperation, making provision for mutual assistance in the fight against irregular migration. The day-to-day implementation of the agreement is governed by an Additional Technical-Operational Protocol of 4 February 2009, which is not publicly available. The first tangible result of the Italian-Libyan partnership was the transfer to Libya of several patrol boats to be jointly operated by the authorities of both countries. The boats have been 'used in joint patrols in Libyan territorial water and international waters in conjunction with Italian naval operations'. The Libyan coast guard was stationed at the Italian command base on the island of Lampedusa and the Guardia di Finanza sent a team to the Libyan coast guard station in Zuwarah, which served as a base of command on the Libyan side. By 30 July 2009, seven operations were carried out, with a total of 602 migrants returned to Libya. According to UNHCR, although a significant number of them clearly required international protection, the returns were performed 'without proper assessment of their possible protection needs'.

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57 UNHCR, 'Submission in the Case of Hini a.s. a Italy (Application no. 27765/09)', Mar. 2010, para. 2.1.3 and references therein, retrievable from: <http://www.unhcr.org/refworld/docid/4b97778d2.html>.
59 CPT Report to the Italian Government, above n. 1, para. 31. However, UNHCR has registered over 900 persons pushed back during the same period, see, 'Refugee protection and international migration: a review of UNHCR's operational role in southern Italy', Sept. 2009, available at: <http://www.unhcr.org/4ac35c600.html>.
60 'UNHCR interviews asylum seekers pushed back to Libya', above n. 1.
61 'UNHCR deeply concerned over returns from Italy to Libya', above n. 1.
Although the relationship between Nautilus 2009 and the Italian push-backs remains ambiguous, what is certain is that Nautilus 2009, running from April to October 2009, coincided with the period in which Italy began this policy. At the launch of Nautilus 2009 the hope was expressed that the mission would be ‘beefed up through the launch of joint patrols between Italy and Libya . . . monitoring the North African country’s territorial waters’. The decrease in the number of arrivals on the shores of Sicily and Sardinia in that period has been openly attributed to the agreements between Italy and Libya. On the other hand, Frontex has been accused of having assisted Italy by taking action that has resulted in the diversion of migrants to Libya. According to Human Rights Watch, on 18 June 2009,

[a] German Puma helicopter operating as part of the Operation Nautilus IV coordinated [the] Italian Coast Guard interception of a boat carrying about 75 migrants 29 miles south of Lampedusa. The Italian Coast Guard reportedly handed the migrants over to a Libyan patrol boat, which took them to Tripoli.

A day after this report was published, Frontex issued a press release ‘to state categorically that the agency has not been involved in diversion activities to Libya’. The press release addresses the incident described in the report, specifying that ‘Operation Nautilus 2009 was underway on June 18th 2009, but in a different operational area.’ The operational plan of Nautilus 2009 remaining secret, this is difficult to corroborate. In any case, even if the exact degree of the Agency’s participation in the diversions to Libya cannot be established, the complementarity between Frontex operations and the Italian-Libyan patrols in reducing unwanted arrivals through the maritime route is quite clear.

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63 ‘Immigration: Illegal Arrivals from Sea Halved in Italy’, above n. 15.
64 ‘Pushed Back, Pushed Around’, above n. 1, at 37 (references omitted).
67 According to Le Monde, ‘no vessels have landed on [Malta] since March this year’ and ‘Italy has also reported a steep decline in the number of migrant vessels landing on its shores . . . the latest estimates show a decrease of 94 per cent between 2009 and the first six months of 2010’. In Spain ‘[t]here has also been a considerable decrease’, a 50% drop being reported between 2008 and 2009. See, ‘Boat people looking for new ways in’, 24 June 2010, available at: <http://www.presseeurop.eu/en/content/article/281011-boat-people-looking-new-ways>. The information is corroborated by the latest statistical bulletin from Frontex, where a massive displacement of migration flows from sea to land routes is avowed, the main reason being ‘the effectiveness of Frontex activities at the sea borders’ as
The fate of refugees and asylum seekers caught up in maritime missions remains unknown. Available evaluations recognise that ‘experiences gained from joint operations show that border guards are frequently confronted with situations involving persons seeking international protection or crisis situations at sea’, but fail to undertake any further analysis on the point.\textsuperscript{68} The fact that Frontex does not register any data with regard to international protection is particularly unhelpful and casts doubt on the robustness of its commitment to fundamental rights. From the information accessible, it appears that migrants are probably diverted back to African countries before being given the opportunity to lodge an asylum application or to contest an entry refusal.\textsuperscript{69} The Italian authorities have officially acknowledged that ‘they do not proceed with the formal identification of migrants who are intercepted at sea’. The government has affirmed that no migrant has ever expressed an intention to apply for asylum and that, consequently, ‘there has been no need to identify these persons and establish their nationality’.\textsuperscript{70} However, prior to the push-back campaign, around 75 per cent of migrants arriving in Italy by sea did request international protection and approximately 50 per cent of these were granted some form of asylum.\textsuperscript{71} This points to potentially very serious breaches of the relevant standards as detailed below.

\textsuperscript{68} Report on the evaluation and future development of the Frontex Agency, COM(2008) 67 final, 13 Feb. 2008, at 5. See also, the assessment by the private contractor COWI, above n. 36. Note, moreover, that the European Commission has reached an agreement with Libya on migration management and border control, issuing a joint communiqué listing a series of activities to be funded through the EU budget. EUR 50 million have been earmarked until 2013. See, the letter addressed by Commissioner Malmström to the Chairman of the LIBE Committee, CAB Ref. LM/pj D(2010)921, 8 Oct. 2010 (on file with the author). For further information, see, the European Commission Press Release, ‘European Commission and Libya agree a Migration Cooperation agenda during high level visit to boost EU-Libya relations’, MEMO/10/472, 5 Oct. 2010.

\textsuperscript{69} This is precisely what the victims of the 2009 push-back campaign have alleged in the case pending before the ECtHR, 

\textsuperscript{70} CPT Report to the Italian Government, paras. 13-14, above n. 1.

3. Contextualising sovereign powers of maritime interdiction

State authority at sea is not absolute. The 1982 UN Convention on the Law of the Sea (LOSC)\(^72\) circumscribes states’ powers so that they are exercised with due respect to the Convention itself and to ‘other rules of international law’.\(^73\) In the high seas freedom of navigation reigns and, as a rule, ships are subject to the exclusive jurisdiction of their flag state.\(^74\) Other states may exercise jurisdiction in very limited instances only.\(^75\)

In the case of ships of uncertain nationality and stateless ships, states enjoy a ‘right of visit’.\(^76\) In principle, such a right of visit, ‘[e]xcept where acts of interference derive from powers conferred by treaty’, appears simply to entail a right to approach and board the ship as to effect a vérification du pavillon. Whether this right engenders further powers of seizure is controversial. The doctrine is divided and limited jurisprudence is available on this point.\(^77\) Some authors consider that the use of force would not be justified in the case of flagless ships without ‘some jurisdictional nexus in order that a state may extend its laws to those on board a stateless ship and enforce the laws against [them]’.\(^78\) Other authors argue that “extraordinary deprivational measures are permitted with respect to stateless ships”.\(^79\) The first view appears more consonant with the LOSC. The fact that visit and enforcement powers have been regulated separately in the Convention\(^80\) suggests that a right of visit does not imply wider enforcement

\(^72\) United Nations Convention on the Law of the Sea, 1833 UNTS 3 (LOSC). Both the EU and all its Member States have ratified the Convention. See, the status of the Convention as of 20 Aug. 2010 at: <http://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en>, as well as Council Decision 98/392/EC, of 23 Mar. 1998, concerning the conclusion by the European Community of the United Nations Convention of 10 Dec. 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, [1998] OJ L 179/1. According to art. 309 LOSC, ‘[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention’.\(^73\) Ibid., arts. 2(3) and 87(1), concerning, respectively, the territorial sea and the high seas.\(^74\) Ibid., arts. 92(1) and 87. See also, art. 6 of the 1938 Convention on the High Seas, 450 UNTS 82.\(^75\) Arts. 99, 100, 109, 110 and 111 LOSC, covering the only instances in which non-flag states may exercise jurisdiction: slave trading, piracy, unauthorized broadcasting, flaglessness, hot pursuit, and constructive presence.\(^76\) Ibid., arts. 92(2) and 110.\(^77\) The only reported case that has reached a national court concerning the interdiction of a flagless ship transporting undocumented migrants on the high seas in which the flaglessness of the ship was considered sufficient ground to justify the assertion of enforcement jurisdiction is that of Panayat a.s., decided by the Tribunale di Crotone on 27 Sept. 2001, cited in RDI (2001), at 1155. For commentary, refer to S. Trevisanu, ‘Droit de la mer’ (2006) 133 Journal du droit international 1035-7.\(^78\) R. R. Churchill and A. V. Lowe, The Law of the Sea (Manchester: Manchester University Press, 1983), at 214.\(^79\) M. S. McDougal and W. T. Burke, The Public Order of the Oceans (New Haven/London: YUP, 1962), at 1084.\(^80\) Note, for instance, that the right to visit a pirate vessel on the high seas is provided by art. 110 LOSC, whilst the jurisdictional basis for seizure is accorded separately by art. 105.
prerogatives. According to article 110, when a ship is without nationality, the warship of the state concerned may proceed to verify its identity. 'If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration'. Nowhere does the LOSC provide for any other powers with regard to these vessels.

Seizure begs the additional question that a crime has been committed on the high seas. However, where a ship is engaged in the transport of slaves, in human trafficking, or in the smuggling of migrants, '[t]he approach taken under various international instruments to maritime jurisdiction over such crimes is inconsistent'. Slave trade, pursuant to articles 99 and 110 LOSC, attracts only a right of visit. The slavery Conventions do not provide for interdiction powers either. The UN Trafficking Protocol provides for cooperation between state parties in order to prevent and combat trafficking and to protect and assist the victims thereof. Without specifically providing for interdiction, article 11 requires states parties to 'strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons'. Nonetheless, 'the rights, obligations and responsibilities of States . . . under international law, including international humanitarian law and international human rights law . . . the 1951 Convention . . . relating to the Status of Refugees and the principle of non-refoulement' remain unaffected. As far as smuggling is concerned, the relevant UN Protocol establishes that where a state party has reasonable grounds to suspect that a vessel flying the flag of another state is engaged in migrant smuggling it may so notify the flag state, request confirmation of registry and, if confirmed, request its authorization to board and search the vessel. If evidence is found thereafter that the vessel is engaged in migrant smuggling, the state concerned can then take 'appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State'. In cases of boats without nationality suspected of being engaged in migrant smuggling, the state concerned

81 R. Barnes, 'The International Law of the Sea and Migration Control' in Ryan and Mitsilegas (eds.), above n. 29, 103-50, at 133.
84 1926 Slavery Convention, [1927] UKTS 16, and 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 UNTS 3.
86 Ibid., art. 14(1).
may directly 'board and search the vessel'. In the event 'evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law'. In neither case shall these measures:

afford the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention... relating to the Status of Refugees and the principle of non-refoulement...

Therefore, contrary to what the European legislator appears to assume in its Decision governing Frontex operations at sea, such actions as seizing the ship and apprehending the persons on board; ordering the ship to modify its course towards a destination outside the territorial waters or the contiguous zone; escorting the vessel or steaming nearby until the ship is heading on such course; conducting the ship or the persons on board to a third country or handing them over to the authorities of a third state, do not readily follow from the terms of the applicable treaties. The fact that the cogues and pateras used for the transport of migrants do not fly the flag of any state does not seem to allow for unlimited enforcement jurisdiction in their regard.

In this framework, detention constitutes a separate issue. The European legislator, supposedly 'in accordance with the Protocol against the Smuggling of Migrants', proposes that when ships without nationality are presumably engaged in the smuggling of migrants the persons on board may be apprehended. However, the Smuggling Protocol does not regulate anywhere the conditions under which smuggled migrants can be detained. It provides merely for the state party concerned to take 'appropriate measures' if evidence is found confirming the suspicion that the vessel is engaged in the smuggling of migrants by sea. In the case of *Medvedyev*, the European Court of Human Rights has established the inadequacy of a similar 'appropriate measures' provision contained in article 17 of the UN Convention against Illicit Traffic in Narcotic Drugs to

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88 Ibid., art. 8(7).
89 Ibid. Note, in this context, that, according to well-established jurisprudence, international agreements outside LOSC containing an exception to the general rule prohibiting the visitation and boarding of foreign vessels on the high seas 'must be constructed *stricto jure*. See, the Arbitral Award on the *Wandsworth (US v. Great Britain)* (1921) 6 RIAA (1955), at 71-3.
90 Art. 19 Smuggling Protocol.
91 Frontex Guidelines Decision, above n. 10, Annex, Part I, paras. 2.4 (d), (c) and (f).
93 Frontex Guidelines Decision, above n. 10, Annex, Part I, paras. 2.5.2.5. and 2.4(d).
94 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, [1989] 28 ILM 497.
serve as a legal basis for the arrest of persons on board a ship on the high seas suspected of being engaged in drug trafficking. The Court considered that such provision did not afford sufficient protection against arbitrary violations of the right to liberty. Like article 8(7) of the Smuggling Protocol, article 17 of the Convention against Drug Trafficking merely allows the intervening state to 'take appropriate measures' concerning the vessel in question and, if 'evidence of involvement in illicit traffic is found', to take 'appropriate action with respect to the vessel, persons and cargo on board'. The Court considered that '[n]one of those provisions refers specifically to depriving the crew of the intercepted ship of their liberty', concluding that 'they do not regulate the conditions of deprivation of liberty on board ship, and in particular the possibility for the persons concerned to contact a lawyer... Nor do they place the detention under the supervision of a judicial authority'. The lawfulness criterion inbuilt into article 5 ECHR wants that the specific regime for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be [accessible and] foreseeable in its application so as to 'satisfy the general principle of legal certainty'.

In this light, a thorough legal system must be established regulating the particular terms and conditions under which persons on board flagless vessels navigating the high seas could be subject to detention, respecting the legality criterion enshrined in the ECHR and subjecting the measure to proper procedural guarantees and judicial oversight. Otherwise, the EU rules for sea border operations coordinated by Frontex risk violating article 5 of the Convention.

With regard to detention, an additional observation is in order. Not only does the Smuggling Protocol fail to regulate the conditions under which those suspected of involvement in migrant smuggling by sea can be detained, but it specifically requires a general distinction to be drawn between the victims and the smugglers themselves. Whereas the Protocol provides for 'the prevention, investigation and prosecution' of the crimes related to migrant smuggling, the victims must be the object of 'protection and assistance'. To that end, each Contracting Party shall adopt...

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96 Ibid., Grand Chamber Judgment, para. 61.
98 Grand Chamber Judgment, above n. 95, paras. 80 and 102.
99 Smuggling Protocol, above n. 87, art. 4.
'appropriate measures' to preserve and protect their rights 'consistent with its obligations under international law'.\footnote{100} Consequently, if the rules for Frontex operations are to implement the Smuggling Protocol in good faith,\footnote{101} 'appropriate measures' shall be introduced to properly distinguish victims from smugglers, in accordance with international standards. The opposite may lead to an abuse of rights.\footnote{102}

In the contiguous zone, extending out from the baseline up to 24 nautical miles, the coastal state enjoys 'a limited right of police'.\footnote{103} Contrary to what seems to follow from the Frontex Guidelines Decision,\footnote{104} this area does not fall within the exclusive sovereignty of the coastal state and preserves the navigational freedoms associated with the high seas. Article 33(1) LOSC allows the coastal state to exercise 'the control necessary to prevent [the] infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea'. But only such control as is necessary to prevent immigration rules from being breached is permitted, which requires proportionality in each particular case.\footnote{105} A priori, it is not obvious that powers of detention, escort to port and forcible return are encompassed in this provision. The observations made with regard to the high seas on this point are pertinent here too. According to the tenet of nulla crimen nulla poena sine lege, it is 'arguable that the necessary power to control does not include the right to arrest, because at this stage [that is, that of a ship coming into the contiguous zone] the ship cannot have committed an offence'.\footnote{106} Enforced direction into port may not be arrest in a

\footnote{100} Ibid., art. 16.

\footnote{101} Art. 26 VCLT codifies the pacta sunt servanda principle, stipulating that: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'. According to art. 31 VCLT, '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. For commentary, refer to G. S. Goodwin-Gill, 'State Responsibility and the "Good Faith" Obligation in International Law' in M. Fitzmaurice and D. Saroooshi (eds.), Issues of State Responsibility before International Judicial Institutions (Oxford: Hart Publishing, 2002), 75-104.

\footnote{102} Art. 300 LOSC provides in this regard that: 'States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right'.


\footnote{104} The Decision distinguishes only between 'territorial waters and contiguous zone' and 'the high seas beyond the contiguous zone', thus assimilating the contiguous zone to the territorial sea for the purposes of interdiction, contrary to the LOSC regime. See, Annex, Part I, paras. 2.5.1 and 2.5.2.

\footnote{105} See, the Award by the Permanent Arbitral Tribunal, Guyana v Suriname, 17 Sept. 2007, para. 445: 'in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary', citing S.S. "I'm Alone" (Canada/United States), 3 RIAA, at 1615 and Red Crusader (Commission of Inquiry, Denmark-United Kingdom), 35 ILR, at 199, retrievable from: <http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf>.

\footnote{106} O'Connell, above n. 103. In the Fedelio case, both the Tribunal and the Court of Appeal of Parma decided that Italian criminal jurisdiction could not apply to the actions committed on the high seas by a Honduran vessel suspected of being engaged in drug trafficking, due to the fact that at no point of the pursuit by the Italian Navy had the foreign ship entered territorial waters. See, RDI (1992), at 1081. On the limits to the exercise of criminal jurisdiction, see, art. 27 LOSC.
In any event, an exercise of jurisdiction in this zone remains limited by the observance of ‘other rules of international law’, including refugee law and human rights.

Not even in the 12 miles of territorial sea can coastal states exert unlimited powers. The right of innocent passage allows vessels to navigate it without entering internal waters or port, unless authorized by the coastal state. Passage must be continuous and expeditious, except for stopping or anchoring incidental to ordinary navigation or rendered necessary by force majeure or distress or for the purpose of rendering assistance. Article 19 LOSC specifies that passage is not innocent when it is prejudicial to the peace, good order, or security of the coastal state. In particular, passage is rendered non-innocent if the vessel engages in the loading or unloading of persons ‘contrary to the immigration rules of the coastal State’. As asylum legislation is commonly integrated in the immigration rules of those states regulating the issue, it is difficult to accept that passage for the purpose of requesting international protection would be ‘contrary to the immigration rules of the coastal State’. The question becomes more complex in the case of a mixed crew of refugees and other persons who would not benefit from the exclusion from penalties for illegal entry provided for in article 31 CSR, or where the master of the ship is carrying the migrants for profit. In such cases, state practice has offered multiple examples of passage being considered non-innocent. Goodwin-Gill and McAdam suggest that ‘[t]he fact that a vessel may be carrying refugees or asylum seekers who intend to request the protection of the coastal state arguably removes that vessel from the category of innocent passage’, but the doctrine is not uniform on this point. Pallis has questioned this approach, noting that seeking asylum actually ‘accords with international law’ for which reason the passage of asylum seekers’ boats should not be deemed contrary to article 19(1) LOSC. Moreover, ‘passage’ does not strictly correspond to the ‘loading’

107 Although there was no enforced transfer of the crew onto the French frigate, the ECtHR has established that, because ‘the ship’s course was imposed by the French forces’, the situation of the applicants ‘amounted in practice to a deprivation of liberty’ in *Medelhyoe v. France* [GC], 29 Mar. 2010, above n. 95, paras. 74-5. The ITLOS has equally countenanced a broad interpretation of the notion of detention in *Camouso (Pamana v. France)*, [2000] ITLOS Rep. 10, 125 ILR 164, para. 71; *Monte Conmoro (Séychelles v. France)*, [2000] ITLOS Rep. 86, 125 ILR 220, para. 90; and *Hashimaru (Japan v. Russia)*, [2005-7] ITLOS Rep. 18, para. 12.

108 Art. 87(1) LOSC.

109 Art. 18 LOSC.

110 For a prominent example, see, the Australian *MV Tampa* incident in 2001. For a full account of the facts of the case, refer to the Full Federal Court of Australia, *Ruddock v. Vedelis* [2001] FCA 1329. For analysis, see, P. Mathew, *Australian Refugee Protection in the Wake of the Tampa* (2002) 96 *AIL* 661-76.


or ‘unloading’ of persons in breach of the immigration regulations of the coastal state, which arguably removes refugee boats transiting the territorial sea from the scope of application of article 19(1) LOSC altogether.

Where passage is considered non-innocent, recourse may be had to article 25 LOSC, allowing coastal states to adopt ‘the necessary steps . . . to prevent passage’. Any such steps should always conform to other applicable ‘rules of international law’.113 The regime of distress constitutes an exception to this norm, extending a right to dock and to seek refuge in adjacent ports in distress. Although the LOSC does not directly codify it, the existence of this right in customary law is supported by commentary114 and consistent jurisprudence.115 The necessity of entering port ‘must be urgent and proceed from such a state of things as may be supposed to produce, on the mind of a skillful mariner, a well-grounded apprehension of the loss of the vessel and cargo or of the lives of the crew’.116 The Irish High Court of Admiralty has recently confirmed ‘the right of a foreign vessel in serious distress to the benefit of a safe haven in the waters of an adjacent coastal state’.117 Refusing entry to port under these circumstances, returning marginally seaworthy vessels to the high seas, seems indeed opposed to ‘elementary considerations of humanity’.118

Alternative solutions to allowing passage and entry to port may fail to comply with the rationale of securing the safety of life at sea inscribed in the maritime conventions. Thus, if in cases of distress initial succour may be provided aboard an assisting ship, temporarily maintaining the survivors at sea,119 according to the Guidelines on the treatment of rescued persons of the International Maritime Organization (IMO), a vessel cannot be considered a final place of safety. A place of safety may only be on

113 Art. 2(3) LOSC. The ECtHR has interpreted, in this context, that acts of interference with the right of innocent passage have not only to conform with arts. 19(1)(g) and 25 LOSC, but also with the requirements of the ECHR and, in particular, with the principle of proportionality. See, Women on Waves v. Portugal, Appl. No. 31276/05, 3 Feb. 2009, para. 43: ‘les États contractants ne sauraient prendre, au nom de “la sûreté publique”, n’importa quelle mesure jugée par eux appropriée [. . .] L’ingérence en question ne répondrait donc pas à un “besoin social impérieux” et ne saurait passer pour “nécessaire dans une société démocratique”’.


116 General Claims Commission United States and Mexico, Opinion rendered 2 Apr. 1929, Kate A. Heff v. The United Mexican States; 4 RIA 444, reprinted in (1929) 23 AJIL 860-5.


118 IGC, Corfu Channel Case (United Kingdom v. Albania), [1949] IGC Rep. 4, para. 22. The expression has been reiterated by the ITLOS in its recent decisions on the cases MV Sejna (No. 2) (St. Vincent v. Guinea), [1999] ITLOS Rep. 10, 120 ILR 143, para. 55; and, Juno Trader [2004], ITLOS Rep.17, 128 ILR 267, para. 77.

119 This would reproduce the initial strategy taken by Australia in the MV Tampa incident in 2001, above n. 110.
dry land, for which reason allowing passage and entry to port might eventually have to be tolerated. With regard to vessels in distress carrying asylum seekers, the European Court of Human Rights' *dictum* that retention in purportedly extra-jurisdictional zones must not deprive them from gaining effective access to determination procedures acquires particular relevance in this context. In addition, a breach of article 5 ECHR should also be anticipated if this option is pursued without a procedure 'in accordance with the law' or for a time exceeding the legal period of detention without judicial review. Beside retention at sea, another possibility the coastal state concerned may wish to contemplate is return to a third country. Yet, as detailed below, summary expulsions, without account being taken of the particular circumstances of the person concerned, may amount to *refoulement*. Therefore, no other reasonably practicable alternatives may finally remain for the coastal state concerned but to allow passage and entry to port in the particular case.

Beyond practical considerations, stemming from a positive obligation to protect the life of those under their jurisdiction, coastal states may be obliged, as a matter of human rights law, to authorize both entry to port and disembarkation. The European Court of Human Rights implicitly accepted in *Xhavara* that migration controls bring the persons concerned under the jurisdiction of the intercepting state and so within the ambit of the ECHR. The incident concerned the death of 58 Albanians aboard the *Katerina Rades*, which sank in open seas 35 miles off the Italian coast after collision with the Italian warship *Sibilla*. Although the claim was finally dismissed for non-exhaustion of domestic remedies, the Court, relying on the doctrine on positive obligations recalled that the first sentence of article 2(1) ECHR enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. Assertive action to effectively protect human life is required in these circumstances. As observed by

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120 IMO Guidelines on the treatment of persons rescued at sea, Resolution MSC.167(78), 20 May 2004, para. 6.14: 'A place of safety may be on land, or it may be aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked...’ (emphasis added).


124 *Xhavara* referred to the ECtHR judgment in *Oman v. UK*, Appl. No. 23452/94, 28 Oct. 1998, which has since been qualified in subsequent decisions. However, the overall principle remains intact. See, for instance, ECtHR, *Tais v. France*, Appl. No. 39922/03, 1 June 2006, paras. 87-110.

125 ECtHR, *Xhavara and 15 others v. Italy and Albania*, Appl. No. 39473/98, 11 Jan. 2001, at 1. The original is in French: The Court ‘*répète cependant que la première phrase de l'article 2(1) astreint les États non seulement à s'astreindre à protéger la mort de manière volontaire et illégitime mais aussi à prendre les mesures nécessaires à la protection de la vie des personnes relevant de leur juridiction*.'
Spijkerboer, '[t]he obligation . . . is not conditioned on a causal relationship between the State’s actions and someone’s death. Rather, the obligation is triggered by the State’s knowledge that a particular life is at risk and that same State’s ability to [protect it from being lost]'.

4. An integrated approach to search and rescue

Rescue-at-sea has often been adduced as the legal basis buttressing the boarding of flagless vessels in the Mediterranean Sea. An extended analysis of the precise contours of this notion becomes hence pertinent. The duty to render assistance to persons in distress at sea constitutes ‘one of the most ancient and fundamental features of the law of the sea’ and is widely recognized as a norm of customary law. A number of treaties specify several elements of this obligation. Together with the LOSC, the 1974 Safety of Life at Sea (SOLAS) Convention and the 1979 Search and Rescue (SAR) Convention bear significant relevance in this context.

Article 98(1) LOSC establishes that ‘every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew, or the passengers . . . to render assistance to any person found at sea in danger of being lost’ and ‘to proceed to the rescue of persons in distress . . .’. The SOLAS Convention similarly provides that '[t]he master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance . . .'. The obligations imposed on coastal states further comprise a duty to ensure that the necessary arrangements are made for coast watching and for the rescue of

130 International Convention for the Safety of Life at Sea, 1184 UNTS 278 (SOLAS). The EU is not a Party to the IMO and has thus not acceded to the Convention, but the majority of its Member States have ratified it without significant reservations, save Austria, Czech Republic and Hungary, which are not Parties. All Parties have accepted the 2004 amendments, except for Malta. See, the status of the Convention as of 5 Aug. 2010 at: <http://wwwimo.org/includes/blastDataOnly.asp/data_id%3D29370/Status-2010.pdf>.
131 International Convention on Maritime Search and Rescue, 405 UNTS 97 (SAR). The EU is not a Party to the IMO and has hence not acceded to the Convention, but the majority of its Member States have ratified it without significant reservations, save Austria, Czech Republic and Slovakia, which are not Parties. All Parties have accepted the 2004 amendments, except for Malta. See, the status of the Convention as of 5 Aug. 2010 at: <http://wwwimo.org/includes/blastDataOnly.asp/data_id%3D29370/Status-2010.pdf>.
132 SOLAS, ch. V, Regulation 33(1).
persons in distress at sea around their coasts. 'These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary...'.

According to article 98(2) LOSC, the obligation also applies on the high seas. The SAR Convention provides in addition for inter-state co-ordination of SAR services and for the delimitation of SAR regions in cooperation between Contracting Parties.

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

As far as the material object of the obligation is concerned, it is crucial to clarify the notions of 'distress' and 'rescue'. The term 'distress' has been defined in the SAR Convention as 'a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance'. Further specifications have been provided in relevant jurisprudence and commentary. In the case of The Eleanor it was held that distress must entail urgency, but that 'there need not be immediate physical necessity'. Subsequently, the decision on the Kate A Hoff established that it is not required for the vessel to be 'dashed against the rocks' before a claim of distress can be invoked.

The International Law Commission has confirmed that a situation of distress 'may at most include a situation of serious danger, but not necessarily one that jeopardizes the very existence of the person concerned'. In this light, unseaworthiness may per se entail distress. According to the European Commission, 80 per cent of the illegal traffic in the Mediterranean towards

133 Ibid., Regulation 7().
134 SAR Annex, chs. 2 and 3.
135 Ibid., para. 2.1.10.
136 Art. 11 of the 1910 Convention for the Unification of Certain Rules relating to Assistance and Salvage at Sea, above n. 129, stipulates that the duty to assist applies to 'everybody, even though an enemy, found at sea in danger of being lost'.
138 Although art. 98 LOSC is placed in the section devoted to the regulation of the high seas, on a literal contemplation of its wording, the reference to 'any person found at sea', instead of to 'any person found on the high seas', pleading for an extensive interpretation. In this line, see, J. K. Gamble Jr. (ed.), Law of the Sea: Neglected Issues (Honolulu: University of Hawai’i, 1979), at 261.
139 Falis, above n. 112, at 337.
140 SAR Annex, para. 1.3.13.
142 Kate A. Hoff v. The United Mexican States, above n. 116.
the EU is undertaken in small unseaworthy vessels, such as \textit{cayucos} and \textit{pateras}, which put the lives of its passengers 'objectively in danger'.\footnote{Improvised rafts, inflatable dinghies, or windsurf boards have been reported to the IMO as having been used as means of transportation. See, the Second Biannual Report, MSC.3/Circ.2, 31 Oct. 2001.} It may therefore be inferred that persons on board such crafts are per definition in distress and \textit{a priori} in need of assistance.\footnote{Study on the international law instruments in relation to illegal immigration by sea, above n. 5, at 9 and 28.} The definition of the term in the EU Guidelines for Frontex operations, as 'a situation in which uncertainty or apprehension exists as to the safety of a ship or of any person on board',\footnote{Frontex Guidelines Decision, Annex, Part II, para. 1.2.} may certainly warrant an extensive interpretation.

The notion of 'rescue' in the SAR Convention includes an 'operation to retrieve persons in distress, provide for their initial medical or other needs and to deliver them to a place of safety'.\footnote{SAR Annex, para. 1.3.2.} Subsequent to non-rescue incidents and frequent disagreement over disembarkation, the SAR and SOLAS Conventions have been amended\footnote{Together with the formal amendments to the SAR and SOLAS Conventions, two further instruments have been adopted to assist in the implementation of the obligations concerned: IMO, 'Guidelines on the treatment of persons rescued at sea', above n. 120; and, 2006 IMO/UNHCR, Practical Guide, 'Rescue at Sea: A Guide to Principles and Practices as Applied to Migrants and Refugees', retrievable from: <http://www.imo.org/indudes/blastDataOnly.asp/data_id=15282/UNHCRIMOleafletpersonsrescuedatsea.pdf>.} and the content of the obligation further clarified.\footnote{For similar opinions, see, S. Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 \textit{IJMCL} 523-42, at 524; and, Barnes, above n. 81, at 139.}

Since July 2006, the state responsible for the SAR region in which assistance is rendered shall exercise 'primary responsibility' to ensure the cooperation necessary for the survivors to be 'delivered to a place of safety'.\footnote{SAR Annex, para. 3.1.9; and, SOLAS, ch. V, Regulation 33 (1-1), (in identical terms).} Although the duty on the coastal state is limited to ensuring collaboration and does not include a commandment to allow for disembarkation onto its own territory, the amendments establish nonetheless an obligation of result.\footnote{SAR Annex, para. 1.3.2; and, SOLAS, ch. V, Regulation 33 (1-1), (in identical terms).} The SAR operation will not be considered accomplished unless the survivors are effectively disembarked.

Neither the 'place of safety' nor the concept of 'safety' itself have been defined, though. Yet, the amendments do clearly indicate that in determining such place of safety both 'the particular circumstances of the case and [the] guidelines developed by the [International Maritime] Organization' have to be taken into account.\footnote{Resolutions MSC.155(78) and MSC.153(78), 20 May 2004. Retracing the origins and describing the prospective evolution of the current SAR regime, see, J. Coppens and E. Somers, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?' (2010) 25 \textit{IJMCL} 377-403.}
According to the IMO Guidelines on the treatment of persons rescued at sea, a place of safety is, in principle,

a location where the rescue operation is considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors. 153

It is commonplace to interpret the delivery to a place of safety as disembarkation in the next port of call, but this practice has not yet evolved into a rule of customary law. 154 Some authors, and the UNHCR, believe that the obligation on the coastal state to allow disembarkation is implicit in the maritime Conventions. 155 They assert that any other interpretation would discourage rescue at sea, running counter the very purpose of the SAR and SOLAS Conventions. A circular of the IMO Facilitation Committee adopted in January 2009 seems to back this proposition, recommending that 'if disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued... into a place of safety under its control...'. 156

153 IMO Guidelines, above n. 120, para. 6.12.
154 R. Barnes, 'Refugee Law at Sea' (2004) 53 ICLQ, 47-77, at 63, referring to the discussions held at the 29th Session of the IMO Facilitation Committee, 7-11 Jan. 2002, on the disembarkation of stowaways. The International Convention relating to Stowaways, adopted by the Diplomatic Conference on Maritime Law in Brussels on 10 Oct. 1957 but never entered into force, does provide for this rule in art. 2(1), establishing that: 'If on any voyage of a ship registered in or bearing the flag of a Contracting State a stowaway is found in a port or at sea, the Master of the ship may... deliver the stowaway to the appropriate authority at the first port in a Contracting State at which the ship calls after the stowaway is found, and at which he considers that the stowaway will be dealt with in accordance with the provisions of this Convention' (emphasis added), available at: <http://www.unhcr.org/refworld/topic/4565c22511,4565c25f197,3ae6b3a80,0.html>.
155 UNHCR, 'Problems Related to the Rescue of Asylum-Seekers in Distress at Sea', UN doc. EC/SCP/18, 26 Aug. 1981, paras. 19-21. See also, EXCOM Conclusion No. 23 (XXXII), at 3: 'In accordance with established international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied in the case of asylum-seekers rescued at sea'.
156 Circular FAL.35/Circ.194, 'Principles relating to administrative procedures for disembarking persons rescued at sea', 16 Jan. 2009. Note that Malta has objected not only to the circular (see, FAL.35/WP5, 'Formalities connected with the Arrival, Stay and Departure of Persons', 14 Jan. 2009), but also to the 2004 amendments to the SAR and SOLAS Conventions and is, therefore, not bound by them. Due to its large SAR Region, Malta favours the 'closest-safe-haven' rule for disembarkation over the 'State-responsible-of-the-SAR-Region-where-the-persons-were-removed' criterion. See the counter-proposal by Malta to the FAL Committee, FSI.17/15/2, 'Measures to protect the safety of persons rescued at sea: comments on document FSI.17/15/1', 14 Feb. 2009, submitted in reaction to an earlier proposal by Italy and Spain to clarify the SAR and SOLAS amendments in document FSI.17/15/1, 'Measures to protect the safety of persons rescued at sea: compulsory guidelines for the treatment of persons rescued at sea', 13 Feb. 2009. Both the joint Italian/Spanish submission and the counter-proposal by Malta have finally been rejected in COMSAR.14/17, 'Report to the Maritime Safety Committee', 22 Mar. 2010, para. 10.1-26. The end-result is that the 2004 SAR and SOLAS amendments remain intact.
The absence in the law of the sea of a rule designating a specific port of disembarkation, leaving it to the states involved in the SAR operation to provide for *ad hoc* arrangements every time, has been characterised by the European Commission as an important lacuna. Therefore, in the Guidelines for Frontex operations at sea it is proposed that the operational plan of each mission ‘spell[s] out the modalities for the disembarkation of the persons intercepted or rescued, in accordance with international law and any applicable bilateral agreements’. Subject only to the limitation that the operational plan may not have the effect of imposing obligations on Member States not participating in the operation, intervening Member States may freely decide on the applicable conditions. Unless otherwise specified, the Guidelines suggest that priority be given to disembarkation in the third country from which the interdicted ship departed or through the territorial waters or SAR region of which it transited. If this is not possible, disembarkation should take place in the Member State hosting the Frontex operation, unless a different course of action proves necessary to ensure the safety of the persons involved.

However, the benefits of a system pre-determining the place of safety are not straightforward. The notion of ‘safety’ has no single meaning and the arrangements made in regard to some of those rescued may not be valid for others. The fact that the ‘place of safety’ is not pre-defined in the maritime Conventions is precisely what allows for ‘taking into account the particular circumstances of the case’ alongside ‘other rules of international law’ in conformity with which the law of the sea is to be interpreted. As established by the IMO Guidelines:

[i]t these circumstances may include factors such as the situation on board the assisting ship, on scene conditions, medical needs, and availability of transportation or

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157 Study on the international law instruments in relation to illegal immigration by sea, above n. 5, at 4 and 6.
159 On this point, see the answer by Commissioner Malström in the interview published in *The Times of Malta*, ’So Malta would not be left alone’, 30 Apr. 2010, where she explains that ‘[t]here is ... the possibility, before a mission starts, that participating Member States agree on other rules of engagement ... [than the ones introduced in the guidelines]’, available at: <http://www.timesofmalta.com/articles/view/20100430/local/so-malta-would-not-be-left-alone>.
160 SAR Annex, para. 3.1.9; and, SOLAS, ch. V, Regulation 33 (1-1).
161 Arts. 2(3) and 87(1) LOSC.
other rescue units. Each case is unique, and selection of a place of safety may need to account for a variety of important factors.\textsuperscript{163}

Only a case-by-case approach leaves enough room for the particularities of each situation and for any entitlements of the survivors to be taken into account. Safety bears different meanings when applied to different categories of rescues. Whereas it may simply relate to the passengers’ immediate well-being, considering shipwrecked persons in general, when the notion concerns refugees and asylum seekers, in particular, their special position has to be taken into account.\textsuperscript{164}

As underlined in the IMO Guidelines, "[t]he need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea."\textsuperscript{165} Therefore, ‘States cannot circumvent refugee law and human rights requirements by declaring border control measures – that is, the interception, turning back, redirecting etc. of refugee boats – to be rescue measures’.\textsuperscript{166} In relation to asylum seekers, an adequate interpretation requires search and rescue obligations to be read jointly with the requirements of refugee law and human rights law.\textsuperscript{167} Launching maritime operations with the objective of stopping ‘migrants from leaving the shores on the long sea journey and thus reducing the danger of losses of human lives’ constitutes a misconception of search and rescue obligations. Equating interception to search and rescue measures and separating them from their human rights implications does not find any backing in international law. In the same way, disembarkation

\textsuperscript{163} IMO Guidelines, above n. 120, para. 6.15. See also, para. 1.3, Part II, Annex, Frontex Guidelines Decision. Among the different elements considered relevant to the assessment of a distress situation, para. 1.3 lists a number of factors: the seaworthiness of the vessel; the number of passengers on board; the availability of supplies; the presence of qualified crew and navigational equipment; the prevailing weather and sea conditions; and the presence of particularly vulnerable, injured, or deceased persons.

\textsuperscript{164} See the Speech by the IMO Secretary-General of 19 Nov 2001, when the reform of the SOLAS and SAR Convention was being launched, suggesting that a holistic approach should be adopted with regard to the treatment of asylum seekers and refugees retrieved at sea: <http://wwwimo.org/Newsroom/mainframe.asp?topicid=92&doc_id=1703>. See also, the FAL Committee Principles on the administrative procedures relating to disembarkation, positing that '[r]escued asylum seekers should be referred to the responsible asylum authority for an examination of their asylum request [upon rescue]' and that '[i]nternational protection principles as set out in international instruments should be followed', above n. 156, paras. 4-5.

\textsuperscript{165} FAL Committee Principles, ibid., para. 6.17. Note that the UN General Assembly has subsequently endorsed these guidelines in: UN doc. A/RES/61/222, 16 Mar. 2007.


\textsuperscript{168} 'A sequel of operation Hera just starting', above n. 43.
in a pre-determined place – in Senegal, Mauritania or Cape Verde, as in the Hera operations; or in Libya, as in the case of the Italian push-back scheme – disregarding the particular requirements determining the safety of the asylum seekers on board, may not only amount to a direct breach of the protection obligations of the EU Member States, but also to a *mala fide* implementation of maritime law itself. \(^{169}\)

### 5. Co-operation with third countries, extraterritoriality, and *non-refoulement*

States cannot exercise sovereign powers in the territorial sea of a third country without the latter’s consent. The Hera operations have taken the bilateral arrangements entered into by Spain with Senegal and Mauritania as their legal basis, whereas the push-back campaign orchestrated by Italy is underpinned by a treaty concluded with Libya. Beyond the issue of whether unpublished bilateral agreements concluded by a single Member State and a third country provide a sufficient legal basis in either international or European law to allow other Member States and Frontex to take part in such operations, \(^{170}\) other substantive concerns arise from the current situation.

Member states and Frontex appear to believe that the responsibility for possible breaches of human rights and refugee law occurring in the course of, or as a result of, joint patrols belongs exclusively to the third country in whose territorial waters the operation was carried out. The consent by Senegal, Mauritania or Libya to allow the joint patrolling of their territorial waters \(^{171}\) and the diversion of ‘would-be immigrants’ boats back to their points of departure from a certain distance of the African coast line \(^{172}\) does not relieve EU Member States of their responsibilities under international law. The fact that ‘[a] Mauritanian or Senegalese law enforcement officer is always present on board of deployed Member States’ assets’ \(^{173}\) or that ‘members of the Libyan coast guard . . . take part in patrols on [Italian] ships’ \(^{174}\) does not readily amount to making them ‘always responsible for the diversion’ \(^{175}\) as it seems to be understood.

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\(^{169}\) On the ‘effective implementation’ of international obligations, see, *ICJ*, *LaGrand Case (Germany v. USA) (Merits)*, ICJ Rep. 2001, from para. 77.


\(^{171}\) ‘Libya can process asylum seekers’, above n. 58.


\(^{173}\) Ibid.

\(^{174}\) ‘Libya can process asylum seekers’, above n. 58.

\(^{175}\) ‘HERA 2008 and NAUTILUS 2008 Statistics’, above n. 45.
Against a Fragmentary Reading of EU Obligations Accruing at Sea

Under international law, ‘no State can avoid responsibility by outsourcing or contracting out its obligations, either to another State, or to an international organisation’. International co-operation to block passage to vessels and hand them over to the national authorities of the third country concerned does not release EU Member States from their international engagements; nor does the transfer of competences to international bodies. The Strasbourg Court has established in this connection that:

[absolving Contracting States completely from their ... responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the [ECHR]: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards.]

Accordingly, EU Member States taking part in joint patrols cannot avoid responsibility under the European Convention on Human Rights by transferring powers to Frontex.

The Strasbourg Court has equally held that:

[w]here States establish ... international agreements to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the [ECHR] if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such agreements.

The Court also considers that ‘[i]n so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State ...’. The fact that Senegal, Mauritania and Libya, with which the EU Member States collaborate, are not parties to the ECHR prevents their liability under this instrument. Although Senegal, Mauritania and Libya may well be responsible for the same internationally wrongful act under other instruments to which they are Parties, when a plurality of states is responsible for the same wrongful act the general rule is that ‘in such cases each State is separately responsible for the conduct attributable

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180 ECtHR, Sudi a U4LP, 37201/06, 28 Feb. 2008, para. 126.
to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.\textsuperscript{181} Thus, with regard to the human rights violations that may result from joint maritime operations, the independent responsibility of each participating EU Member State may be invoked.\textsuperscript{182}

This is how the Court proceeded in \textit{Xhavara}, attributing exclusive responsibility to Italy for the acts it perpetrated in international waters as a result of the convention concluded with Albania authorising it to patrol both international and Albanian waters for the purpose of migration control. The Court explicitly established that, because the shipwreck had been directly provoked by the Italian navy, any complaint in this regard had to be considered to be addressed exclusively against Italy. In this way, legal accountability was matched with responsibility for actual facts. The Court made clear that the mere fact that Albania was a Party to a bilateral convention with Italy could not engage its responsibility with regard to the ECHR for every measure that the Italian authorities might adopt for the implementation of the agreement in question.\textsuperscript{183} An analogous reasoning was applied in \textit{Medvedev}. The fact that the flag state had consented through a diplomatic note 'to intercept, inspect and take legal action' against the \textit{Winner}, suspected of being engaged in illicit drug trafficking while navigating through the waters off Cape Verde, did not prevent the European Court of Human Rights from finding France responsible for a violation of article 5 ECHR on account of the illegal arrest of the crew.

Although jurisdiction in international law is generally framed territorially,\textsuperscript{184} extraterritoriality does not prevent human rights obligations from being engaged in particular circumstances. The underlying rationale is to


\textsuperscript{182} According to art. 6 of the ILC Articles on State Responsibility, '[t]he conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed'. The ILC commentary clarifies that the words 'placed at the disposal of' entail the 'exclusive direction and control' of the receiving state over the organs of the sending state. Therefore, situations of mere cooperation or mutual assistance fall outside the purview of this provision.

\textsuperscript{183} \textit{Xhavara v. Italy}, above n. 125, at 5: 'La Cour note d'embâle que le naufrage ... a été directement provoqué par la marine de guerre italien \textit{Sibilla}. Par conséquent, toute doléance sur ce point doit être considérée comme étant dirigée exclusivement contre l'Italie. Le fait que l'Albanie est partie à la Convention italo-albanaise ne saurait, à lui seul, engager la responsabilité de cet État au regard de la Convention pour toute mesure adoptée par les autorités italiennes en exécution de l'accord international en question'.

\textsuperscript{184} There are some exceptional 'recognised instances' of the extraterritorial exercise of jurisdiction by a state, which include, precisely, cases involving the activities of state agents abroad at its embassies or 'on board craft and vessels registered in, or flying the flag of, that State'. See, ECtHR, \textit{Banovic v. Belguim} a.o. v. \textit{Belgium} a.o., Appl. No. 52207/99, 12 Dec. 2001, para. 73.
prevent a double standard from arising. In the words of the Human Rights Committee, it would be 'unconscionable' to interpret responsibility under human rights instruments as to 'permit a State Party to perpetrate violations . . . on the territory of another State, which violations it could not perpetrate on its own territory'. In these situations human rights bodies consider the exercise of 'effective control' over the territory or the persons concerned to be the crucial element giving rise to state responsibility. In Medenzyg, the Court noted that precisely from the date on which the Winner was arrested and until it arrived in Brest, 'the Winner and its crew were under the control of French military forces, so that even though they were outside French territory, they were within the jurisdiction of France for the purposes of article 1 of the Convention'.

What may remain unclear is whether situations other than those amounting to detention or arrest constitute an exercise of control over persons on board vessels sufficient to trigger human rights responsibility. In this regard, the Committee against Torture provides valuable guidance. Its decision in the Marine I case offers an example of human rights responsibility

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189 Medenzyg, above n. 95, para. 50. The Grand Chamber has corroborated in its Judgment of 29 Mar. 2010 in para. 67 that, because France had exercised 'full and exclusive control over the Winner and its crew . . . 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' (references omitted).
being engaged by a single state in a search and rescue operation carried out extraterritorially in co-operation with other countries. The incident involved the recovery of 369 migrants of Asian and African origin by the Spanish authorities off the Mauritanian coast. In spite of the agreement concluded between the governments of both countries and the further collaboration undertaken with third states in the process, the Committee considered that it was Spain that ‘maintained control over the persons on board the Mane I from the time the vessel was rescued and throughout the identification and repatriation process that took place at Nouadhibou’. By virtue of that ‘constant de facto control’, the Committee, relying on its prior jurisprudence, considered that the alleged victims were subject to Spanish jurisdiction for the purposes of the CAT. Jurisdiction was considered to be exercised not only on account of the arrangements subsequent to disembarkation, but from the very moment the vessel was rescued. As Wouters and Den Heijer show, what follows from this case law is that ‘the assertion of physical control over vessels and/or their passengers is sufficient to engage the “controlling” State’s human rights obligations’.

Nothing appears to impede the extension of this reasoning to non-refoulement obligations. Article 33(1) of the Refugee Convention should hence be deemed to apply wherever a Signatory Party exercises ‘effective control’. At face value, ‘the decision generally to constrain the application of rights on a territorial or other basis [in the Refugee Convention] creates a presumption that no such limitation was intended to govern the applicability of the rights not subject to such textual limitations’. On a literal contemplation of the terms in which the different articles of the Refugee Convention have been drafted, refugee rights seem, indeed, to arise progressively. The stronger the level of attachment to the country of refuge, the higher becomes the level of protection. The enjoyment of some rights thus requires ‘residence’, others ‘legal stay’ or ‘legal presence’, whereas others accrue on the basis of ‘simple presence’ in the territory of the

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193 For a detailed analysis, see, V. Moreno-Lax, ‘(Extraterritorial) Entry Controls and (Extraterritorial) Non-Refoulement in EU Law’ in M.-C. Foblets, D. Vanheule and P. De Bruycker (eds.), The External Dimension(s) of EU Asylum and Immigration Policy (Brussels: Bruylant, forthcoming).
196 For instance: art. 7(2) (exemption from reciprocity); art. 14 (artistic rights); art. 16(2) (cautio judicatum solvi).
197 Among others: art. 15 (right of association); art. 17 (employment); art. 19 (access to liberal professions); art. 21 (housing).
198 For example: art. 26 (freedom of movement); art. 32 (protection against expulsion); art. 18 (self-employment).
country of refuge.\textsuperscript{199} Only a core of very essential rights, worded in a generic fashion, is not predicated on any territorial or other material link. Non-discrimination amongst refugees,\textsuperscript{200} access to courts,\textsuperscript{201} and non-refoulement\textsuperscript{202} belong to this category of entitlements addressed broadly to all refugees. As a result, any refugee coming under the jurisdiction of a Signatory Party to the Refugee Convention, whether territorially or extra-territorially, shall enjoy the protection of the prohibition of non-refoulement inscribed in article 33(1).

The Supreme Court of the United States considered, nonetheless, that the Convention did not apply with regard to the Haitian interdiction program carried out by the US Coast Guard on the high seas.\textsuperscript{203} The Court adopted the view that prior access to territory was crucial to the reach of article 33(1) CSR. Based on an ambiguous reading of the text of the Convention and its travaux préparatoires, the Sale decision has been severely criticized.\textsuperscript{204} Commentators are practically unanimous in their disapproval\textsuperscript{205} and subsequent jurisprudence has also rejected its approach. The passages from the travaux relied upon by the majority of the Court are directly contradicted by other passages. 'They make clear words unclear',\textsuperscript{206} leading to the unsustainable proposition that Signatory Parties may exercise extraterritorial jurisdiction to return refugees to a place of persecution, contrary to the ordinary meaning of the language of article 33(1) CSR.

In response to Sale, the Inter-American Commission on Human Rights asserted 'that article 33 had no geographical limitations',\textsuperscript{207} establishing that the US was in breach of its international obligation of non-refoulement when intercepting Haitians and returning them back without a proper assessment of their particular circumstances. In the same vein, the English Court of Appeal declared that Sale was 'wrongly decided', concluding that 'it is impermissible to return refugees from the high seas to their country of

\begin{itemize}
\item \textsuperscript{199} Like art. 31 (exemption from penalties on account of illegal entry) or art. 4 (freedom of religion).
\item \textsuperscript{200} CSR, art. 3.
\item \textsuperscript{201} Ibid., art. 16(1).
\item \textsuperscript{202} Ibid., art. 33(1).
\item \textsuperscript{203} Chris Sale, Acting Commissioner, Immigration and Naturalization Service et al v. Haitian Centers Council Inc. et al. [1993] 509 US 155.
\item \textsuperscript{206} P. Mathew, 'Legal Issues Concerning Interception' (2003) 17 Georgetown Immigration LJ 221-49.
\item \textsuperscript{207} Inter-Am. CHR, The Haitian Centre for Human Rights et al v. United States, Case 10.675, Report No. 51/96, para. 157.
\end{itemize}
origin'.

The majority of their Lordships in the judgment on the Prague Airport case have also retained this reading. In fact, what matters is to where the refugee cannot be sent, from where the action is initiated is superfluous.

During the Hera operations, 'more than 1,000 migrants were diverted back to their points of departure at ports at the West African coast' presumably before any asylum claims had been considered. At the same time, the European Commission’s evaluation reveals that the 'experiences gained from joint operations show that border guards are frequently confronted with situations involving persons seeking international protection ...'. With regard to the Italian push-backs, according to UNHCR, between May and July 2009 ‘at least 900 people were sent back to Libya ‘without proper assessment of their possible protection needs’. Apparently, a significant number from this group was in clear need of international protection.

Although diversion is not always synonymous with refoulement, where it causes the return – directly or indirectly – to the territories where life or freedom is threatened on account of race, religion, nationality, membership of a particular social group or political opinion it does violate article 33(1) of the Refugee Convention.

However, the applicability of article 33 CSR depends on the person concerned meeting the qualification criteria in article 1 CSR, which includes being outside the country of his nationality or former habitual residence. Therefore, if interdiction occurs within the state of origin, the Refugee Convention does not apply. Although ‘would-be refugees’, inside their country of origin, cannot enjoy the protection of the Refugee Convention, they may benefit from other human rights instruments. Article 3 ECHR, for instance, as construed by the Strasbourg organs, grants protection against refoulement to everyone within the jurisdiction of a Contracting State, regardless of his physical location. Having crossed an international frontier is not a prerequisite for the European Convention on Human Rights to apply.

206 R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport, [2003] EWCA Civ 666, para. 34-5.
209 Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants), [2004] UKHL 55. The exclamation by Lord Hope of Craighead ‘that the Sea case was [not] wrongly decided’ emerges as an isolated position in para. 68.
210 Goodwin-Gill and McAdam, above n. 111, at 250.
211 'HERA III Operation', above n. 44.
212 Report on the evaluation and future development of the FRONTEX Agency, above n. 68, at 5.
213 'UNHCR interviews asylum seekers pushed back to Libya', above n. 1.
214 'UNHCR deeply concerned over returns from Italy to Libya', above n. 1.
215 'UNHCR interviews asylum seekers pushed back to Libya', above n. 1.
216 Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants), above n. 209, para. 18.
The extraterritorial applicability of the ‘Soering principle’\textsuperscript{217} was already established in 1992.\textsuperscript{218} At the time, the European Commission of Human Rights was confronted with a case involving eighteen citizens from the DDR wishing to emigrate to the West. As permission was refused, WM and his companions entered the Danish Embassy to request mediation with the German authorities. The ambassador asked them to leave and, as they did not obey, he requested the assistance of the DDR police to remove them from his premises. At their hands WM was allegedly subject to arbitrary detention. Even if ‘the applicant was not deprived of his liberty . . . by an act of the Danish diplomatic authorities but by an act of the DDR authorities’, the Commission declared itself ‘satisfied that the acts of the Danish ambassador complained of affected persons within the jurisdiction of the Danish authorities within the meaning of article 1 of the Convention’. Borrowing from Soering, it pointed out that:

an act or omission of a Party to the Convention may exceptionally engage the responsibility of that State for acts of a State not party to the Convention where the person in question had suffered or risks suffering a flagrant denial of the guarantees and rights secured to him under the Convention.

Because what happened to the applicant at the hands of the DDR authorities could not be considered to be ‘so exceptional’ as to engage the responsibility of Denmark, the claim was ultimately dismissed.\textsuperscript{219} Arguably, no ‘substantial grounds’ had been shown for believing that WM, when refouled, faced ‘a real risk’ of being subjected to torture or to inhuman or degrading treatment or punishment in the DDR.\textsuperscript{220}

A comparable case on the extraterritorial applicability of the Soering principle to the acts of the British army in Iraq has been decided by the Strasbourg Court.\textsuperscript{221} The case concerned two Iraqi nationals affiliated to the Ba'ath Party, allegedly involved in the murder of two British servicemen. The applicants were held in detention in a military prison run by the UK forces in Basra from 2003 up to their surrender to the Iraqi authorities in December 2008 for a trial at which they risked the death penalty. Despite the extraterritorial setting of the case, the Court declared the claim admissible, considering that, given the ‘total and exclusive’ control

\textsuperscript{217} ECtHR, Soering v. United Kingdom, Appl. No. 14038/88, 7 July1989, para. 91: ‘the decision by a Contracting State to extradite a fugitive may give rise to an issue under article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country’.


\textsuperscript{219} Ibid., at ‘THE LAW’, para. I.

\textsuperscript{220} Mutatis mutandis ECtHR, above n. 217.

\textsuperscript{221} Al-Saadi v. United Kingdom, above n. 19 (final on 4 Oct. 2010, after dismissal of the referral to the Grand Chamber in: <http://cmiskp.echr.coe.int/dp197/viewhkml.asp?sessionId=60785589&skin=hudoc-en&action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=85738>).
the British authorities exercised over the premises in question, 'the individuals detained there . . . were within the United Kingdom's jurisdiction'.\footnote{222} In its ruling, the Court established that, like article 3 ECHR, articles 2 ECHR and 1 of Protocol No. 13 ECHR similarly preclude 'the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there'.\footnote{223} In the absence of a binding assurance that capital punishment would not be imposed, the Court concluded that 'through the actions and inaction of the United Kingdom authorities the applicants [were] subjected . . . to the fear of execution by the Iraqi authorities . . . causing [them] psychological suffering of [such] nature and degree [that it] constituted inhuman treatment', in breach of article 3 of the Convention.\footnote{224}

EU law also includes a reference to non-refoulement. The Schengen Borders Code alludes, in its preamble, to the rights and principles 'recognized in particular by the Charter of Fundamental Rights of the European Union' and submits its implementation to the observation of 'the Member States' obligations as regards international protection and non-refoulement'. In the operative part, article 3 holds that the Code is to be applied 'without prejudice to the rights of refugees . . ., in particular as regards non-refoulement'. Article 5(4)(c), in turn, allows for derogations to normal entry requirements on account of humanitarian considerations and international obligations. Finally, article 13(1) establishes that entry refusals 'shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection'. The Frontex Regulation supposedly 'respects the fundamental rights and observes the principles recognised by article 6 . . . of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union'.\footnote{225} The RABIT amendment reiterates the need to conform to fundamental rights and non-refoulement.\footnote{226}

The content of non-refoulement in this framework has yet to be determined by the Court of Justice of the EU (CJEU). Meanwhile, article 6 EU and the EU Charter of Fundamental Rights, to which those instruments refer, offer assistance in establishing it.\footnote{227} Two provisions are particularly relevant for our purposes. On the one hand, article 18 EUCFR stipulates that the right to asylum shall be guaranteed with due respect for the rules

\footnote{222} See, the admissibility decision of 30 June 2009, para. 88.
\footnote{223} \textit{Al-Saadoon and Majffri}; above n. 19, para. 123.
\footnote{224} Ibid., para. 143-4.
\footnote{225} Recital 22 of the Frontex Regulation.
\footnote{226} Recital 17 and 18 and arts. 2 and 12(6) of the RABIT Regulation.
\footnote{227} According to Recital 5 in the Preamble, the Charter 'reaffirms . . . the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights'.
of the Refugee Convention and in accordance with the EU Treaties. The explanations of the Presidium, in conformity with which the Charter is to be interpreted,\(^{228}\) clarify that this wording is based on article 78 TFEU, 'which requires the Union to respect the Geneva Convention on refugees'.\(^{229}\) As a result the 'right to asylum' in EU law shall include, at a minimum, a right to protection against refoulement as established in article 33(1) CSR.\(^{230}\) Article 19(2) EUCFR, on the other hand, establishing that '[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment', incorporates the Strasbourg case law on article 3 ECHR.\(^{231}\)

Having identified the minimum content that the principle of non-refoulement shall comport in this context, it still remains to be determined whether the border acquis may apply extraterritorially. In principle, articles 52 EU and 355 TFEU define the scope of application ratione loci of the founding Treaties in territorial terms. However, the ECJ has given these provisions a broad interpretation. Thus, free movement rules have been construed extensively and declared to apply to 'all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community'\(^{232}\) or otherwise retain 'a sufficiently close link with that territory'.\(^{233}\) Transport policy and maritime regulations have equally been held to apply abroad to all maritime zones over which Member States exercise sovereign rights in accordance with the law of the sea.\(^{234}\) If a sufficient connection to EU law is provided, it seems that '[t]he geographical application of the Treaty [as] defined in Article [52 EU]... does not, however, preclude Community rules from having effects outside the territory of the Community'.\(^{235}\)

\(^{228}\) Art. 52(7) EUCFR: 'The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States'.


\(^{230}\) The content of the 'right to asylum' in article 18 EUCFR has elicited a rich debate. Some authors read in it a right to seek asylum, see, C. Harvey, 'The Right to Seek Asylum in the European Union' (2004) 1 EHRLR 17-36. Other authors ascertain a right to be granted asylum, see, M.-T. Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27 RSQ 33-52.

\(^{231}\) Explanations to the EUCFR, above n. 229, at 24.

\(^{232}\) ECJ, Union Cycliste Internationale, 36/74, [1974] ECR 1405, para. 28. See also, PEDES, 237/83, [1984] ECR 3153, para. 6, deducing from this principle that '[i]t follows that activities temporarily carried out on the territory of the Community are not sufficient to exclude the application of that principle, as long as the employment relationship retains a sufficiently close link to that territory'.


This logic receives considerable backing in the Schengen Borders Code. Although border controls are initially described in geographical terms, by contrast, when defining specific methods of surveillance the Code adopts an extraterritorial criterion. As regards rail traffic, it establishes that checks can be performed ‘in stations in a third country where persons board the train’. Concerning air borders, the Code determines that checks can be effected ‘on the aircraft or at the gate’, even in ‘airports which do not hold the status of international airport’. At sea ‘checks may also be carried out . . . in the territory of a third country’. In this light, maintaining a strict territorial basis for the applicability of the Schengen Borders Code seems unwarranted. It is the legal instrument itself that delineates its own scope of application ratione loci as exceeding the territories of the EU Member States.

The European Commission, elaborating on its scope of application ratione materiae, has arrived at the same conclusion. In response to a request from the LIBE Committee of the European Parliament, it has delivered an opinion concerning the applicability of the Code to the Italian-Libyan push-backs. The Commission considers that border surveillance activities that aim to prevent unauthorised border crossings fall within the purview of the Schengen Borders Code. The reasoning is grounded in the object of article 12 SBC. Because Italian-Libyan controls amount to border surveillance activities as defined by the Code, they are deemed to fall within its material scope of application. As a result, both the Code and the principle of non-refoulement enshrined therein ought to be respected, regardless of whether controls are undertaken in the territorial waters of EU Member States or on the high seas.

The Decision on Frontex maritime operations maintains the same position, establishing that nobody ‘shall be disembarked in, or otherwise...

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Art. 2 SBC defines external borders as ‘the Member States’ land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders’. Border checks are defined as ‘checks carried out at border crossing points’ and border guards as public officials assigned ‘to a border crossing point or along the border, or in the immediate vicinity of that border’. SBC Annex VI, para. 1.2.2.

This is precisely the argument that the Italian authorities invoked in response to the CPT report on the push-back operations, claiming that: ‘we recall that the operations under reference – namely rescue at sea operations on High Seas – do not fall under the Schengen Border Code’. See, ‘Response of the Italian Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Italy from 27 to 31 July 2009’, 28 Apr. 2010, at 9, available at: <http://www.cpt.coe.int/documents/ita/2010-inf-5-engpdf>.

For a detailed discussion on the scope of application ratione loci of the Code and further references, see, M. den Heijer, ‘Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control’ in Ryan and Mitsilegas (eds.), above n. 29, 169-98, at 176-80.

Letter from ex Commissioner Barrot to the President of the LIBE Committee of 15 July 2009 (on file with the author).
handed over 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. This rule, being enunciated under the rubric of ‘General principles’ inscribed in the binding part of the Decision, shall be deemed to apply to all activities regulated therein. It may, accordingly, be inferred that both interdiction and search and rescue measures undertaken by EU Member States anywhere at sea with the purpose of border control, or in the course of a maritime surveillance operation, shall be considered as coming within the remit of the Schengen Borders Code and subject to its provision on non-refoulement.

6. Access to procedures and effective remedies

Where non-refoulement applies, a series of related procedural guarantees become applicable as well. As article 33(1) CSR prohibits the refoulement of refugees, it has been accepted that the only adequate manner in which to determine whether the person concerned may be safely expelled is to establish whether his life or freedom would be at risk in the country of destination on account of his race, religion, nationality, membership of a particular social group or political opinion before the removal takes place. It is therefore understood that the Refugee Convention ‘may implicitly require States to perform status determination procedures’. As UNHCR notes in its ‘Handbook on Procedures’, in order to enable states parties to the Convention to implement their provisions, refugees have to be identified.

Such identification, although mentioned in the Convention itself, is not specifically regulated. The Convention does not indicate which kind of

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244 According to art. 1 of the Decision, maritime surveillance operations coordinated by Frontex ‘shall be governed by the rules laid down in Part I to the Annex. Those rules and the non-binding guidelines laid down in Part II to the Annex shall form part of the operational plan drawn up for each operation coordinated by the Agency’.
245 This is not the only example in EU law providing for the applicability at sea of the principle of non-refoulement. Article 12(2) of the Council Joint Action governing the Atalanta operation against piracy in Somalia stipulates that no one ‘may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment’. See, Council Joint Action 2008/851/CFSP of 10 Nov. 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, [2008] OJ L 301/33.
246 Hathaway, above n. 195, at 279; and Goodwin-Gill and McAdam, above n. 111, at 215.
249 Arts. 9 and 31(2) CSR.
procedures are to be adopted.250 It is left to each Signatory State to establish the one it considers most appropriate, taking into account its particular constitutional and administrative structure.251 The general principle of effectiveness in international law requires, in any case, that the implementation of a treaty be conducted in such a way as to allow the instrument to produce its 'appropriate effects'252 in light of its 'object and purpose'.253 It has therefore been submitted that, at a minimum, provision for an individual assessment of each particular case is necessary.254

As far as judicial review is concerned, article 16(1) CSR allows every refugee to 'have free access to the courts of law on the territory of all Contracting Parties'. During the drafting process the absolute character of this provision elicited no debate.255 To be able to enforce the rights derived from the Convention, refugees were to be granted unimpeded access to judicial protection without exceptions.256 Although the possibility to review the outcome of the refugee status determination procedure is not expressly contemplated therein, the doctrine has accepted the applicability of article 16(1) CSR in this context too.257 Some jurisprudence endorses this approach. The English High Court has indeed considered that:

[the use of the word ‘refugee’ is apt to include the aspirant, for were that not so, if in fact it had to be established that he did fall within the definition of ‘refugee’ in article 1, he might find that he could have no right of audience before the court because the means of establishing his status would not be available to him.]

As regards the suspensive effect of appeals, several cases observe that, the prospect of removal being refugees’ principal concern, '[i]f their fears are well-founded, the fact that they can appeal after they have been returned to the country where they fear persecution is scant consolation'.259 It has thus been maintained that '[i]f a claim for asylum is made by a person . . . that person cannot be removed from or required to leave . . . pending a decision on his claim, and, even if his asylum claim is refused, so long as an appeal is being pursued'.260

250 On the fairness of determination procedures, see, inter alia, EXCOM Recommendation No. XXX, Oct. 1977.
251 UNHCR Handbook, para. 189.
253 Art. 91(2) VCLT.
255 Hathaway, above n. 195, at 237.
256 Note that art. 42 CSR forbids any reservations to art. 16(1) CSR.
257 Cartier, above n. 205, from 320, and references therein.
258 R v. Secretary of State for the Home Department, ex parte Jahanpur et al., [1993] Imm. AR 564 (Eng. QBD), 11 June 1993, at 566.
In the framework of the ECHR, article 3, enshrining 'one of the fundamental values of democratic societies', requires states to organize the procedures to determine whether eventual return would cause the person concerned to face a ‘real risk’ of exposure to ill-treatment in a manner that enables independent and rigorous scrutiny. Deportation orders have to be served in writing after an individual examination of the case, following a legal procedure previously established by law. The reasons underlying the removal have to be notified to the person concerned alongside the means and conditions to appeal the decision before the removal occurs. To preserve the effectiveness of rights, no impediments of a legal or material character can be imposed on the access to such procedures. The failure of the person concerned to fulfill immigration requirements, or the fact that he may be sent to a purportedly safe third country, does not exonerate state authorities from establishing not only prospective breaches but also an ‘arguable claim’ that the rights protected under the ECHR would be violated if return takes place. In fact, indirect refoulement is forbidden too. The removal to an intermediary country, be it also a Contracting Party to the ECHR, does not affect the responsibility of the expelling state ‘to ensure that the applicant is not, as a result of the decision to expel, exposed to treatment contrary to article 3 of the Convention’. Presumptions of safety remain subject to rebuttal. Therefore, Contracting Parties cannot rely on international arrangements, like the ones underpinning the Hera operations or the Italian push-back scheme, to transfer persons from


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

263 Abdulqawi and Karrim a. Turkey, above n. 123, paras. 107-17.

264 The Convention aspires to guarantee rights that are ‘practical and effective’, not ‘theoretical or illusory’. See, among many others, ECtHR, Ardo a. Italy, Appl. No. 6694/74, 13 May 1980.

265 Jabari v. Turkey, above n. 262, para. 40: ‘It would appear that the applicant’s failure to comply with the five-day registration requirement under the Asylum Regulation 1994 denied her any scrutiny of the factual basis of her fears about being removed to Iran’; in Çetinmelalpinin v. France, above n. 123, from 54, the Court declared France to be in breach of its obligations by providing for an asylum procedure the access to which was subordinated to a prior decision on leave to enter that was enforceable before the asylum claim had been assessed.

266 The term ‘arguable’ is not synonymous with ‘manifestly founded’ or ‘admissible’. At times the Court has accepted the arguability of a claim determining its foundedness only after a thorough examination. In T.I. v. UK, above n. 179, the Court considered the claim arguable because it raised concerns about the risks faced after expulsion, although it was declared inadmissible in the end. On the issue of arguability, see, Wouters, above n. 254, from 333; T. Spijkerboer, ‘Subsidiarity and ‘Arguability”: the European Court of Human Rights’ Case Law on Judicial Review in Asylum Cases’ (2009) 21 IJRL 48-74; N. Mole, Asylum and the European Convention on Human Rights (Strasbourg: Council of Europe Publishing, 2007), from 67; and, F.J. Hampson, ‘The Concept of an “arguable claim” under Article 13 of the European Convention on Human Rights’ (1990) 39 ICLQ, 891-9.

267 T.I. v. UK, at 15; and, K.R.S. v. UK, at 16; above n. 179.
one jurisdiction to another automatically before conformity with article 3 ECHR has been established.

Where an independent and rigorous assessment has led the state to conclude that no substantial grounds have been shown for believing that the applicant would face a real risk of being subject to ill-treatment upon return, the individual concerned must still be provided with an effective remedy. The Court held in Jabari:

that article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief. 268

To be considered effective, remedies have to be legally and materially accessible. 269 The authority referred to in article 13 ECHR does not 'necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective'. 270

With regard to the suspensive effect of appeals, there has been an evolution in the Court’s case law. The Court initially considered that the notion of an effective remedy required 'the possibility of suspending the implementation of the measure impugned'. 271 In Conka, it established that article 13 'requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible'. The Court considered it 'inconsistent with article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention'. 272 In Gebremedhin, the Court eventually concluded that article 13 requires access to appeals 'with automatic suspensive effect'. 273

Within the EU legal framework, the EU borders acquis does not provide for a specific procedure to be followed in refoulement cases. In principle, entry should be refused to any third-country national not fulfilling the entry requirements established by the Schengen Borders Code, which include being in possession of adequate travel documents and valid visas. 274 Entry refusals should be issued by a competent national authority in writing,

268 Jabari v. Turkey, above n. 262, para. 48.
271 Jabari v. Turkey, above n. 262, para. 50.
272 Conka v. Belgium, above n. 270, para. 79.
274 SBC, arts. 13 and 5(1).
in a standard form stating the reasons behind the refusal, and should ‘take effect immediately’. These rules are, however, ‘without prejudice to the application of special provisions concerning the right of asylum and to international protection’. The asylum *aquis*, on the other hand, has regulated the procedure applicable to asylum applications made in the territory or at the borders of the EU, leaving it for the Member States to decide on the arrangements applicable to requests submitted abroad. This does not mean, though, that a legal procedure to determine the compatibility of pre-entry refusals with *non-refoulement* is not required under EU law. In the absence of harmonized rules on the issue, it is for the domestic legal system of each Member State to lay down the applicable procedure. In such case, domestic rules should not render ‘practically impossible or excessively difficult the exercise of rights conferred by Community law’. In particular, the associated ‘right to effective judicial protection’ should remain intact.

The individual entitlement to judicial protection is one major consequence of the EU being organized as a ‘community based on the rule of law’. The right is considered to be a general principle of European law, stemming from the common constitutional traditions of the Member States, as enshrined in articles 6 and 13 of the ECHR. Article 47 of the EU Charter of fundamental rights has subsequently codified a subjective ‘right to an effective remedy and to a fair trial’, intended to apply vis-à-vis the institutions of the Union and the Member States when they are implementing EU law. As a result, ‘everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal’. The right comprises, in particular, an entitlement to ‘a fair and public hearing within a reasonable time by an independent

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275 Ibid., art. 13(2).
276 Ibid., art. 13(3).
277 Ibid., art. 13(1).
279 Ibid., art. 3.
285 EUCFR, art. 51(1), and Explanations to the EUCFR, above n. 229, at 29.
286 EUCFR, art. 47(1).
and impartial tribunal previously established by law' and 'the possibility of being advised, defended and represented'. According to the Presidium's explanations, article 47 is based both on article 13 and 6 ECHR. Judicial protection in EU law is, however, 'more extensive' as it guarantees the right to an effective remedy 'before a Court'. Therefore, the 'national authority' to which article 13 ECHR refers has to be understood within the EU legal framework as a reference to a court of law. Likewise the substance of article 6 ECHR has been given a wider scope. In EU law the right to a fair hearing is not confined to civil and penal law suits. The procedural guarantees enshrined in article 6 ECHR, the applicability of which has been excluded in cases concerning immigration proceedings by the Strasbourg Court, are generally applicable within the remit of the EU legal order.

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

Concerning the specific relationship between general principles and secondary legislation in EU law, the Sajus jurisprudence established that the general principle of judicial protection overrules any provision contained in secondary legislation that affords less individual protection. In the instant case, article 243 of the Community Customs Code did not provide for national Courts to grant interim relief. The European Court of Justice

287 Ibid., art. 47(2).
288 Ibid., art. 47(3).
289 Explanations to the EUCFR, above n. 229, at 29.
290 Ibid., at. 30.
292 Explanations to the EUCFR, above n. 229, at 33.
293 Ibid.
considered that the provision should be given an interpretation consistent with the general principle, as it could not 'limit the right to effective judicial protection'. Transposing the argument to the matter of our concern, the regime of pre-border controls at sea has to be aligned with the requirements of article 47 EUCFR. Removals cannot take place 'immediately'. When an 'arguable claim' of *refoulement* is formulated, an exercise of consistent interpretation becomes necessary. The Court has consistently held that, 'if the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the EC Treaty'. On this account, 'Member States must . . . make sure they do not rely on an interpretation of wording of secondary legislation which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law'. Therefore, either the wording of article 13(3) SBC is given an interpretation in conformity with article 47 EUCFR, or, as contemplated in article 13(1) SBC, an entirely new procedure is enacted introducing 'special provisions concerning the right of asylum and to international protection'. The EU legislator has put forward an intermediate solution in its Decision governing Frontex maritime missions, submitting that the persons intercepted or rescued in the course of a joint operation 'shall be informed in an appropriate way so that they can express any reasons for believing that disembarkation in the proposed place would be in breach of the principle of *non-refoulement*'. Then the SAR coordination centre concerned should be informed of the presence of such persons and convey the information to the competent authorities of the Member State hosting the maritime operation. On the basis of that information, the operational plan of the mission 'should determine which follow-up measures may be taken'.

However, these provisions do not amount to a legal procedure previously established by law that would enable an independent and rigorous scrutiny in each individual case. Whereas the principle of informing the persons intercepted of the prospective place of disembarkation is considered a legally binding rule, inscribed in Part I of the Annex to the Decision, the follow-up measures to be adopted, inscribed in Part II of the Annex, produce no legal effect. No procedural guarantees, access to legal counsel or representation have been contemplated either. A provision on

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295 Art. 13(2) SBC.
298 Ibid., Annex, Part II, para. 2.2.
299 Art. 1 Frontex Guidelines Decision, above n. 244.
judicial protection is also lacking, as are the conditions under which remedies before the Courts competent to grant appropriate relief could be exercised. The fact that appeals should be endowed with automatic suspensive effect is not reflected anywhere in the text. As a result, the general impression is that the EU legislator is trying to defer the essential conclusion that meaningful procedures and judicial protection can only be guaranteed on dry land. While an initial onboard profiling is necessary, it is not sufficient for the correct identification and subsequent processing of asylum seekers. Should the competent Courts be able to sit elsewhere in a way that would not compromise the effectiveness of non-refoulement, access to the territory of the EU Member States may be open to debate. Otherwise, inherent in a plea of non-refoulement is an entitlement to provisional admission on dry land for the purpose of such procedures as may be necessary to guarantee that removal to a third country is safe.

7. Conclusions

Without minimizing the challenges posed by irregular maritime migration, EU Member States must secure to everyone within their jurisdiction the rights and freedoms they derive from human rights instruments and EU law. Reasons of political convenience or economic cost do not exempt from this obligation. The fact that compliance may attract protection seekers and possibly cause a rise in the number of asylum applications does not excuse Member States from organising their border control systems in such a way that they can meet their responsibilities.

Operational guidelines for maritime missions and a regime to apportion responsibility among participating Member States may be welcome, but they cannot modify the duty to comply with clear international obligations in good faith. Responsibility accures in these situations from the mere fact of exercising effective control through rescue or interdiction, without requiring a specific system to allocate it in a more suitable way.

Where interception occurs, fundamental rights remain applicable. Member states and Frontex cannot intercept migrants as a means to reduce loss of life without considering the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded

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301 One of the arguments Belgium submitted to justify the elimination of the automatic suspensive effect of appeals in expulsion cases was the overloading of the Conseil d’Etat and the risk of abuse of procedure, which the Strasbourg Court rejected considering that: ‘Article 13 imposes on the Contracting States the duty to organize their judicial systems in such a way that their courts can meet its requirements’, Conka v Belgium, above n. 270, para. 84.
fear of persecution or a real risk of ill treatment may be put in jeopardy.\textsuperscript{302} Interception does not equate to rescue in international law.

Interdiction powers should be exercised with due regard to the LOSC and ‘other rules of international law’,\textsuperscript{303} respecting the regime of innocent passage as well as the right of vessels in distress to seek refuge in an adjacent coastal state. Ultimately, a positive obligation to preserve human life may require that permission to enter port be accorded. The fact that\textit{cayucos} and\textit{pateras} do not fly the flag of any state does not allow for unlimited enforcement jurisdiction in their regard. The UN Human Trafficking Protocol does not create any interdiction powers whatsoever, whereas the UN Smuggling Protocol requires a distinction to be drawn between the smugglers and their victims. If the former can be made the object of legal prosecution and punishment, the latter have to be assisted and protected through measures appropriate to preserve their human rights.

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

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

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

On this account, the EU Member States should abandon their fragmentary approach to their maritime obligations and align their border control strategy with the rights that migrants and refugees derive from international and EU law. ‘[T]he special nature of the maritime environment . . . cannot justify an area outside the law where ships’ crews are covered by no legal system capable of affording them enjoyment of the[ir] rights’. The scrupulous adherence to the rule of law requires the EU and its Member States to anchor the Union in ‘the values of respect for human dignity, freedom, democracy, equality . . . and respect for human rights’.

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304 Medvedev v. France (GC), 29 Mar. 2010, above n. 95, para. 81.
305 Les Verts and Unión de Pequeños Agricultores, above n. 283.
306 Art. 2 EU.