Anti-Smuggling Operations in the Central Mediterranean

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In recent years, the Central Mediterranean Sea route[1] has become the most important for illegal migrants reaching Europe by sea since the closure of the Western Balkans route and the conclusion of a European-Turkish agreement.[2] Pretending that the Mediterranean Sea has only lately become an important route of migration would be flawed.[3] However, the focus on this topic has been intensified in recent years. In Syria, a ferocious civil war has forced millions to seek protection in Europe since 2011. In Libya, the volatility following the fall of long-standing ruler Muammar Ghaddafi in 2011 has proven a fertile ground for transnational crime, notably migrant smuggling. As Patricia Mallia underlines, 'the spectre of irregular immigrants constitutes a problematic reality for many southern European States. Quite apart from any threat of terrorist infiltration, regular influxes of irregular immigrants constitute a threat to the security and stability of the coastal State'.[4]

On 18 October 2013, after two boats capsized off Lampedusa, leading to the death of 368 Eritreans and 232 Syrians, Italian military marine launched Mare Nostrum[5], with the aim to avoid a surge of deaths in the Central Mediterranean.[6] In November 2014, it was replaced by Frontex Operation Triton, acting on a more limited zone. While also engaged in rescue operations, Frontex main mandate is to coordinate the monitoring and control of the borders of the Member States of the European Union. The coverage of Operation Triton has been expanded since April 2015, when two shipwrecks left more than a thousand irregular migrants dead or missing off the Libyan coasts. It currently operates 138 nautical miles south of Sicily, thus not only in the territorial waters of Italy, but also in the high seas.

Following the dramatic shipwrecks of April 2015, the Council of the European Union also established the military operation EUNAVFOR Med (renamed Operation Sophia), in the Southern Central Mediterranean.[7] Recently extended to December 2018[8], its objective is to 'identify, capture and dispose of vessels and assets used or suspected of being used by smugglers or traffickers', to contribute to the disruption of their business model.[9] Its phase 1 was dedicated to information gathering. Phase 2 aimed to board, search, seize and divert suspected vessels on the high seas (2a) and in the Libyan territorial sea (2b). Phase 3 was about taking 'all necessary measures against a vessel and related assets, including through disposing of them or rendering them inoperable'. Phases 2b and 3 hinged on a Security Council Resolution, or consent of the coastal State concerned.

This depiction gives a first idea of the legal issues raised by operations aiming to tackle migrant smuggling in the Central Mediterranean. While their main aim is to *tackle* migrant smuggling, thus to *prevent* the travel of migrants, Triton and Operation Sophia remain engaged in rescue operations, blurring the line between the SAR (search and rescue) and the law enforcement regimes. Moreover, they undertake actions *beyond* the territorial sea of Member States, in the high seas. What are Frontex and Operation Sophia vessels entitled and obliged to do during the interception[10] of a ship full of illegal migrants? In case of a breach of an international obligation such as *non-refoulement*, how to delineate responsibilities between multiple actors? The uncertainty of the legal framework, combined with issues regarding implementation and effectiveness of the operations in dealing with migrant smuggling, raises numerous challenges.

The Obligation of *Non-refoulement* in Maritime Operations Aiming to Tackle Migrant Smuggling in the Central Mediterranean

The Extraterritorial Scope of the Obligation of Non-refoulement in the High Seas

The first aim of the interception policies put in place in the Central Mediterranean Sea is a tighter control of migration influx. Therefore the danger exists that persons, who could put forward legitimate claims of a refugee status, are returned to territories where they may face persecution. The aim of this subsection is to assess to which extent the international obligation of *non-refoulement* applies in the high seas, *ie* extraterritorially.

The obligation of *non-refoulement* stands at the crossroads of international refugee law and other legal frameworks of international law, such as human rights law. The latter sanctions it in a several instruments, whether directly or indirectly.[11] The paramount instrument of international refugee law, 1951 Convention relating to the status of Refugees (hereafter 'Refugee Convention'), amended by 1967 Protocol, prohibits a State to expel or return a refugee 'in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. (Article 33(1)) This article, embodying the principle of *non-refoulement*, is the cornerstone of an efficient regime of international protection.[12] Article 33(2) abates this right in case the refugee is a 'danger to the security of the country in which he is'. Article 33 embodies the humanitarian essence of the treaty. *Non-refoulement*, hence, is a non-derogable obligation of the Convention. This is also enshrined in the 1967 Protocol (Article VII(1)), and the Executive Committee and the United Nations General Assembly have recognised it[13], consistently affirming that the principle of *non-refoulement* was primary, fundamental, cardinal, and even 'progressively acquiring the character of a peremptory rule of international law'.[14]

While the prohibition not only extends to the country of origin of the person fearing persecution, but also to any other territory where he could be threatened[15], the essential question for the purpose of this research refers to the applicability *ratione loci* of the obligation, especially with respect to maritime operations at sea. While it appears clear that *non-refoulement* is not limited to refugees formally recognised as such, but should apply to all people having a well-founded fear of persecution[16], the Refugee Convention does not define any geographical scope for the obligation, although its customary status has been widely embraced.[17]

The *travaux préparatoires* of the Ad Hoc Committee and of the Conference of Plenipotentiaries seem to lead to two different readings of Article 33, which shall be balanced.[18] Early interpretations had restrictively conditioned the obligation of *non-refoulement* to the presence of the person in the country.[19] However, it was promptly admitted that it also applied at the border of the State.[20] Notwithstanding the 'excision' of the territorial sea operated by some States with respect to asylum procedures[21], the obligation also applies in the territorial sea.[22] Nowadays, however, migration controls are conducted further away from the territorial sea, let alone from the 'dry' territory of the State. They are 'externalised', for instance through visa procedures, carrier sanctions, or maritime operations.

A restrictive interpretation on the extraterritorial scope of the norm of *non-refoulement* has been embraced in controversial national jurisprudence.[23] In the *Sale* decision, the United States Supreme Court notably relied on the Swiss and Dutch positions at the Conference of Plenipotentiaries, ignoring however that these positions had been merely set forth by the potentiality of mass influx[24], and failing to take the views of the Ad Hoc Committee into account. It took a contrasting view to some, who have contended that the absence of mention relating to the application *ratione loci* of *non-refoulement* implied that Article 33 should apply everywhere[25], and linked the scope of *non-refoulement* to the wording of Article 33(2) – 'in which he is'.[26] The Supreme Court also deemed that the humanitarian purpose of the Convention could not impose obligations to the State with respect to aliens outside its territory.[27]

In *R v Immigration Officer*, the House of Lords stated that only the refugees present on the state's territory were protected by the obligation of *non-refoulement*, excluding even persons at the border. Similarly to the US Supreme Court, it discounted the *travaux préparatoires* of the Ad Hoc Committee and considered that the Convention could not impose extraterritorial obligations. Eventually, it considered that in the case examined, applicants had not left their country of nationality, depriving them of the right to claim the status of refugees or asylum seekers.[28] These decisions have been widely contested, notably, with respect to the Supreme Court decision, by the Inter-American Commission on Human Rights.[29]

A majority of scholars share the view that the ordinary meaning of *refouler* does not presuppose a presence of the person in the country[30], and agree that the 1951 Convention not only embraces rejection at the border, but also in transit zones and on the high seas.[31] Some underscore that Article 1(3) of the Refugee Protocol provides that Articles 2 to 34 of the Convention 'shall be applied by the States Parties hereto without any geographical limitation'[32], and that the humanitarian purpose of the Convention shall not be ignored.[33] Others reach a similar conclusion by focusing their analysis on the wording 'in any manner whatsoever', or on State Practice.[34]

Interception at sea of smuggled migrants does not *ipso facto* violate the prohibition[35], nor does the *refoulement* of a ship from the territorial sea to the high seas. [36] However, UNHCR has mentioned that interception shall not result to a denial of access or *refoulement*[37] or *chain refoulement*.[38] Asylum seekers have the right of a fair and effective refugee status determination. The duty to ensure protection needs and a fair asylum procedure[39] (thus not on board a vessel) falls on the State of interception.[40] However, the prohibition of *refoulement* does not equate to a duty to receive refugees and grant asylum.[41] A State can transfer asylum seekers to another country for status determination insofar as protection is guaranteed.[42]

All things considered, while the purpose and object of the 1951 Convention seem to entail a broader scope *ratione loci*, which includes border situations and potentially a wider application, this is not absolutely clear.[43] State practice remains ambiguous, and a State consent does not exist for obligation of *non-refoulement* if persons are not in the territory or at its borders.[44] Nevertheless, the principle of *non-refoulement* appears worthless if States are authorised to circumvent it before refugees arrive at their borders.[45]

In terms of international human rights law, the submission of a person to a State jurisdiction does not stem from territorial considerations, but from the 'effective control' (whether 'spatial'[46] or 'personal'[47]) of the State, or its agents. Hence, a difference must be drawn between *de jure* jurisdiction, and *de facto* jurisdiction.[48] Extraterritorial application of human treaties is recognised under *de facto* jurisdiction, *ie* everywhere a State exercises control.[49] Owing to 'the complementarity and mutually reinforcing nature of international human rights law and international refugee law', scholars have contended that the principle of *non-refoulement* shall be covered by the same territorial scope – thus a wider one – under both regimes.[50] International Court of Justice and European Court of Human Rights have both stated that the duty to respect Article 33 is valuable wherever a State exercises effective or *de facto* jurisdiction. Preventing *refoulement* even appears as a positive obligation.[51] In complying with the principle, the intercepting State is obliged to grant access to its territory before taking the decision to push back migrants, insofar as the prohibition of *refoulement*, and the individual's right to access asylum procedures *before* removal, are to be applied territorially *and* extraterritorially.[52]

With respect to Operation Sophia, Council Decision 2015/778 asserts its compliance to the 1951 Convention and notably to the principle of *non-refoulement* (para. 6). With respect to Frontex, whereas its founding regulation in 2004 made no mention of human rights obligations[53], Regulation 252/2010 enshrined the obligation of *non-refoulement* in Recitals 3 and 10, as well as in Annex 1.2. In Regulation 656/2014, Recitals 10, 12, 13, 19 mention the obligation of *non-refoulement*, and Article 4 is explicitly dedicated to it. Furthermore, RABIT Regulation, respecting 'fundamental rights' and observing 'the principles recognised in particular by the Charter of Fundamental Rights of the European Union', should be applied 'in accordance with the Member States' obligations as regards international protection and *non-refoulement*'.[54] However, albeit emphasising the need for Member States to comply with the obligation of *non-refoulement*, Frontex Regulation 656/2014 appears inadequate to address the issues raised by interception operations, and notably the obligation of *non-refoulement* and its extraterritorial scope.[55] It is unable to harmonise the fundamentally distinct aims of tackling migrant smuggling and respecting the rights of refugees. It provides that only in the case of an interception in the territorial sea or in the contiguous zone, the coastal Member State shall take disembarkation in charge. If the interception takes place in the high seas, disembarkation 'may take place in a third country. If that is not possible, disembarkation shall take place in the host Member State.'[56] Nevertheless, as aforementioned, Article 6(2)(b) explicitly allows Frontex units to expel a vessel from its territorial sea, which is contrary to the EU asylum *acquis*, and makes the Regulation inconsistent. Furthermore, the Regulation does not provide for the application of *non-refoulement* with respect to other Member States, failing to provide clarification on the procedure to follow if the coastal State, albeit a Member State, endures systemic flaws in the conditions of reception of asylum seekers, and the treatment of their asylum requests.[57] The

Regulation also fails to clearly designate a 'place of safety' where to disembark migrants[58], and does not refer to the prohibition of collective expulsion.[59] Eventually, the Regulation does not make any mention with regard to the need to ensure that intercepted persons have access to effective remedies. [60]

Elements of Responsibility of States with Respect to Extraterritorial Migration Control: the Case of Italy

On 6 May 2009, 11 Somalis and 13 Eritreans were among 200 migrants who left Libya by sea, hoping to reach Europe. Three vessels of the *Guardia di Finanza* and the Coastguards intercepted them in the high seas. The Italian authorities proceeded to their transfer onto their vessels, before confiscating their personal effects, including their identity papers. No measures were implemented to evaluate their protection needs. Without informing them of their real destination, they disembarked the asylum seekers by force in Tripoli, handing them indiscriminately over to Libyan counterparts owing to a bilateral agreement.[61]

The *Hirsi Jamaa* case brings to light a typical example of the circumstances, which may lead to a violation of the norm of *non-refoulement* when extraterritorially applied in the high seas, thus to a wrongful conduct under international law. By putting the migrants under direct and 'effective control', Italy triggered *de jure* and *de facto* jurisdiction, for the interception of the refugees on the high seas, and their push-backs to Libya without any due account of the risks of persecution and *chain refoulement* that they may face.[62] This case has confirmed that a State bears responsibility for *refoulement* as a violation of human rights, committed on individuals placed under its *de facto* jurisdiction, including during interceptions at sea.[63] Every time a State exercises jurisdiction, its responsibility may be engaged for violations of the principle of *non-refoulement* under human rights treaties.[64]

Every internationally wrongful act of a State entails the international responsibility of that State[65], as well as the obligation to make reparation.[66] A State is internationally responsible for a wrongful conduct: (a) if it is attributable to the State under international law, and (b) if it constitutes a breach of an international obligation of the State.[67]

With respect to the first element of responsibility (attribution of conduct), Article 4 provides that a State is liable for any conduct of its organs, without regard to their functions.[68] Article 5 establishes its liability for any conduct of persons or entities, which, albeit not being organs of the State, are empowered to exercise some form of governmental authority and act in that capacity in the particular instance.[69] Article 6 states that 'the 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'.[70] Article 8 contemplates the attribution of the conduct to a State in a case where a person or a group would act under the 'direction' or 'control' of that State.[71] In addition, the ILC Codification provides that 'a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.'[72] It also contemplates cases of direction and control[73], as well as coercion[74], in which the State would bear responsibility.

Regarding the second element of responsibility (breach of an international organisation), it is necessary to identify the law binding the State involved. With respect to the norm of *non-refoulement,* each and every State of the European Union individually is bound by the obligation, through the ratification of the Refugee Convention. It must be stressed that, by transferring some of their powers to an international organisation, members of the latter international organisation do not abandon their international obligations. Under international law, no State may be relieved of its responsibilities by outsourcing or contracting out control activities entailing obligations to third States, international organisations, or private parties.[75] To the contrary, they must ensure that the powers that they have transferred are exercised with due account to their international obligations.[76]

While many have considered the *Hirsi Jamaa* case a milestone in the international protection regime, subsequent incidents have exposed circumstances where the international obligation of *non-refoulement* may still be breached, in Europe and elsewhere in the world.[77] In the Central Mediterranean Sea, the incident involving the Liberian-registered tanker *MV Salamis* deserves attention.[78] On 4 August 2013, the Italian Maritime Rescue Coordination Centre (MRCC), an organ of Italian State under Article 4 of the ARSIWA, urged the *MV Salamis* to rescue 102

migrants from a boat off the Libyan coast. It ordered the shipmaster to conduct them to Libya, Khoms being considered the nearest port of safety. The shipmaster refused, and headed to Malta, where the authorities refused to allow disembarkation. Finally, Italy agreed to receive the migrants on 7 August. It has been asserted that Italy and Malta had breached its obligation of *non-refoulement* by directing the shipmaster to return to Libya.[79] This interpretation relies on Article 8 ARSIWA. However, it may fail to take due account of the high threshold required to assess the notion of 'control'. In the present case, the MRCC and the Maltese authorities only gave verbal orders, without physical contacts. Hence the attribution of responsibility through the notion of 'control' may be difficult to ascertain.[80]

Another situation deserving attention is the support that single States (*in casu* Italy) may provide to third States' coast guards (*in casu* Libyan border guards) to implement operations, which aim to impede the departure of migrant boats, sometimes with harsh consequences.[81] Basic modes of *non-entrée*, such as visa allocations, carrier sanctions, high seas interdictions, having been proven vulnerable to legal challenges[82], European entities try to find other ways to halt immigration[83] while circumventing their obligation of *non-refoulement*. One of them entails closer cooperation with countries of origin and of transit, through 'cooperation-based *non-entrée* mechanisms', such as financial incentives[84], training-, equipment and machinery-supplying, or even delegations of interceptions or interceptions in the territorial sea.[85]

It appears as an evidence that, if a departure state (*in casu* Libya) would 'contractually' restrict the right to leave, enshrined in the Universal Declaration on Human Rights (Article 13), with the aim to prevent violations of immigration laws of a potential receiving state (*in casu* Italy), 'access to *non-refoulement* would be eviscerated'.[86] An internationally wrongful act, such as *refoulement*, could potentially be jointly attributed to Italy and Libya under the principle of independent responsibility.[87] This would be tenable if the conduct of State organs is attributable to both States, and entails a breach of international obligations, for instance in case of joint border controls.[88] However, if vessels *under Libyan command* conduct interceptions without penetrating into Italian jurisdictional sphere or SAR zone, where primary responsibility towards persons in distress falls into Italy's hands[89], separate responsibility cannot be attributed to Italy, unless Libyan border authorities are conceived as 'subsidiary organs' of Italy, and executors of the Italian immigration policies.[90] Nevertheless, to establish the necessary link with 'subsidiary organs', sole instructions would be insufficient. It shall be proven that Libyan border authorities have acted under 'exclusive direction and control' of Italian authorities.[91] Hence the mere fact that Libyan coast guards benefit from training, funding or equipment is not sufficient to assert that they act as 'subsidiary organs' of the Italian government. Article 8 may be of help, providing that 'the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'[92], but this provision seems primarily aimed to private persons and entities. Hence it would be questionable to apply it to Libyan coastguards, which are organs of a State.

Under the principle of indirect accountability, however, Italy could be held responsible of the internationally wrongful act by 'aiding and assisting' Libya in committing illicit actions.[93] On the basis of Article 16, Italy could be held accomplice[94] through political, financial, technical or logistical support. As some have underlined, the jurisprudence, which could help to define the contours of the responsibility for 'aiding and assisting' in the commitment of an international wrongful act, is very thin.[95] Most importantly, the International Court of Justice has estimated that the assistance must not have been essential, but must have 'contributed significantly' to the wrongful act. Moreover, it has stated that the wrongful conduct must be considered a violation for both entities.[96]

Recent evolutions raise new legal challenges. In January, a bilateral Memorandum of Understanding (MoU) was signed by Italy and Libya in order to enhance their cooperation in the fight against irregular migration.[97] In the past months, the European Union has constantly reaffirmed its support in order to help Libya monitor its borders.[98] In the context of this close cooperation, in May 2017, Italy's Maritime Rescue Coordination Centre (MRCC) ordered the Libyan authorities to take charge of a rescue operation, in spite of the presence of an NGO's boat closer to the vessel in distress. The persons were subsequently brought back to Libya.[99] Some have underlined the responsibility of Italy in the present case. [100] The persons in question were never under *de jure* or *de facto* jurisdiction of Italy. Nevertheless, jurisdiction and attribution of conduct may not be equated. It has been suggested that Article 16 and the principle of assistance may be of some help to attribute a supportive role to Italy insofar as: (a) it was fully aware

of the circumstances making the act internationally wrongful; (b) its assistance had been given in order to facilitate the wrongful act; and (c) the act would have been wrongful if committed by itself.[101] Focusing on pre-border controls conducted by Italy and Libya on a mutual basis, or by Libya, Mariagiulia Giuffré has asserted that 'the conditions posed by Article 16 of the ILC Articles appear to be fully met'.[102] Nevertheless, Article 16 'deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act *by the latter*. Such situations arise where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations *of the latter*, for example, by knowingly providing an essential facility or financing the activity in question'.[103] If the persons concerned have never left Libya's jurisdiction and have never been under 'direct and effective control' of Italy, the violation of the obligation of *non-refoulement* may be more difficult to establish.

To sum it up, it has been established that a border guard of a Member State violates the cardinal obligation of *non-refoulement* if he returns a person to a territory where the latter person may be exposed to persecution, insofar as jurisdiction is triggered by a sufficient control from the guard over the individual. With respect to maritime operations aiming to tackle migrant smuggling at sea, these criterion may be fulfilled if a vessel is intercepted and handed over to the authorities of a third country where persecution may happen. In order to establish jurisdiction, merely escorting the vessel, or verbally ordering the vessel to change its trajectory, may not be sufficient.[104] The criterion may as well be fulfilled if joint operations are undertaken in the territorial waters of a third country, and involve 'the exercise of law-enforcement power by third-country officers on board a Member State's vessel'. In this case, the host Member State may bear indirect responsibility through the aid or assistance of the third country's officers.

Elements of Responsibility of International Organisations with Respect to Extraterritorial Migration Controls: the Case of the European Union

Frontex being a body of the European Union, thus of an international organisation, the Articles on the Responsibility of International Organisations (ARIO)[105] – which reflect the ARSIWA – are of salient relevance.

With respect to attribution of conduct), Article 6 provides that an international organisation is liable for any conduct of its organs, without regard to their functions.[106] Article 7 states that 'the conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct'.[107] In addition, the ILC Codification provides that 'an international organisation which aids or assists a State or another international organisation in the commission of an internationally wrongful act by the State or the latter organisation is internationally responsible for doing so if: (a) the former organisation does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organisation.'[108] It also contemplates cases of direction and control[109], as well as coercion.[110]

Regarding the second element of responsibility (breach of an international organisation), it is necessary to identify the law binding the international organisation involved. While a full analysis of the incorporation of the principle of *non-refoulement* in the EU legal setting is beyond the scope of this research[111], it can be underlined that the Treaty on the European Union (TEU) sanctions human rights and fundamental freedoms as general principles of the Union's law.[112] Furthermore, it militates for an accession of the EU to the ECHR, and provides that the rights guaranteed by the ECHR are incorporated into EU law as general principles. [113] The Treaty on the Functioning of the European Union (TFEU) provides that its policies regarding immigration and asylum must comply with the principle of *non-refoulement*.[114] Eventually, the EU Charter of Fundamental Rights (EUCFR) contains the principle of *non-refoulement*.[115] The Schengen Borders Code, as well as Frontex Regulation 656/2014, explicitly mentions *non-refoulement*. (Article 3(b)). Hence, the obligation of *non-refoulement* binds the EU and Frontex.[116]

To complement a situation of 'exclusive responsibility' attributed to a Member State, this chapter shall evaluate to which extent Frontex, as one of the organs or agents of the European Union[117], may arouse the responsibility of the EU, as an international organisation, for breaching the prohibition of *refoulement*, insofar as the criterion of attribution applies. It must first be assessed (a) whether; (b) under which circumstances; (c) to which extent the conduct of the border guards of a Member State could be attributed to the European Union, through Frontex. For the

purpose of this research, the wrongful act would be an indiscriminate pushback of migrants, entailing a violation of the obligation of *non-refoulement*.

Regarding attribution, according to Article 6 of ARIO, if an 'organ' or 'agent' of the European Union commits the internationally wrongful act, this wrongful act is attributable to the EU. However, the Member States involved in Frontex operations implement acts for which they have primary competence, while the EU only coordinates these operations under the principle of subsidiarity.[118] Hence, while all Member States of which guest officers commit acts which breach the principle of *non-refoulement* may be held jointly responsible, it is not established that the UE incurs responsibility, through Frontex, under Article 6. Following Article 7 of ARIO, border guards, as public officials, are agents of the Member States, and they are placed, through Frontex, at the disposal of the European Union, in order to control external borders of the Union. However, the question of the 'effective control' over the conduct remains. Frontex only acting as a coordinating body, and the instructions being officially given by border guards of the host member State, 'effective control'[119] of the European Union cannot be established.[120] To sum it up, it appears problematic, from Articles 6 and 7, to attribute an internationally wrongful act committed by border guards of the Member States during Frontex operations to the European Union.

Nevertheless, attribution of responsibility may be achieved through Article 14 ARIO, which provides that an international organisation may be held responsible of aiding and assisting a State or another international organisation in committing an internationally wrongful act, provided that the criterion of knowledge is fulfilled, and to the extent that the same act would be wrongful if committed by the former organisation.[121] On the basis of Article 14, the European Union could be held accomplice[122] by embracing an auxiliary, supporting role, while the primary responsibility would still fall in the Member State's hands. The high level of the threshold for establishing indirect responsibility has been underlined[123]: the proof must be established, that an accomplice international organisation (*in casu* the European Union) assisted another State (*in casu* Italy, through Frontex), knowing that a serious possibility existed that an international wrongful act (*in casu* indiscriminate pushbacks that would entail *refoulement* to territories where refugees could face persecution) would be committed, and still accepting to provide the assistance.[124] In the *Hirsi Jamaa* judgment, the ECHR has established that Italy knew or should have known that the returned refugees would face persecution or *refoulement* to their country of origin. In the present scenario, while the element of 'significant support' may be fulfilled, it remains hard to establish a link close enough between the aid or assistance and the wrongful act, as well as the knowledge that the aid would be used in the commission of a wrongful act.[125] Insofar as the link and knowledge could be firmly established, and Frontex being bound to respect the principle of *non-refoulement*, a responsibility of the European Union for aiding and assisting a Member State in violating an international obligation may be contemplated through the coordination of a joint operation.[126]

Conclusions

This article has shown that, regarding the protection regime, international law shall clearly determine a safety place as a place of disembarkation for rescued persons, so that migrants are able to oppose a decision of rejection with an effective remedy. If needed, the law of state responsibility, notably through the principle of indirect responsibility, may be of help. With respect to the obligation of *non-refoulement* related to responsibility, this research has shown that the new cooperation models set forth by Member States and Frontex move the borders of responsibility, and do not allow to reproduce the analysis of the *Hirsi Jamaa* case, where Italy and Libya were jointly responsible. In cases of externalised migration controls, however, Italy could be held responsible of the internationally wrongful act by 'aiding and assisting' Libya in committing illicit actions. With respect to the European Union, it appears problematic, from Articles 6 and 7, to attribute an internationally wrongful act committed by border guards of the Member States during Frontex operations to the European Union. Nevertheless, attribution of responsibility may be achieved through Article 14 ARIO (derivative or indirect responsibility).

Three final remarks may be put forward. Firstly, the borders are not lines in the sand, in the land or in the sea. They are not only *territorial*, but also *functional*. A conception of the *border* in accordance with the current world is needed. In the same sense, it is important to underline the necessity of an evolutionary interpretation of treaties[127], in order to adapt entitlements and obligations to current threats hanging on States and individuals. Eventually, one term must be underscored: *effectiveness*.[128] If engagements are taken, without providing the expected result, then they are

vain. This is valid for States, which combat transnational crime such as migrant smuggling, and shall assume obligations, such as *non-refoulement*.

Notes

[1] European Commission, 'Route migratoire en Méditerranée Centrale – Déclaration de Tunis' (24 July 2017) <http://europa.eu/rapid/press-release_STATEMENT-17-2125_fr.htm?locale=EN> accessed 21 August 2017.

[2] European Commission, 'Irregular Migration via Central Mediterranean: From Emergency Response to Systemic Solutions' (2 February 2017) European Political Strategy Centre Strategic Notes, Issue 22.

[3] Philippe De Bruycker, Anna Di Bartolomeo and Philippe Fargues, 'Migrants smuggled by sea to the EU: facts, laws and policy options' (2013) PC RR2013/09, Robert Schuman Centre for Advanced Studies, European University Institute.

[4] Patricia Mallia, *Migrant Smuggling by Sea* (Brill Nijhoff 2009) 46.

[5] UNHCR, 'On a high seas rescue mission with the Italian Navy' <http://www.unhcr.org/532c4cbb6.html#_ga=1.216101590.1993380992.1412002836> accessed 30 June 2017.

[6] Official website of the military marine, Ministry of Defence of the Italian government, 'Mare Nostrum' <http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx> accessed 10 July 2017.

[7] Council Decision (CFSP) 2015/778 (18 May 2015).

[8] Council Decision (CFSP) 2017/1385 (25 July 2017).

[9] Council Decision (CFSP) 2015/778, Art. 1.

[10] Interceptions are defined by UNHCR as 'all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination': UNHCR,*Interception of asylum-seekers and refugees: the international framework and recommendations for a comprehensive approach* (EC/50/SC/CRP.17, 9 June 2000).

[11] Universal Declaration of Human Rights 1948 (Article 5); European Convention for the Protection for Human Rights and Fundamental Freedoms 1950 (Article 3); International Covenant on Civil and Political Rights 1966 (Article 7); Convention against Torture 1984 (Article 3); Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para. 1' in Andreas Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011) 1350-1355.

[12] Article 42(1) precludes reservations, *inter alia*, to Article 33.

[13] ExCOM Conclusion No. 79 (XLVII) 1996, para. (i); UN doc. A/RES/51/75 (1997), para. 3.

[14] ExCOM Conclusion No. 25 (XXXIII) 1982, para. (b).

[15] UN doc. E/AC.32/SR.20 (1950); UN doc. E/1618, E/AC.32/5 (1950).

[16] Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press 2007) 208.

[17] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (2007) para. 15; Sir Elihu Lauterpacht and

Daniel Bethlehem, 'The Scope and Content of the Principle of Non-refoulement: Opinion' in Erika Feller, Volker Türk and Frances Nicholson, *Refugee Protection in International Law* (Cambridge University Press 2003) 87, 110; Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Martinus Nijhoff 2009) 295; Walter Kälin, Martina Caroni and Lukas Heim, n. 11, 1343-1346; Guy Goodwin-Gill, 'The limits of the powers of expulsion in public international law' (1976) 47(1) British Yearbook of International Law 55, 88; Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13 IJRL 533;*contra* James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 363; James C. Hathaway, 'Leveraging Asylum' (2009-2010) 45 Texas International Law Journal 503, 508; see also Nils Coleman, who emphasises the conditionality of the norm, in Nils Coleman, 'Non-Refoulement revised: Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law' (2003) 5 European Journal of Migration and Law 23, 65.

[18] Thomas Gammeltoft-Hansen, *Access to Asylum, International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011) Ch. 3.1.3 [ebook].

[19] Atle Grahl-Madsen, *Commentary on the Refugee Convention* (1963 Division of International Protection UNHCR) Commentary (3) on Article 33; Nehemiah Robinson, *Convention relating to the Status of refugees: its history, contents and interpretation – A Commentary* (New York: Institute for Jewish Affairs, 1953) 163.

[20] ExCOM, Conclusion No. 6 (XXVIII) 1977 para. (c); UNHCR, 'Interception of Asylum-Seekers and Refugees' EC/50/SC/CRP.17 (n. 24) para. 21; Patricia Mallia, n. 4, 85; James C. Hathaway, n. 17, 315; Paul Weis,*The Refugee Convention, 1951: The travaux préparatoires analysed with a Commentary by the late Dr. Paul Weis* (Cambridge University Press, 1995) 341.

[21] Maarten den Heijer, *Europe and Extraterritorial Asylum* (PhD thesis Leiden University 2011); Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009), Ch. 2.7 [ebook].

[22] Patricia Mallia, n. 4, 86; Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, 'Border Control at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 International Journal of Refugee Law 256, 262; *contra CPCF v Minister* [2015] High Court of Australia S169/2014.

[23] *Sale, Acting Commissioner, INS v Haitian Centres Council* [1993] 113 (USSC) 2549, see however Justice Blackmun's dissenting opinion; *R v Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.* [2004] UKHL 55, para. 17; *Ruddock v Vadarlis* [2001] FCA 1329.

[24] UN Doc. A/CONF.2/SR.16, 6.

[25] This relies on the fact that other parts of treaties explicitly link provisions to a geographical scope. See James C. Hathaway, n. 17, 160; Guy Goodwin-Gill and Jane McAdam, n. 16, 246; *contra* Thomas Gammeltoft-Hansen, n. 18, Ch. 3.2.2 [ebook].

[26] However, it has been underlined that a proper legal analysis could not derive a general rule from an exception. See Thomas Gammeltoft-Hansen, n. 18, Ch. 3.2.3 [ebook].

[27] *Sale, Acting Commissioner, INS v Haitian Centres Council* [1993] 113 (USSC) 2549, para. 83; *Sale, Acting Commissioner, INS v Haitian Centres Council* [1993] 113 (USSC) 2549, paras. 181-182; Maarten den Heijer, n. 21, 134. It must however be stressed that at the time of drafting of the 1951 Convention, the deterrence of refugees by a State outside its geographical borders did simply not exist. See James Hathaway, n. 17, 337.

[28] *R v Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.* [2004] UKHL 55, para. 18.

[29] *Haitian Centre for Human Rights et al. v. United States of America* [1997] Inter-American Commission on Human Rights, Merits; UNHCR, *Advisory Opinion*, n. 130, para. 24; *contra* United States, Department of State,

Observations of the United States on the Advisory Opinion of the UNHCR on the Extraterritorial Application of non-refoulement obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (2007); see also *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.* [2004] UKHL 55, paras. 27, 65-71.

[30] James C. Hathaway, n. 17, 339; Sir Elihu Lauterpacht and Daniel Bethlehem, n. 17, 110; Violeta Moreno-Lax, 'Seeking asylum in the Mediterranean: against a fragmentary reading of EU Member States' obligations accruing at sea' (2011) 23(2) International Journal of Refugee Law 174, 205.

[31] UNHCR, *Advisory Opinion*, n. 17, para. 24; Walter Kälin, Martina Caroni and Lukas Heim, n. 11, 1361-1369; Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, n. 22, 267;*Haitian Centre for Human Rights et al. v. United States of America* [1997] Inter-American Commission on Human Rights, Merits, para. 157;*Hirsi Jamaa and others v Italy* App no 27765/09 (ECHR, 23 February 2012), paras. 68-81; *contra* Nils Coleman, n. 17, 256.

[32] Douglas Guilfoyle, n. 21, Ch. 2.7 [ebook].

[33] Efthymios Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart Publishing 2013), Ch. 8.III.B [ebook].

[34] Guy Goodwin-Gill and Jane McAdam, n. 16, 248; Efthymios Papastavridis, n. 33, Ch. 8. III.B [ebook]; Efthymios Papastavridis, 'The EU and the obligation of non-refoulement at sea' in Francesca Ippolito and Seline Trevisanut (eds.), *Migration in the Mediterranean, Mechanisms of International Cooperation* (Cambridge University Press 2015) Ch. 10 [ebook]; Bill Frelick, ''Abundantly clear': refoulement' (2005) 19 Georgetown Journal of International Law 679; nevertheless, Thomas Gammeltoft-Hansen reminds that the wording 'in any manner whatsoever' does not seem to have been added with respect to geographical considerations, but regarding procedural matters, see Thomas Gammeltoft-Hansen, n. 18, Ch. 3.2.1 [ebook].

[35] Guy Goodwin-Gill and Jane McAdam, n. 16, 277; Anne T. Gallagher and Fiona David,*The International Law of Migrant Smuggling* (Cambridge University Press 2014), Ch. 6.3.4 [ebook].

[36] Andrea Caligiuri, 'La lutte contre l'immigration clandestine par mer: problèmes lies à l'exercice de la jurisdiction par les états côtiers' in Rafael Casado Raigon (ed.), *L'Europe et la mer* (Bruylant 2005), 427; Guy Goodwin-Gill and Jane McAdam, n. 16, 166.

[37] UNHCR ExCOM, 'Conclusion on Protection Safeguards in Interception Measures' (2003) 97(LIV).

[38] *Hirsi Jamaa and others v Italy* App no 27765/09 (ECHR, 23 February 2012) paras. 146 and 209;*Plaintiff M70/2011 and Plaintiff M106/2011 v. Minister for Immigration and citizenship* [2011] Australia High Court 244 CLR 144, para. 249.

[39] Walter Kälin, Martina Caroni and Lukas Heim, n. 11; Mariagiulia Giuffré, 'Access to asylum at Sea? Non-refoulement and a comprehensive approach to extraterritorial human rights obligations' in Violeta Moreno-Lax and Efthymios Papastavridis (eds.), *'Boat refugees' and migrants at sea: A comprehensive approach* (Brill Nijhoff 2016) 248.

[40] UNHCR, *Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing Maritime Interception Operations* (2010) para. 2.

[41] James C. Hathaway, n. 17, 301.

[42] Andreas Schloenhardt and Colin Craig, 'Turning back the boats': Australia's Interdiction of Irregular Migrants at Sea' (2015) 27(4) International Journal of Refugee Law 536.

[43] Thomas Gammeltoft-Hansen, n. 18, Ch. 3.3 and 3.4 [ebook].

[44] Anne T. Gallagher and Fiona David, n. 35, Ch. 3.4.4 and 6.3.2 (ebook).

[45] Mark Pallis, 'Obligations of States towards Asylum-Seekers at Sea: interactions and conflicts between legal regimes' (2002) 14 International Journal of Refugee Law 329, 344.

[46] *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ) (9 July 2004); *Loizidou v Turkey* App no 15318/89 (ECHR 18 December 1996).

[47] *Öcalan v Turkey* App no 46221/99 (ECHR 12 May 2005); *Al-Skeini and Others v. United Kingdom* App no 55721/07 (ECHR 7 July 2011).

[48] Mariagiulia Giuffré, 'State Responsibility beyond borders: what legal basis for Italy's Push-Backs to Libya?' (2013) 24(4) International Journal of Refugee Law 720. Whereas the ECtHR, in 2001, had favoured a restrictive territorial interpretation of jurisdiction save exceptional circumstances (*Bankovic and Others v. Belgium and Others* App no 52207/99 (ECHR 12 December 2001)), recent decisions have bent this contested judgment towards a more extraterritorial-oriented conception of human rights treaties. (*Al-Skeini and Others v. United Kingdom* App no 55721/07 (ECHR 7 July 2011); *Al-Jedda v. United Kingdom* App no 27021/08 (ECHR 7 July 2011); *Al-Saadoon and Mufdhi v. United Kingdom* (2010) 51 EHRR 9; *Jaloud v. the Netherlands* App no 47708/08 (ECHR 20 November 2014).

[49] Andreas Schloenhardt and Colin Craig, n. 42, 569; Guy Goodwin-Gill and Jane McAdam, n. 16, 244; James C. Hathaway, n. 17, 336; Seline Trevisanut, 'The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection' (2008) 12 Max Planck Yearbook of United Nations Law, 232; Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 Human Rights Law Review 411, 429.

[50] Anja Klug and Tim Howe, 'The Concept of State Jurisdiction and the Applicability of the *non-refoulement* principle to extraterritorial interception measures', in Bernard Ryan and Valsamis Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (Brill Nijhoff 2014) 71.

[51] *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECHR 23 February 2012) paras. 34, 70 ss. and 135.

[52] *Xhavara and others v Italy and Albania* App no 39473/98 (ECHR 11 January 2001). In this case, the ECtHR considered that, in the framework of migration controls, the persons concerned are brought under the jurisdiction of the intercepting state, hence within the scope of ECHR. See also: Mariagiulia Giuffré, n. 39, 252; Violeta Moreno-Lax, n. 30, 174; Mariagiulia Giuffré, 'Watered-Down Rights on the High Seas: Hirsi Jamaa and Others v Italy' (2012) 61 ICLQ 728.

[53] Efthymios Papastavridis, n. 33, Ch. 10 [ebook].

[54] Regulation (EC) 863/2007 of the European Parliament and of the Council of 11 July 2007, establishing a mechanism for the creation of Rapid Border Intervention Teams (RABIT) and amending Council Regulation (EC) 2007/2004, para. 17.

[55] Maarten den Heijer, 'How the Frontex Sea Borders Regulation avoids the hot potatoes' (2014) <https://eustudies.org/conference/papers/download/56> accessed 13 August 2017.

[56] Frontex Regulation 656/2014, Article 10(1).

[57] Efthymios Papastavridis, n. 33, Ch. 10 [ebook]; Maarten den Heijer, n. 55; CJEU, Joined Cases C-411/10 and

C-493/10, *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissionner, Minister for Justice, Equality and Law Reform* [21 December 2011], para. 94.

[58] Efthymios Papastavridis, n. 33, Ch. 10 [ebook]; Efthymios Papastavridis, 'Rescuing Migrants at Sea: The Responsibility of States under International Law' (2011) <https//ssrn.com/abstract=1934352> accessed 21 August 2017.

[59] *Hirsi Jamaa and others v Italy* App no 27765/09 (ECHR, 23 February 2012), para. 177; Efthymios Papastavridis, n. 33, Ch. 10 [ebook].

[60] Maarten den Heijer, n. 55; Efthymios Papastavridis, n. 33, Ch. 10 [ebook].

[61] *Hirsi Jamaa and others v Italy* App no 27765/09 (ECHR, 23 February 2012), paras. 9-12.

[62] Relying on the ECHR, he ECtHR found that Italy had engaged its responsibility for violations of Articles 3 and 4, thus of fundamental rights of the returned refugees.

[63] *Hirsi Jamaa and Others v. Italy* App. 27765/09 (ECHR 23 February 2012), paras. 146, 180.

[64] Marko Milanovic, n. 49, 417; Mariagiulia Giuffré, n. 48, 718.

[65] ARSIWA, Art. 1.

[66] *Factory at Chorzow (Germany v. Poland)* [1927] PCIJ Reports Series A No. 9 [21]

[67] ARSIWA, Art. 2, which is reflected in Articles on the Responsibility of International Organisations (ARIO), Art. 4.

[68] ARSIWA, Art. 4, which is reflected in ARIO, Art. 6.

[69] ARSIWA, Art. 5.

[70] ARSIWA, Art. 6, which is reflected in ARIO, Art. 7.

[71] ARSIWA, Art. 8.

[72] ARSIWA, Art. 16, which is reflected in ARIO, Art. 14.

[73] ARSIWA, Art. 17, which is reflected in ARIO, Art. 15.

[74] ARSIWA, Art. 18, which is reflected in ARIO, Art. 16.

[75] Guy Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations' (2007) 9 UTS Law Review 26, 34; Maarten den Heijer, 'Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control' in Bernard Ryan and Valsamis Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (Brill Nijhoff 2014) 197.

[76] ILC Draft Articles on the Responsibility of International Organisations (2011), Article 61.

[77] ProAsyl, *Pushed back: Systematic human rights violations against refugees in the Aegean Sea and at the Greek-Turkish land border* (2014); ECRE, 'At least 13 people die in the attempt to enter Spain – Migrants accuse Guardia Civil of using rubber bullets and tear gas against them' (7 February 2014) <https://www.ecre.org/at-least-13-people-die-in-an-attempt-to-enter-spain-migrants-accuse-guardia-civil-of-using-rubber-bullets-and-tear-gas-against-them/> accessed 23 July 2017; UN News Service, 'Australia: UN Agency concerned by reports that asylum-seeker

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[78] Patricia Mallia, 'The MV Salamis and the State of Disembarkation at International Law: The Undefinable Goal' (2014) 18(11) ASIL <https://www.asil.org/insights/volume/18/issue/11/mv-salamis-and-state-disembarkation-international-law-undefinable-goal> accessed 11 August 2017.

[79] ibid.

[80] Roberta Mungianu, *Frontex and Non-Refoulement: The international responsibility of the EU* (Cambridge University Press 2016), Chapter 8 [ebook].

[81] Sudarsan Raghavan, 'Libya's coast guard abuses migrants despite EU funding and training' Washington Post (Washington, 11 July 2017) <https://www.washingtonpost.com/world/middle_east/libyas-coast-guard-abuses-desperate-migrants-despite-eu-funding-and-training/2017/07/10/f9bfe952-7362-4e57-8b42-40ae5ede1e26_story.html> accessed 11 August 2017.

[82] Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a world of cooperative deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 248.

[83] Ahmed Elumami, 'Libyan coastguard turns back nearly 500 migrants after altercation with NGO ship' Reuters (10 May 2017) <http://www.reuters.com/article/us-europe-migrants-libya-idUSKBN1862Q2> accessed 23 July 2017.

[84] Thomas Gammeltoft-Hansen and James C. Hathaway, n. 82, 251.

[85] ibid., 252.

[86] Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27(3) European Journal of International Law 591, 603 and 613; see, also, the 'wide range of actions' that may be lead to *refoulement* in James C. Hathaway, n. 130, 318 ss.

[87] The principle of independent responsibility could be applied to the interceptions conducted in 2009, which led to the *Hirsi Jamaa* case.

[88] Mariagiulia Giuffré, n. 48, 723.

[89] ibid.

[90] ILC Draft Articles on Responsibility of States (2001), Article 6; Mariagiulia Giuffré, n. 48, 723.

[91] Mariagiulia Giuffré, n. 48, 724; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge University Press 2002) 103.

[92] ILC Draft Articles on Responsibility of States (2001), Article 8.

[93] Nora Markard, n. 86, 616.

[94] James Crawford, n. 91, 148.

[95] Mariagiulia Giuffré, n. 48, 727.

[96] *Bosnia and Herzegovina v Serbia and Montenegro case (Genocide Convention Case*) [2007] ICJ paras.

420–424; James Crawford, n. 91, 149.

[97] 'Italy-Libya agreement: The Memorandum Text' Associazione per gli Studi Giuridici sull'immigrazione <http://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf> accessed 14 July 2017.

[98] European Commission, 'EU Trust Fund for Africa adopts 46 million (euros) programme to support integrated migration and border management in Libya' (28 July 2017) press release <http://europa.eu/rapid/press-release_IP-17-2187_en.htm> accessed 15 August 2017.

[99] Ahmed Elumami, n. 83.

[100] Jean-Pierre Gauci, 'Back to old tricks? Italian Responsibility for returning people to Libya' (6 June 2017) EJIL, Talk! <https://www.ejiltalk.org/back-to-old-tricks-italian-responsibility-for-returning-people-to-libya/> accessed 13 August 2017.

[101] ibid.; ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Article 16, para. 3.

[102] Mariagiulia Giuffré, n. 48, 730.

[103] ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Article 16, para. 1.

[104] Roberta Mungianu, n. 80, Chapter 8 [ebook].

[105] ILC Draft Articles on the Responsibility of International Organisations (2011) Article 3.

[106] ARIO, Art. 6.

[107] ARIO, Art. 7.

[108] ARIO, Art. 14.

[109] ARIO, Art. 15.

[110] ARIO, Art. 16.

[111] For a complete account on the topic, see Roberta Mungianu, n. 80, Ch. 5 [ebook].

[112] TEU, Article 2 and Article 3(5)

[113] TEU, Articles 6(2) and 6(3).

[114] TFEU, Article 78.

[115] EUCFR, Article 19.

[116] Efthymios Papastavridis, n. 33, Ch. 10 (ebook).

[117] According to ILC Draft Articles on the Responsibility of International Organisations (2011), Article 2. The question of the international legal personality of Frontex falls outside the scope of this research. It is considered that it does not enjoy international legal personality. See: Roberta Mungianu, n. 80, Ch. 3.2 [ebook].

[118] TEU, Article 5; Efthymios Papastavridis, n. 33, Ch. 10 [ebook].

[119] The concept of 'effective control' has been dealt by ECtHR in*Behrami and Saramati*, paras. 132-133, and *Al-Jedda v United Kingdom*. It is defined by the ILC in the Commentaries to Article 7 ARIO.

[120] Roberta Mungianu, n. 80, Ch. 3.4.2 and Ch. 4.3.1.4 [ebook]; Efthymios Papastavridis, n. 33 [ebook].

[121] ILC Draft Articles on the Responsibility of International Organisations (2011), Article 14.

[122] James Crawford, n. 91, 148.

[123] Mariagiulia Giuffré, n. 48, 728; Maarten den Heijer, n. 21, 75.

[124] *Bosnia and Herzegovina v Serbia and Montenegro case (Genocide Convention Case*) [2007] ICJ para. 432.

[125] Roberta Mungianu, n. 80, Ch 4.5 [ebook]; *contra* Guy Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement' (2011) 23 International Journal of Refugee Law 443, 453.

[126] Roberta Mungianu, n. 80, Chapter 8.4 [ebook].

[127] See, notably, Eirik Bjorge, 'The Vienna Rules, Evolutionary Interpretation, and the Intentions of the Parties' in Andrea Bianchi, Daniel Peat and Matthew Windsor, *Interpretation in International Law* (OUP 2015).

[128] See, notably, Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 British Yearbook of International Law 48.

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