EUNAVFOR MED MISSION AND COLLABORATIVE EU OPERATIONS FOR THE FIGHT AGAINST SMUGGLING OF MIGRANTS

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Civilian and military collateral operations that, due to the geopolitical position in which they are located, inevitably connect and influence the operation under examination in the present work. For the sake of completeness, we proceed with an examination of the particular legal regime within which the Union’s CFSP acts, in order to consider the naval military operations put in place within EU. Not least, since it is an authorized military operation pursuant to chapter VII of the United Nations Charter, it seems necessary to retrace, starting from Resolution 2240 (2015) and considering the recent UNSC practice, the reasoning by which the Council authorized the recourse to coercive actions against ships involved in the trafficking of migrants, in order to highlight the critical points and possible contradictions in terms of means and purposes. On the basis of international law rules of the sea and special provisions introduced by the Palermo Protocol, it will be evaluated whether the coercive measures implemented by the military ships involved in operations against the ships involved in the smuggling of migrants can be said to be fully legitimized by the instruments in force, including Resolution 2240.

Finally, we focus on recent agreements which, although within the framework of a general European policy, have been stipulated between individual EU Member States and third countries in order to combat migrant smuggling; in particular, we focus on Memorandum of Understanding signed between Italy and Libya in 2017, which will be taken up as a critical node in the protection of human rights of trafficked migrants.

The last paragraphs focus on the effective protection of migrants involved in traffic operations, starting from the fundamental rights that are generally applied to those rights that come to the fore in particular situations, such as the prohibition of exploitation of migrants and protection of those who have

suffered torture or other inhuman or degrading treatment. Before going into detail about the human rights violations that occurred, or could occur, against migrants during specific traffic counter operations, it is necessary to provide a general framework of international and regional legal instruments that, directly or marginally, provide a form of protection for the rights of such persons.

Subsequently, returning to the establishing decision EUNAVFOR MED and the related Resolution 2240 (2015) of the United Nations Security Council. The most problematic aspects of the operation will be highlighted regarding the effective protection of migrants human rights, with particular reference to compliance with the principle of non-refoulement, prohibition of collective expulsions, torture and inhuman and degrading treatment, also with reference to European Court of Human Rights (ECtHR) jurisprudence in this area.

Once analyzed the critical points of operation from which potentially violations of some fundamental rights of migrants could arise, it is necessary to ask oneself about who, in this case, would be held responsible for such violations, since the mission includes coercive actions that apply in international waters. In addition to the problems inherent to the jurisdiction of the intervening state, in international waters, on ships without a flag or bearing the flag of a third country that refuses to allow boarding and inspection, it must also be considered that the states act, within the scope of Operation Triton, coordinated by the FRONTEX EU agency, and, as part of Operation Sophia, through a decision of the Council of the European Union and under the authorization of UNSC. Therefore, it will be useful to ask whether and how lean issues related to FRONTEX responsibility, now Coast Guard and European Frontier, and states responsibility and international organizations are in relief.

§ 1—TOWARDS.... EUNAVFOR MED

The Council of the European Union adopted a Decision under the Common Foreign and Security Policy (CFSP) which established on 22 June 2015 a military crisis management operation, EUNAVFOR MED\(^2\), which aims to contrast to the trafficking of migrants in the Mediterranean sea\(^3\).


This operation, whose passage to the second phase was authorized through Resolution 2240 (2015)\(^4\) of the United Nations Security Council (UNSC), has raised heated debates among non-governmental organizations, as far as the legal framework of the mission is concerned. Not forgetting, in this sense, a reference to the first mission deployed by the Union outside its territory, namely the Atalanta operation (Ocean Shield)\(^5\), which will be examined in order to highlight both the similarities and differences with the EUNAVFOR MED operation.

Given the unique nature of operation in question, deriving from the particular type of crime that is intended to be countered, which lends itself to being addressed in various areas of EU law, this mission does not represent the only action adopted by the Union for this purpose, but must be considered as a piece of a wider mosaic, to which other bodies and agencies of the Union cooperate\(^6\).

The European Union Action Plan against smuggling of migrants and the European Security Agenda\(^7\), adopted by the Commission on 28 April 2015, make cooperation against migrant smuggling within the EU and with countries a third priority in the fight against organized crime networks. In addition to reiterating the need to address the root causes of irregular immigration, in cooperation with the countries of origin and transit, the Action Plan focused on establishing a Common Security and Defense Policy (CSDP) operation which includes the repatriation to countries of origin of migrants who do not have the right to stay in EU. The Plan proposed to establish a single contact point on migrant smuggling to strengthen operational cooperation, coordination and information sharing between member states with EU agencies. Actions against trafficking carried out within Union’s programmatic cycle to combat organized crime and serious forms of international crime were also strengthened, including cross-border cooperation against document fraud and

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\(^6\) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Security Agenda, COM (2015) 185 final, Strasbourg, 28 April 2015.

\(^7\) Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The European Agenda on Security/ COM/2015/0185 final.
other forms of illegal use of procedures of entry and legal residence. In particular, the EUNAVFOR MED mission shares its area of intervention with the Triton operation of FRONTEX agency. Therefore, following an analysis of the competences, widely discussed in the doctrine, and the evolution that FRONTEX has had since its establishment to date, the collaboration relationship that Triton, now Themis, will entertain with EUNAVFOR MED, will be outlined, as well as the respective tasks they have assumed since 2015. It is interesting, then, to refer to the role that EUROPOL plays in the collection of information and intelligence coordination, focus on the first phase of SOPHIA operation, extending, for the sake of completeness, the analysis to the setting of police cooperation within EU.

§ 2 – The Action Plan to Combat Migrant Smuggling within the European Agenda on Migration

Preventing and combating migrant smuggling and human trafficking are integral parts of European immigration policy. Furthermore, the Community (now Union) joined, in 2006, the two additional protocols to the United Nations Convention against Transnational Organized Crime concerning the fight against smuggling and trafficking, as well as having set up specific legal instruments to regulate this area. Directive 2011/36/EU of April 5, 2011, which replaced a previous Council framework decision adopted in 2002 is dedicated to the prevention and repression of trafficking in human beings and protection of victims. Migrants are instead contained in two distinct instruments: Directive 2002/90/EC, which defines the

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11 Council Directive 2002/90/EC of 28 November 2002, aimed at defining the facilitation of illegal entry, transit and residence, in the Official Journal L 328/2002, p. 17 et seq. As can be seen, therefore, the definition provided by the directive differs significantly from that established by the Palermo protocol, which inevitably has repercussions on the lines adopted by the member countries.
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conduct of “anyone who intentionally helps a person who is not a citizen of a member state to enter as a crime of” aiding in entry and illegal transit “and transit in the territory of a member state in violation of the legislation of that state relating to the entry or transit of foreigners”12, regardless of whether the subject acted for profit12; the framework decision 2002/946/GAI13, which establishes minimum rules for sanctions, the liability of legal persons and jurisdiction14. Furthermore, in order to favor an effective repression of both crimes, Directive 2004/81/CE was adopted, which allows the issuance of a special residence permit to victims who cooperate with the competent authorities to bring the traffickers to justice.

Coming now to the European Agenda of May 2015, it begins by placing emphasis on the priority of protecting people in need. To fulfill this imperative, the Commission has identified six short-term actions: tripling the FRONTEX15, Triton and Poseidon operations, in order to coordinate operational support at member states borders under pressure on the one hand and to help to save the lives of migrants at sea.

The relocation of migrants in need of international protection would replace the distribution defined by the Dublin Convention, signed in Ireland on June 15, 1990, according to which the state of first landing would have to take charge of analyzing the asylum applications of migrants arrived in its own territory, in order to prevent immigrants from presenting asylum applications in several member states (asylum shopping) and to limit the phenomenon of “immigrants in orbit”, i.e. EU, of migrants in need of international protection; the resettlement of displaced persons with a clear need for international protection16; the establishment of a new method based on the “hotspots” to which the European Asylum Support Office (EASO), FRONTEX and EUROPOL cooperate, in order to conduct

15 It is useful to note here that the creation of Triton dates back to November 2014, following the interruption of Operation Mare Nostrum. The passage from the second to the first operation has raised many criticisms from international organizations in defense of human rights, precisely because of the primary objective of border control, and not of saving lives at sea, which characterizes the Triton mission.
16 On 18 February 2003 the Convention was replaced by Regulation (EC) No. 343/2003 (better known as the Dublin II Regulation). On 26 June 2013 the Dublin II Regulation is in turn replaced by Regulation (EU) No. 604/2013, known as Dublin III, which is based essentially on the principles of the previous Regulation and of the previous Convention.
identification operations quickly, registration and fingerprinting of incoming migrants; and the creation of a CSDP aimed at dismantling traffic networks in the Mediterranean, identifying, seizing and destroying the boats used by traffickers.

Alongside the aforementioned short-term actions, the Agenda identifies four pillars “for a fair, solid and realistic Union migration policy”: reducing incentives for irregular immigration; save lives and secure external borders; establish a strong asylum policy, based on the creation of a national network of Dublin units and the full implementation of the law on fingerprints; create a new legal migration policy.

With regard to the second pillar, the agenda introduces the so-called smart frontiers initiative (smart frontiers), aimed at “inaugurating a new phase to make border crossings more effective, facilitating the crossing of the great majority of third-country nationals who they are travelers ‘in good faith’ and strengthen the fight against irregular immigration, creating a register of all transboundary movements of third-country nationals, in full respect of proportionality”.

Despite the repeated priority declared in the agenda with respect to the protection of migrants lives, and the humanitarian purposes connected with them, the actions defined in it are mainly focused on defending regional boundaries and community security, rather than on protecting trafficked migrants. The strengthening of FRONTEX’s operational activity, formally authorized through the communication of the European Commission (EC) for a coast and European border guard and an efficient management of the external Europe borders, implies the creation of a semi-military natural agency composed of FRONTEX and the main coastal authorities of member states, in order to facilitate the implementation of the main EU border control standards, and to support states in difficulty in defending their borders.

In conjunction with the agenda, EC introduced an Action Plan against Migrant Trafficking, which presents the specific actions needed to implement the European Agenda on Migration and European Security Agenda, adopted by EC on 28 April 2015, and makes cooperation against migrant smuggling within EU and with third countries a priority in the fight against organized crime networks.

In addition to reaffirming the need to address the root causes of irregular immigration, in cooperation with the countries of origin and transit, the common security policy gave particular emphasis on the need to strengthen the action of police and judicial authorities. The Plan aims to establish a single contact point on migrant smuggling to strengthen operational cooperation,
coordination and information sharing between member states and with EU agencies. Eurojust, for example, was tasked with setting up a thematic group on migrant smuggling to strengthen and formalize cooperation between national prosecutors and promote judicial assistance, in particular through the establishment of joint investigation teams. In this regard, a Letter of Understanding was signed between Eurojust and EUNAVFOR MED on 1 October 2015, through which the European agency and mission are committed to sharing information useful for combating the traffic of migrants and trafficking in human beings and to establish areas of cooperation aimed at fostering the communication and training of officials in this area.

Actions against trafficking carried out within the EU policy cycle to combat organized crime and serious forms of international crime were also strengthened, including cross-border cooperation against document fraud and other forms of illegal use of procedures illegal entry and stay.

The exchange of information, moreover, has assumed considerable importance, also in relation to the latest news reported by the magistrates of Palermo Antimafia District Directorate, involved, in 2015, in the operation Glauco II which led to the arrest of Eritrean, Ethiopian subjects, Ivorians, Ghanaians and Guineans on charges of having favored the illegal entry, making huge profits, of hundreds of compatriots who have revealed that transnational networks are characterized by the ability to organize themselves even in hostile territories and are equipped with codes of concerted, standardized and tested behavior, as well as considerable managerial skills. In this regard, from the investigations of the Italian investigators it has emerged that the criminal organizations are used to create a sort of decalogue for the migrant, containing instructions on how to behave and how to avoid, if necessary, the procedures of photo signaling and ascertainment of ritual. Beside the decalogue, the groups that organize the traffic use an alphanumeric cataloging and recognition system for migrants. This code, in addition to being provided to the relatives of the passenger for information on the journey status of his relative, plays a fundamental role for the traffickers, since it allows the control of payment flows correctness. The journey, in fact, is not paid in a single tranche. The payment is made in relation to each individual passage of the planned route. As emerges once again from the Glaucus II operation, proof of the existence of this accounting mechanism is provided by telephone interceptions made against the heads of

20 Letter of Understanding on Cooperation between Eurojust and EUNAVFOR MED, firm a Rome from the President of Eurojust, Michèle Coninsx e, per EUNAVFOR MED, from Brigadier Maurizio Ricciò, of 1st October 2015.
organization. The investigations of state police have also ascertained numerous “intercontinental” contacts, which occurred between members on the opposite shores of the Mediterranean, through programs that use VOIP protocols, such as Skype, Whatsapp or Viber. From the aforementioned interceptions illegal money transactions have emerged, for hundreds of thousands of euros.

In addition to the above, the Plan also identifies among the actions to be undertaken the identification, seizure and destruction of traffickers vessels, as well as the promotion of proactive financial investigations for the confiscation and recovery of crime proceeds, and anti-money laundering initiatives.

It clearly emerges that in the case of trafficking organizations it is extremely complicated to quantify, locate and remove from them the illegal revenues obtained from travel. The privileged illegal circuit for money transfers is in fact the so-called “hawala”22. It is an informal value transfer system, based essentially on a “trust” relationship, which allows to avoid the traceability of legal banking and fiduciary circuits23. The EU Action Plan states that “law enforcement authorities must have the capacity to target the financing of organized crime responsible for traffic”. “Looking for money connected with traffickers’ networks should become a priority for the national asset recovery offices and the Camden inter-agency asset recovery network (CARIN)”. The EU would also have had to intensify its cooperation with third countries considerably to enable the proceeds of crime to be traced and confiscated in the countries of origin and trafficking of migrants.

The third point of the Plan then focuses on the prevention of trafficking and assistance of vulnerable migrants. In addition to the importance of raising awareness among migrants about

22 The “hawala” system has its origins in the past, when merchants who wanted to send money to their lands of origin made a deposit with a “hawala banker” who, in exchange for a small commission, would have arranged for the sum to be made available for withdrawal from another “hawala banker” where requested by the client. The two bankers would then settle the related issues, either by offsetting or through normal trading activity. To date, the system does not differ particularly from how it was originally conceived, with individuals in different parts of the world using their current accounts to facilitate international money transfers. Deposits and withdrawals are made through Hawala bankers and not through traditional financial intermediaries. See M. E. QORCHI, Informal funds transfer systems: an analysis of the informal Hawala system, Washington, International Monetary Fund, 2003.

23 The CPS is composed of delegates from the Member States who are ambassadors and meets on average twice a week. The CPS operates in turn thanks to the cooperation of numerous institutional actors, with whom it constantly interacts, sending them directives and receiving opinions and recommendations from them. These include: the Military Committee (CMUE), composed of Chiefs of Defense of the Member States, which deals with the military aspects of crisis management; the Committee for Civilian Aspects of Crisis Management (CIVCOM), the Politico-military Group (GPM), which is in charge of monitoring, on the one hand, the military aspects of the security sector reform missions, on the other, the EU action in the development of African capabilities of crisis management; the Civil/Military Planning Cell of the General Staff of the EU, consisting of both civil and military personnel and aimed at ensuring greater cooperation/coordination between the military and civilian structures of the CSDP.
traffic risks and intensifying repatriation as a trafficking deterrent, it is worth noting the promise to “increase efforts to offer assistance and protection to trafficked migrants” that would have had to find a glimmer of implementation in 2016, through an “impact assessment on the possible revision of Directive 2004/81/EC regarding the residence permit issued to victims of trafficking and trafficked migrants who cooperate with authorities”.

§ 3 – EUNAVFOR MED OPERATION SOPHIA: MANDATE AND EVOLUTION

The Council Decision (CFSP) 2015/972 of 22 June 2015, which attributes legal effects to EUNAVFOR MED operation, was preceded by a preparatory work phase. The EU Council expressed its willingness to combat migrant smuggling and trafficking in human beings in a coordinated manner in April 2015. This declared intention was followed by the adoption by the Political and Security Committee (CPS)24 of a Crisis Management Concept (CRC), dated May 13, 2015, i.e. a preparatory draft that potentially led to the adoption of a military mission, before the operation was formally launched, on 22 June 201525. The political-military Group (PGM) and the Committee for civil aspects of crisis management (CIVCOM) who, with the support of the Secretary General of the Council, on May 5, 2015, issued a series of recommendations for the creation of a military operation aimed at undermining the trafficking networks of human beings in the central-southern Mediterranean region, including through the seizure and destruction of boats used by traffickers.

The most interesting aspects, in addition to the focus specifically on contrasting migrant trafficking with a reference only after the humanitarian crisis26 on which the final decision stands out strongly, are multiple references to the need to strengthen political dialogue with Libya. This dialogue, already reiterated in PFCA for Libya on 13 April 2015, should have followed the wake of what was already established by the United Nations operation, United Nations Support Mission in Libya (UNSIMIL), in this area. Particular importance, then, is given to the need to identify, seize

24 References to the adoption of a Crisis Management Concept can be found in art. 1, par. 2 of the “Decision (CFSP) 2015/778 of the Council of 18 May 2015 on a European Union military operation in the central-southern Mediterranean (EUNAVFOR MED), in the GJUE of 19 May 2015”, as well as in all subsequent acts produced by the Political and Security Committee relating to the mission in question. Limited additional information relating to the Crisis Management Concept can be found in the “Proposal for a decision (CFSP) 2015/778 of the Council of 18 May 2015 relating to a European Union military operation in the central-southern Mediterranean (EUNAVFOR MED), Brussels, 17 May 2015.”


and destroy the vessels used in the traffic, which is why PGM “welcomes efforts to get a possible operation, based on a Libyan request” (par. 13), as well as the desirable coordination with other Union actors in this region, including, in addition to FRONTEX, EUROPOL, EASO and EUROJUST, and CSDP missions in the Council of the European Union of the Council to the Political and Security Committee, “PGM Recommendations on the draft Crisis Management Concept for a possible CSDP operation to disrupt human smuggling networks in the Southern Central Mediterranean” 27.


Shortly after these recommendations, and again from the point of view of CMC drafting, the opinion issued by the European Union Military Committee (EUMC) to the Political and Security Committee 29, on 12 May 2015 30. This document is particularly relevant as it focuses on some key aspects of the mission including, in particular, the strengthening of coercive measures against traffickers and clear definition of the legal bases within which to operate, which “should be further developed and set in a single document, summarizing the current situation, what freedom of action exists, the open legal issues and actions to be taken to solve these issues”.

The Military Committee also insists on the need to further clarify what is meant by the term “people smuggling”, as well as other related terminology, such as “human trafficking”, “refugees”, “migrants”, “interdiction”, “assets” and others (par. 2), as well as to define a detailed and complete Military Directive (IMD). In its considerations about the mission, EUMC considers it, on the

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29 The Military Committee of the European Union is the supreme military body within the Council of the European Union; meeting place for military consultations and cooperation between EU Member States in the field of conflict prevention and crisis management. It is composed of the Chiefs of Defense (Chiefs of Defense (CHOD), and their military representatives (Milreps). The President of the Committee, elected by the Council among four-star officers, on the recommendation of the heads of defense, remains in office for three years For more information see the “Council Decision of 22 January 2001 establishing the European Union Military Committee”, in OJ, EU, 30 January 2001.
one hand, “militarily challenging given the extraordinarily complex situation on shore”, on the other, “militarily feasible under the premises of a robust legal framework and rules of engagement” (par. 7). Committee’s insistence on the definition of clear and detailed rules of engagement (Rules of Engagement, RoE) must be kept in mind if we consider that in the half-yearly report concerning the implementation of EUNAVFOR MED operation, critical points are still found on an operative point of view. In particular, the definition of RoE is considered fundamental for the recourse to the use of force, repeatedly considered inevitable by the Committee, to be implemented for the seizure of boats “in a non-compliant situation”, for the neutralization of ships and assets of traffickers, in particular hostage rescue situations and for temporary detention “of those posing a threat to the force or suspected of crimes”. Furthermore, rules of engagement are deemed necessary “for the handling of migrants and smugglers”. This reference to the management of migrants for which rules of engagement would be necessary is not further clarified within the opinion of the Committee nor, even less, in the final decision of the Council. Since the rescue obligations of migrants are widely reaffirmed by UNCLOS, whose respect is explicitly recognized by the decision, and that the management of migrants once landed is subject to very specific Union rules, one wonders what is meant for “handling of migrants”. It could be assumed, only at a hypothetical level since the documents made public by the Council do not provide explanations in this regard, that this expression refers to the pre-identification of migrants on board the military ships on which they are transhipped, or to the choice of “port safe” in which the rescued people should be disembarked, or both. In reality, the initial operational plan of the mission, and still in force, establishes that all the migrants rescued in the context of operations to counter smuggling by EUNAVFOR MED must be landed in Italy. As regards the

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33 The fact, reported by various press organs, concerned a boat departed from Egypt, which had loaded migrants from a Libyan port near the city of Zuara. The National Rescue Center (CNS) of the Coast Guard received a phone call from a Thuraya satellite, from which came the request for help from migrants on board. Once the coordinates have been identified by the Italian Coast Guard, the Portuguese container ship King Jacob identified the boat about 70 miles north of the Libyan coast (110 miles south of Lampedusa). According to when told by the commander of the merchant ship, the migrants, seeing the container ship, moved en masse on the same side of the boat, causing the boat to overturn; other testimonies, however, denounced a collision between the container ship and the boat transporting migrants (among others, “Shipwreck in the Sicily Channel” On board in 950, many women and children [...]). Immediately after the shipwreck an impressive rescue operation was launched, which also involved the Triton operation vessels of the FRONTEX agency, naval units of the Coast Guard, the Italian and Maltese Navy, merchant ships and fishing boats of Mazara.
transition to the various phases, EUMC considers of particular importance the intelligence activity to which the first phase is dedicated, even though it considers it not very effective if not followed by the subsequent phases, in particular by the third one (destruction of the ships used by the traffickers), which would represent the apex and fulcrum of the mission. The Committee establishes that the transition from one phase to another, which are to be considered as “an accumulation of tasks and not as independent activities” (par. 9), must take place through a specific recommendation by the Operation Commander (opCdr), supported by EUMC, to Political and Security Committee. The term of the mission, whose duration is indicatively set in one year, is not clearly established in CMC, although some guidelines are given, including the fact that “the flow of migrants and smugglers activities have been significantly reduced” (paragraph 16). At the end of phase one, however, it would be desirable once it has been achieved “a sufficient understanding of migrants smuggling and trafficking business models, financing, routes, places of embarkation, capabilities and identities” (par. 16).

Of particular importance, according to the Military Committee, is the creation of interaction mechanisms, including the exchange of information and, where necessary, the coordination of the use of military means, with other partners, including the United Nations, NATO, the Arab League, Third States (including Egypt, Tunisia and, if possible, a recognized Libyan government), INTERPOL, other Union missions such as EUBAM Libya34, EUCAP Sahel Niger, EUCAP Sahel Mali35, as well as Union agencies such as EUROPOL, EUROJUST, EASO and...

del Vallo (Trapani), for a total of 18 vehicles, coordinated by the Gregoretti of the Coast Guard. The commander of the ship carrying the refugees was sentenced, with a ruling by the Catania GUP on 13 December 2016, to 18 years in prison for aiding and abetting illegal immigration, multiple murder and shipwreck.


FRONTEX. The coordination between the SOPHIA operation and the specialized agencies of the Union will be dealt with later in the present analysis. For the moment it is worth noting that, as far as FRONTEX has tasks that are clearly different from those of EUNAVFOR MED. The Committee requires close cooperation between the external border control agency and the military mission “for the management and transfer of migrants, possible detention and prosecution of smugglers and dispose, or to tow seized vessels” (par. 42).

Coming now to Decision 778/2015, it is interesting to note that in the preamble the Council relies on the need to act “in order to prevent human tragedies resulting in the smuggling of people across the Mediterranean” (par. 1) and expressing “its indignation about the situation in the Mediterranean”, underlines Union's willingness to mobilize “the root causes of this human emergency” and establishes an immediate priority “to prevent more people dying at sea” (par. 2). In par. 3, finally, the Council undertakes to fight the traffickers, in compliance with the rules of international law, “by undertaking systematic efforts to identify, capture and destroy vessels before they are used (by traffickers)” and declares to have informed, on 11 May 2015, the United Nations Security Council on the intent to create, given the “crisis of migrants in the Mediterranean”, a Union naval mission for which its support would have been necessary (par. 4). The declaredly humanitarian intent that emerges from the Preamble is the immediate response of the Union to the largest migrant shipwreck in recent years, which occurred in the Sicilian Channel during the night of 18 April 2015, which caused 58 confirmed victims, among the 700 and the 900 missing

This criticism, shared from the point of view of the coherence of intent, however, does not matter the legal bases, since, as will be seen in the following paragraphs, CSDP actions, pursuant to art. 43 TEU can also cover “humanitarian and rescue tasks”. On the other hand, it is worth noting that the High Representative of the European Union for Foreign Affairs and Security Policy, Federica Mogherini, said in a session before the Security Council that the Mediterranean crisis “is not only a humanitarian emergency, but also a security crisis, since they are linked to, and in some cases

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finance, which contributes to instability in a region that is already
instable enough.

Returning to the central body of the decision, the objective (mission) that the Council attributes to the operation (article 1) is
to contribute to “the disruption of the business model of human
smuggling and trafficking in the Southern Central Mediterranean”
to be accomplished through “systematic efforts to identify,
capture and dispose of vessels and assets used or suspected of
being used by smugglers or traffickers” and in full compliance
with international law, including UNCLOS and any resolutions of
the United Nations Security Council. Going back to the
reflections on the consistency of intentions mentioned above, the
gap between the intention stated in the Preamble to manage a
“humanitarian crisis” and the objective expressed by art.1.
As regards the mandate (article 2), the mission, which should operate “with the political, strategic and political-military
objectives set out in the Crisis Management Concept” is divided
into various phases, the first of which is centered on
identification and monitoring “of migration networks through
information gathering and patrolling on high seas in accordance
with international law”. This evaluation is essentially based on the
identification of the existing models reproduced by the traffickers, obtained from the monitoring of the routes used by
them to cross the Mediterranean sea.

This first phase, as limited to the collection of information, does not require any Resolution of the Security Council for the
purpose of its full implementation. Rather, as will come to light shortly, it is precisely at this time that other Union agencies such
as FRONTEX, EUROPOL and EUROJUST are involved. In
light of this, although the EUNAVFOR MED mission, as expressly established by art. 1 of Council decision that established it,
falls in name and in fact in the category of military crisis management operations, it is worth noting that, at least for
what concerns the first phase of information gathering and intelligence, which also foresees a cooperation with non-military
Union staff and agencies (eg police officers) could also be considered to Operation Sophia not a military operation in the
strict sense, but rather a mixed operation.
The second phase appears to be the most problematic from the

39 Art. 2, par. a): “in a first phase, (EUNAVFOR Med shall) support the detection and monitoring of migration networks through information gathering and patrolling on the high seas in accordance with international law”.
40 Art. 1, par. 1: “The Union shall conduct a military crisis management operation contributing to the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean (EUNAVFOR MED), achieved by undertaking systematic efforts to identify, capture and dispose of vessels and assets used or suspected of being used by smugglers or traffickers, in accordance with applicable international law, including UNCLOS and any UN Security Council Resolution”.
41 Art. 1 of decision: “The Union shall conduct a military crisis management operation [...].”

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applicative and legal point of view, is in turn divided into three sub-phases: in the first, EUNAVFOR MED must lead “boarding, search, seizure and diversion on the high seas of vessels suspected of being used for human smuggling or trafficking” in compliance with the applicable international law, including UNCLOS and Palermo Protocol. In the second, in accordance with “any applicable UN Security Council Resolution or consent by the coastal state”, the units involved in the mission conduct “boarding, search, seizure and diversion, on the high seas or in the territorial and internal waters of that state, of vessels suspected of being used for human smuggling or trafficking, under the conditions set out in that Resolution or consent”; finally, the third, and also most complicated to implement, concerns the adoption, subject to authorization by Resolution of the Security Council or consent of the State concerned (Libya), of “all necessary measures against vessel and related assets, including through disposing of them or rendering them inoperable” which are suspected of being used for trafficking and trafficking in human beings, within the territory of that state.

The reference to prior authorization of the Security Council for the transition to the two subsequent sub-phases is particularly interesting given that in general the establishment of a European mission involving the use of force has always occurred at a later time than the adoption of a Resolution by the Council. Also in this respect, therefore, the EUNAVFOR MED operation represents a unicum; the possibility for the Council to set up the mission without prior authorization from UNSC derives from the division of the operation itself into phases, of which the first (information gathering and intelligence sharing) does not need, for non-military actions included therein, authorization from UNSC, which is necessary for the transition to the second phase. Precisely for this reason, EU Council Decision also acts as an implicit request to UNSC to authorize the second phase, which could have been implemented only after Resolution of the Security Council.

In article 2, moreover, the decision gives the transaction the right to collect, in compliance with the applicable law, “personal data concerning persons taken on board ships participating in EUNAVFOR MED related to characteristics likely to assist in their identification, including fingerprints [...]”.

The mission was officially launched on 22 June 2015 and, since its operational area extends into the central-southern Mediterranean, the choice of headquarters has fallen on Rome, under the leadership of Rear Admiral Enrico Credendino of the Italian Navy. The operation, to which 27 EU member states, has

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43 States that are part of the mission: AUT, BEL, BGR, CYP, CZE, ESP, EST, FIN, FRA, GER, GBR, GRE, HRV, HUN, IRL, ITA, LAT, LIT, LUX, MAL, NED, POL,
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four ships (an Italian Landing Platform Dock, a German frigate, a Spanish frigate and a British ship), two helicopters (one Italian and one Spanish) and four aircraft (two from Luxembourg, one from Spain and one from Poland).

In addition, since the beginning of the Operation, the ships of the European Task Force have been able to contribute to the effort that Italy, with Operation Mare Sicuro, Europe with Operation Triton of the FRONTEX Agency and many other organizations national and international, with whom EUNAVFOR MED is in close coordination, are carrying out in the Central Mediterranean to safeguard human life at sea.

The transition from the first to the second phase of the operation, officially took place on 28 September 2015. It limited the first sub-phase, while it was reiterated that the transition to further sub-phases would be subject to a Resolution by the Board UN Security Council or the consent of the third state concerned (Libya), and should have been publicly declared by decision of the Political and Security Committee.

The Operation officially took the name of “EUNAVFOR MED operation Sophia” on 26 October 2015, from the name given to the girl born on the ship of the operation that had saved her mother on 22 August 2015 off the Libyan coast.

Migrants to be transported are recruited through social media or a sort of travel agency managed by traffic networks outside Libyan territory. Before leaving, the migrants are held in safe houses in peripheral areas a few kilometers from the beach, where they can stay from a few days to several months, to then be transferred to collection areas, where generally the last tranche of payment takes place and tickets and “boarding passes” are distributed useful for the continuation of the journey.

As regards traffic techniques (Tactics, Techniques and Procedures, TTP report), the report shows an evolution. In fact, until the beginning of June, ships sailed independently, led by a couple of educated migrants on the use of GPS and how to make the call to rescue, already planned by the traffickers, as evidenced by the poor supply of fuel, with which the boats could have reached at most 60 miles from the starting coast. From the beginning of June, on the other hand, traffickers have increasingly begun to escort ships to international waters (TTP 2- “Escorted”). The cause, according to testimonies collected by FRONTEX from the

POR, ROM, SLO, SVK, SVE. Only Denmark does not participate in the operation according to its domestic legislation which provides for its “non-direct involvement” in the CSDP (EU Common Security and Defense Policy).

44 Political and Security Committee Decision (CFSP) 2015/1772 of 28 September 2015 concerning the transition by EUNAVFOR MED to the second phase of the operation, as laid down in point (b)(i) of Article 2(2) of Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) (EUNAVFOR MED/2/2015), in OJ, L 258/5, 3 October 2015.


46 This type of autonomous navigation is defined by the “TTP 1-Unescorted” report.

http://ojs.imodev.org/index.php/RIGO
rescued migrants, would be the growing rivalries between groups of traffickers. In reality, following the implementation of the second phase of the territorial mission (TTP 3-“Territorial escort”). The operation commander highlighted the fact that, being smuggling an economic crime, it is important to hit the profits, which is why the transition to the last two phases of the mission would be fundamental, as they would hit the assets of the traffickers reducing their revenues.

EC extended the mandate of the Sophia operation on 20 June 2016 for a further year, until 27 July 2017, also adding two additional tasks to mission’s mandate: the training of the Coast Guard and the Libyan Navy; and the contribution to arms embargo operations according to UN Resolution no. 2292 (2016), then renewed with Resolution 2357 (2017).

The Political and Security Committee of the Union, with Decision (CFSP) 2016/1635 established on 30 August 2016, that EUNAVFOR MED would be involved in the capacity building and training of the Libyan Coast Guard for smuggling activities in deep sea. The training operational plan was agreed through a Memorandum of Understanding, signed on 23 August 2016, between the operation commander, Admiral Enrico Credendino, and the commander of the Libyan Navy Coast Guard and Port Security, Commodore Abdallah Toumia. Numerous other organizations are actively involved in the program, including EUBAM Libya and FRONTEX, and it is divided into three packages: sea training; one on the ground, in dedicated training centers of EU countries; in Libya, and aboard a patrol unit of the Coast Guard and the Libyan Navy. The first 78 members of the Libyan naval corps embarked on 26 October 2016 on EU training ships, in order to “enhance their capability to disrupt smuggling and trafficking in Libya and to perform search and rescue activities, aimed at saving lives and improving security in the Libyan territorial waters”.

The second package of the program began on 30 January 2017 at a training center in Crete. 20 officers of the Coast Guard and the Libyan Navy are trained in various areas, including the legal aspects related to the law of the sea, human rights and strengthening of the awareness of gender equality, as well as research and rescue activities at sea. Furthermore, apart from these training modules, UNHCR and IOM also participated. EU

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Border Assistance Mission in Libya (EUBAM Libya) is a civilian mission set up by the European Union Council on 22 March 2013, at the invitation of Libya itself, in order to support the Libyan authorities in strengthening and developing security for the state borders. Precisely for the purpose it intends to achieve, in the context of this mission, on 14 February 2018. Concurrently on 25 July 2017 with the renewal of the operation until 31 December 2018, the Council added three new supplementary tasks to its mandate: To set up a control mechanism for trainees to ensure the long-term efficiency of the training of the Coast Guard and the Libyan Navy carry out new surveillance activities and collect information on the illicit trafficking of oil exports from Libya, in accordance with resolutions 2146 (2014)\(^{50}\) and 2362 (2017)\(^{51}\) of the UN Security Council; improve the possibilities for exchange of information on trafficking in human beings with the law enforcement agencies of member states, FRONTEX and EUROPOL.

An important measure adopted by the Union, aimed at interfering with the illegal activity of traffickers, is the prohibition, through Regulation 2017/1325, of supplying Libya with inflatable boats and outboard engines\(^{52}\). This Regulation, which modifies the previous, and more generic, regulation (EU) 2016/44\(^{53}\) concerning the restrictive measures to be taken against Libya, specifically addresses the prohibition, after prior authorization, to export all those goods that could be used for the smuggling of migrants and trafficking in human beings, and also includes the prohibition to provide technical assistance for their use or to provide any form of financing\(^{54}\).

Particularly relevant, from the point of view of cooperation and coordination between EUNAVFOR MED and Union agencies, is the establishment, starting from July 2018, of a Crime


\(^{54}\) Art. 2bis, par.1: “1. Prior authorization is required to: a) sell, supply, transfer or export, directly or indirectly, the goods listed in Annex VII, originating or not from the Union, to any person, entity or body in Libya, or for a use in Libya; b) provide technical assistance or intermediation services pertaining to the assets listed in Annex VII, or relating to the supply, manufacture, maintenance and use of these assets, directly or indirectly, to any person, entity or body in Libya or for use in Libya; c) provide financing or financial assistance in relation to the assets listed in Annex VII, including in particular grants, loans and export credit insurance for the sale, supply, transfer or export of such products or for the provision of technical assistance or intermediation services directly or indirectly connected to any person, entity or body in Libya, or for use in Libya.”
Information Cell, a pilot project involving the presence, on the flagship San Giusto, of a team of five experts, belonging to EUNAVFOR MED, FRONTEX and EUROPOL, in order to further improve the exchange of information on criminal activities in the Central Mediterranean sea and provide a platform shared to fully exploit the capabilities of the European Agencies involved. This is the first case in which a police cell is set up as part of a military operation, the first results of which will be published after the first six months of operation.

At the level of information exchange, extremely important, then, is the establishment of the Shared Awareness and De-confliction in the Mediterranean consultative forum (Shade MED), which is repeated every six months, and today has reached its sixth edition, which, organized as part of Operation Sophia, it provides a round table among the various actors involved in the fight against traffic in the Mediterranean. At June 2017 session, for example, there were representatives of International Center of Migration Policy Development, NATO, EUROJUST, the National Antimafia Directorate, EUROPOL and INTERPOL.

§ 4 – EU CIVIL AND MILITARY OPERATIONS: THE LEGAL REFERENCE POINT

The scope of EU policies which naturally includes Operation SOPHIA\(^55\) is that of CSDP\(^56\), as an integral part of CFSP\(^57\), with

\(^55\) The European Union currently has six active military operations: EUFOR ALTHEA/Bosnia Herzegovina (since 2004); EUNAVFOR MED (from 2015); EU NAVFOR/Atalanta (from 2010); EUTM RCA/Central African Republic (from 2016); EUTM/Mali (from 2013); EUTM/Somalia (since 2008); and ten civilian missions: EUBAM/Moldova and Ukraine (since 2005); EUAM/Ukraine (since 2014); EUMM/Georgia (since 2008); EUAM Rafah/Palestinian Territories (since 2005); EUAM/Iraq (from 2017); EUCAP/Somaliland (from 2012); EUBAM/Abyei (since 2013); EUCAP/Sahel Niger (since 2012); EUCAP/Sahel Mali (from 2014); EULEX/Kosovo (since 2008); EU POL COPPS/Palestinian Territories (since 2006).

\(^56\) The Treaties of the European Union contain numerous provisions on external action, which are found both in Title V of the Treaty on European Union (TEU) and in Part V of the Treaty on the Functioning of the European Union (TFEU), and whose objectives are listed in detail in articles 21 and 22 of the TEU. The aforementioned objectives are pursued according to the specific rules of each sector of external action: the TEU includes the Common Foreign and Security Policy (CFSP, Chapter 2, Section 1) and the Common Security and Defense Policy (CSDP) (Head 2, Section 2); Part V of the TFEU, on the other hand, includes the common commercial policy (articles 206-207), development cooperation (articles 208-211), economic, financial and technical cooperation with third countries (articles 212-213), humanitarian aid (art. 214), restrictive measures (art. 215), and international agreements (art. 216-219). For further details see: A. HATJE, J.P. TERHEICHTE, P.C. MÜLLER-GRAFF, Europarechtswissenschaft, ed. Nomos, Baden-Baden, 2018. J. SCHWARZE, V. BECKER, A. HATJE, J. SCHOO, EU-Kommentar, ed. Nomos, Baden-Baden, 2019.

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However, as emerged in the specific case of the fight against migrant trafficking, other sectors within the Union’s competence may also be relevant for external action, although they are not formally classified as such in the Treaties. This is the case, for example, of environmental policy (art. 191 TFEU), fisheries policy (art. 28 TFEU), foreign exchange policy (art. 119 TFEU) and the provisions that are most relevant for the purposes of this work, i.e. those on the control of external borders (Article 77 TFEU). For completeness, it should be remembered that an important CFSP body, introduced following the entry into force of the Lisbon Treaty, is the European External Action Service (EEAS), of which, pursuant to art. 27, par. 3 TEU, the High
particular reference to crisis management missions, which, although not equipped with a uniform model, they can be divided into three groups based on the type of personnel used, namely military (military missions), civil (civil missions) or both (mixed missions).

EU competence to undertake crisis management missions finds its legal basis in art. 43, par. 1 TEU, which lists the types of operations that the EU can carry out: “joint actions on disarmament, humanitarian and relief missions, consultancy and assistance missions in military matters, conflict prevention missions and peacekeeping and crisis management combat unit missions, including missions aimed at restoring peace and stabilizing operations following the end of conflicts”.

Council decisions constitute constitutive acts of CSDP missions adopted ex. articles 28, par. 1 and 43 par. 2 TEU. In general, art. 28 states that “when an international situation requires operational intervention by the Union, the Council adopts the necessary decisions. They define the objectives, scope and means that the Union must have, the conditions of implementation and, if necessary, the duration”. With specific reference to crisis management operations, instead, art. 43 par. 2 establishes that “the Council adopts decisions relating to missions [...] establishing the objective, scope and general methods of implementation”.

The Board’s decision, therefore, governs the general aspects of each operation, starting from the preamble in which it specifies the international context in which the decision matured and the actions possibly undertaken in the same field by EU and others international organizations. In general, in the case of a military mission with coercive powers, the preamble mentions the Resolution of the United Nations Security Council which authorized the operation. Equally relevant, then, are the

Representative avails himself in carrying out his duties. The Service, which works in collaboration with the diplomatic services of the Member States and is composed of officials from the relevant departments of the General Secretariat of the Council and of the Commission and personnel seconded from the national diplomatic services, was created in order to promote consistency between various areas of external action split between TUE and TFEU. J. SCHWARZE, V. BECKER, A. HATJE, J. SCHOO, EU-Kommentar, op. cit.,

It should be noted that international agreements related, mainly or exclusively, to the CFSP are closely linked to the performance of crisis management operations or to the participation of third States in them. These agreements may have as their object the status of the mission in the third country in which it is deployed; the participation of third countries in a specific operation such as, for example, the agreement concerning Montenegro’s participation in Operation Atalanta or the general framework for the participation of third countries in EU operations; and the exchange of classified information.

The civil operations are conducted thanks to the use of three categories of operators: the c.d. seconded personnel, ie public officials who are temporarily seconded to the EU, who come from the ranks of the public administration (policemen, judges, magistrates etc.); operators who, not belonging to any of the national central administrations, are recruited through a call for contribution; and local or international staff employed directly by the Union.

A. MANGAS MARTÍN, Tratado de la Unión Europea, Tratado de Funcionamiento, op. cit.

A. MANGAS MARTÍN, Tratado de la Unión Europea, Tratado de Funcionamiento, op. cit.
provisions of art. 29 which concerns the “decisions that define the Union’s position on a particular issue of a geographical or thematic nature” (Common Positions)\(^6\). The legal value of these Positions is expressed in a less direct way compared to art. 28, which explicitly states the binding nature of EU decisions which have operational interventions, while establishing that states must conform their national policies to EU positions, as well as defend them in international organizations in which they participate (art. 34). In practice, they refer to art. 29 the decisions by which the Union imposes restrictive measures against third states, individuals or groups of individuals. Mostly, these are measures that the Union adopts in implementation of UN Security Council resolutions with the aim of sanctioning, ex. art. 41 Charter of United Nations, behaviors reprehensible on an international level so as to induce the recipients to cease such conduct. In this case, if the restrictive measures concern the arms embargo, the reduction of diplomatic relations or the entry ban for third country nationals, the implementation is up to member states. If instead they have as their object the interruption of economic or commercial relations, or the freezing of capital, the decisions pursuant to art. 29 TEU are accompanied by a Regulation based on art. 215 TFEU, which provides for the binding prohibitions\(^6\) in a binding and directly applicable manner.

Returning to the substantive provisions of decisions in general, they mainly concern: the establishment of the mission; the definition of the mandate, methods of financing, direction and strategic control; designation of the commander or the head of missions, headquarters and indication of the duration. Furthermore, the decisions usually refer to a series of elements that are not then regulated in detail directly by the decision itself, such as, for example, the functioning of the chain of command and control of the operation on the ground, the status and privileges that each of them they enjoy the specific methods of financing, the participation of third states, the management by the latter of information covered by EU secrecy on the territory of the host state.

The heart of the mission planning and management process is the numerous technical documents that are adopted in relation to each CSDP operation. It is useful to mention here the concept of crisis management, adopted by the Political and Security Committee at the outbreak of an international crisis; subsequently, CPS itself assigns the competent bodies to the task of elaborating the strategic options that, in the case of military

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\(^6\) Article 29 TEU: “The Council adopts decisions that define the Union’s position on a particular issue of a geographical or thematic nature. Member States shall ensure that their national policies conform to the positions of the Union”. J. SCHWARZE, V. BECKER, A. HATJE, J. SCHOO, EU-Kommentar, op. cit.

operations, are developed by EU Military Committee, while in the case of civil missions the task is performed by the Committee for Civilian Crisis Management. Subsequently, the planning continues with the elaboration of the Operational Concept (CONOPS) and the Plan for the execution of the operation (OPLAN). The definition of both acts is entrusted to the Operation Commander for military missions, and to the Head of Mission for civil missions, both supported by their respective headquarters. Finally, these documents are sent to the Political and Security Committee, which integrates and re-elaborates them before transmitting them to the Council, which must unanimously adopt them.

The OPLAN deserves a special mention, as it deals with the specific and peculiar elements of each individual transaction. First, it analyzes the general context in which the mission is called to operate and the degree of risk to which it is exposed, so as to be able to develop an effective security plan. The aspects regulated by the Plan include: the list of operational activities in which the mission mandate is articulated; the definition of the overall organizational structure; the ways in which information exchange and reporting activities must be managed; the indication of the lines through which the chain of command and control is developed in the field; clarifications about the rules on the use of weapons; the code of conduct that the personnel employed must comply with; the regulation of the various organizational profiles, such as the management of relations with local actors, logistics, medical assistance and others.

Equally relevant, among the technical documents, are the rules of engagement, that is the political-military directives that regulate the possibility of resorting to force and are also unanimously adopted by the Council. The participating states in the missions can put reservations to the rules of engagement drawn up by the Union, applying more restrictive rules, and limiting the possibility of recourse to force by their military contingents.

It is good to remember, moreover, beyond what was said above, the central role played by the Political and Security Committee, which adopts numerous decisions based on art. 38 TUE. PSC

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64 For military operations, it is the Operation Commander – appointed ad hoc in relation to each mission – to exercise the operational command. In the event that an operation carried out using NATO assets and capabilities, the general command is established at the Supreme Headquarters Allied Powers Europe (SHAPE) and the Commander is Deputy Supreme Allied Commander in Europe (DSACEUR). If, as in the case of the EUNAVFOR MED operation, the headquarters is made available by a Member State, it is this State that performs the role of nation-square and makes the Operation Commander available.

65 Military OPLANS, bearing witness to the important role they hold, are among the classified documents of the Union, unlike the OPLAN for civil missions, which are declassified at least partially. An example of a partially declassified OPLAN is the Operation Plan for the EU Police Mission in Kinshasa (DRC), Eupol Kinshasa, Brussels, 21 April 2010, doc. 5364/3/05 REV 3.

66 Article 38, second paragraph TEU: “Within the framework of this chapter, the political and security committee exercises, under the responsibility of the Council and the High Representative, the political control and strategic direction of the crisis management operations envisaged in the Article 43.” For further details see F. NAERT,
decisions concern, mainly, the appointment of Operation and Force Commander, for military operations, and of the Head of Mission in relation to civil operations; while the decision-making power regarding the objectives of the missions and their conclusion lies exclusively with the Board. Furthermore, CPS can take decisions to amend the OPLAN, RoE and documents that define the chain of command.

Focusing again on military missions, it should be remembered that the Union does not have its own army; consequently, it is necessarily the member states that must make available to the Union military capabilities for the implementation of the common foreign and defense policy (art. 42, par. 3 TEU), through the deployment of national military contingents, on indications provided by EU Military Staff to EU Military Committee (force generation process)\(^67\). Therefore, from a strictly legal point of view, the military contingents posted to the Union operating under CSDP missions are therefore not EU organs, but state bodies temporarily placed at the disposal of international organization\(^68\). In practice, in fact, it can be said that, on the one hand, states maintain the full command and control and, on the other, they operate a transfer of authority towards EU, delegating to EU the operational command and control.

Furthermore, the preparation of these operations requires a double initial decision by the Board: a first, which establishes the mission, followed by a second one, aimed at launching the operation, that is, starting it in practice\(^69\).

\(^{67}\)\(^{68}\)\(^{69}\)
Peacekeeping missions \(^70\), as is known, are authorized to resort to force in legitimate defense, to be understood as a legitimate defense of the mandate and, as such, necessary to guarantee the achievement of the objectives set by it. As part of Union’s military operations, the use of armed force has sometimes been allowed as a last resort for maintaining public order and security, as in the case of EUFOR Althea operation in Bosnia-Herzegovina \(^71\); to crack down on acts of piracy, as in the case of EUNAVFOR Somalia/Atalanta operation; to protect the personnel and installations of the United Nations and other humanitarian organizations; to protect the civilian population under the threat of attack, displaced or refugee, contribute to the stabilization of general security conditions, guarantee the delivery of humanitarian aid and ensure freedom of movement and international personnel, as in the case of the EUFOR Tchad/RCA operation in Chad and in the Central African Republic\(^72\).

There are also situations in which a clear distinction between military, civil or mixed missions is complex, especially if, as in the case of EUNAVFOR MED operation, the objectives that the Union has set are many and by their very nature require the action of not only military organs.

For this reason, it is good to outline the characteristics, in practice, of the civil operations conducted by the Union, whose priority areas were identified in 2000 by the European Council of Santa Maria de Feira\(^73\), dwelling on police operations. The police actions, which represent most of CSDP civilian operations, consist of activities of “consulting, training and observation and activities of an executive nature”\(^74\). Among them, it is useful to mention the European Union Police Mission (EUPM) in Bosnia and Herzegovina between 2003 and 2012; EUPOL-COPPS, operating in the Palestinian territories since 2006\(^75\); EUPOL Afghanistan, present in the country since 2007; EUPOL PROXIMA, which operated in Macedonia between 2004 and 2005, before being replaced by the European Union Police

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\(^70\) D. LIAKOPOULOS, “Kritik an friedenserhaltenden/Peacekeeping Operationen und die Entwicklung des Konzepts der Souveränität im Völkerrecht”, in International and European Union Legal Matters, 2011.


\(^73\) European Council, Presidency Conclusions. Annex I. Report of the Presidency on strengthening the common European security and defense policy, Santa Maria de Feira, 19 June 2000, p. 17 ss.


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It should also be noted that since 2000 EU has established, in the framework of its civil operations, also a series of monitoring operations, including specific actions dealing with border monitoring. This aspect is interesting because, as is evident throughout the present work, EUNAVFOR MED operations represents a unicum difficult to place in the wake of the previous practice and, as anticipated in the previous paragraph, not even the terminology used in its institutional mandate, and even in the Resolution of the Security Council, it helps in identifying the precise purpose with which the mission was established. An example of border assistance missions are the EU Border Assistance Mission at the Rafah crossing point (EUBAM Rafah), deployed since 2005 in the Palestinian territories in order to monitor compliance with the agreement concluded between Israel and Palestinian National Authority, aimed at guaranteeing the movement and access through the Rafah pass; EUBAM Moldova/Ukraine, invested, between 2005 and 2011, with the role of supervising the carrying out of customs operations on the border between the two countries, providing local authorities with technical advice and training, in order to strengthen their capacity to prevent and suppress cross-border crimes.

EUAVSEC South Sudan was also conceptually assimilated to border monitoring operations, established in 2012 in order to provide assistance and advice to South Sudan government in order to contribute to the sustainable and effective functioning of the international airport of Juba, as a result of following the independence of South Sudan. The airport of Juba has ceased to be a local hub of secondary importance, becoming the main international connection route of a state without access to the sea and with insufficient road structures.


79 The operation, in fact, was established through a clause in the Joint Action through which the Council proceeded to modify the mandate of the EU special representative already active in the region: Council Joint Action 2005/776/CFSP of 7 November 2005 amending the mandate of the European Union special representative for Moldova, in OJEU, L 292, 8 November 2005, p. 13 et seq., Art. 1, lett. to, the discipline of the
As part of the Atalanta operation, a dispute arose between European Parliament and Council in relation to the conclusion of the agreement between EU and Mauritius on the conditions of the transfer of persons suspected of piracy and the related assets seized by the naval force directed by EU to the Republic of Mauritius and on the conditions of persons suspected of piracy after the transfer (Dec. 2011/640/CFSP). The Parliament has challenged the decision to conclude the agreement, arguing that it was not a “predominantly” or “exclusively” agreement relating to CFSP, as it also concerned criminal judicial cooperation, which is why the drafting of the agreement should have follow a different procedure.

In light of the above, it emerges that, although the Union has established a single mission of a formally mixed nature, the practice reveals that, beyond their formal qualification as civil missions, there are other mixed missions, such as, for example, EUSEC RD Congo mission, in 2005, and EU SSR Guinea Bissau, between 2008 and 2010.

Moreover, over the last few years, there has been an increase in mixed actions within CSDP, as demonstrated by the simultaneous launch, in 2012, of EUCAP Nestor and EUCAP Sahel Niger, both responsible for carrying out consultancy functions and assistance in the security sector without executive powers.

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operational details of the mission was then entrusted to a Memorandum of Understanding concluded with the countries concerned: Memorandum of Understanding between the European Commission, the Government of the Republic of Moldova and the Government of Ukraine on the European Union the Republic of Moldova and to Ukraine, 7 October 20


81 This is the EU support mission, AMIS II, to the African Union (Council Joint Action 2005/577 of the 18 July 2005 concerning the European Union civil-military support action to the African Union mission in the Sudanese region of Darfur, in GUUE, L 198, 20 July 2005, pp. 46 et seq.). As part of the mission, the civilian component carried out police activities, while the military one provided technical assistance of various childs.


85 Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CSDP mission in Niger (EUCAP Sahel Niger), in the OJEU, L 187, 17 July 2012, p. 48 et seq. Operation EUCAP Sahel Niger is aimed at supporting the capacity building of Niger security operators to fight terrorism and organized crime. The mandate of the operation, established in 2012 to support the Niger authorities in matters related to security and the terrorist threat, has now been more specifically oriented towards assistance for better control and the fight against irregular migration. In fact, Niger is a country of origin and transit for migrants from Central and Western Africa to Libya and then to Europe. The mission had been decided in a different context but now Niger (one of the three poorest states in the world) is facing threats of various kinds: from jihadist terrorism penetrated by Mali, Algeria and Nigeria, to drug trafficking, weapons and human beings, especially in the northern Agadez region.
§ 5 – RESOLUTION 2240 (2015) OF THE UNITED NATIONS SECURITY COUNCIL

EU’s push towards urgent and shared action was welcomed internationally by the United Nations Security Council which, with Resolution 2240 (2015)86 – although the negotiation phase had encountered some difficulties due to opposing resistance from Libya and some African countries, but above all from the Russian Federation-authorized the transition to the second sub-phase. The main issue to be resolved concerned the scope of application of the Resolution, which some states, including Russia, wanted limited to the high seas, while European states wanted to extend to the Libyan territorial waters if not even to Libyan territory (targeted raids on the coast).

A first draft of Resolution was elaborated by Italy and presented by the United Kingdom, which acted as promoter state together with France, Spain and Lithuania. The text proposed by Italy took as its model Resolution 1851 (2008) on the fight against piracy off Somalia, placing itself under the umbrella of Chapter VII of the United Nations Charter87, which authorizes the use of force in the face of threats to peace, violations of peace and acts of aggression. Reference was then made to the rescuing of people who could be on board boats, in accordance with the rules of international law, human rights and international refugee norms.

Resolution's 2240 (2015) text was adopted, after three phases of negotiations, with 14 votes in favor and the sole abstention of Venezuela. Although the final result is substantially unchanged compared to the initial draft presented by the United Kingdom, some aspects have raised more doubts than others, namely the modalities for requesting the consent of the flag state and classification of ex Chapter VII within the text. Starting from the second question, it is linked and is the main cause of the abstention of Venezuela which, in the opinion of the writer, summarizes in an exemplary manner an important conceptual contradiction found in the text, and which is linked, moreover, to the observations that emerged in the previous paragraph regarding the declared purposes and those, instead, implemented through the EU Council Decision88. The application of Chapter VII of the United Nations Charter to a humanitarian crisis would have been, from the point of view of the Venezuelan state, a serious mistake that would have created a dangerous precedent.

87 A. PEILET, The charter of the UNO. A commentary, op. cit.
The complexity of the problem, in fact, would have required a comprehensive approach that went beyond the purely military and security approach that some states were promoting. The text of Resolution, continued Carreño, would in fact have been aimed at preventing migrants from reaching a safe place, through the imposition of a “border policy”.

The problem raised by Venezuela in the UN is being reconnected and adds a further element to the question of the binomial between the defense of the internal security of states and protection of persons involved in the trafficking of migrants. It is clear, in fact, that the management of illegal immigration flows is a phenomenon that is less and less concerned with the purely state sphere and that requires reflection on the ambivalence between the perception of massive migration flows as a threat to international peace and security and the need to manage the humanitarian crises from which these waves of refugees are generated. The overlap of the two types of case in fact risks creating a confusion of goals and the use of means that are not effective and inadequate for the protection of the fundamental rights of the persons involved. In fact, the Resolution is peculiar for the dual purpose that it seems to want to achieve.

On the one hand, in fact, it is part of the recent action taken by the Security Council to combat transnational organized crime, on the other it seems to pursue the goal of safeguarding the lives of trafficked migrants, conceiving the massive flow of refugees as a humanitarian crisis to stem. The Resolution text in fact continues with a statement by the Council, which identifies the reasons for its decisions in the unacceptable perpetration of tragedies in the Mediterranean sea, which resulted in hundreds of deaths, mostly caused by exploitation and misinformation to work of transnational criminal organizations that favor illegal immigration with dangerous and disrespectful methods of human life, in order to obtain a personal gain. Furthermore, the Council emphasizes

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90 Par. 6 ss: “Deploring the continuing maritime tragedies in the Mediterranean Sea that have resulted in hundreds of casualties, and noting with concern that such casualties were, in some cases, the result of exploitation and misinformation by transnational criminal organisations which facilitated the illegal smuggling of migrants via dangerous methods for personal gain and with callous disregard for human life, “Expressing grave concern at the recent proliferation of, and endangerment of lives by, the smuggling of migrants in the Mediterranean Sea, in particular off the coast of Libya and recognizing that among these migrants may be persons who meet the definition of a refugee under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto, “Emphasizing in this respect that migrants, including asylum-seekers and regardless of their migration status, should be treated with humanity and dignity and that their rights should be fully respected, and urging all States in this regard to comply with their obligations under international law, including international human rights law and international refugee law; as applicable, stressing also the obligation of States, where applicable, to protect the human rights of migrants regardless of their migration status, including when implementing their specific migration and border security policies, “Reaffirming in this respect the need to promote and protect effectively the human rights and fundamental freedoms of all migrants, regardless of their migration status, especially those of women and children, and to address international migration through
that all migrants, including asylum seekers and regardless of their status, must be treated humanely, with dignity and in full respect of their fundamental rights, and recalls states to their duties before international law, protection of human rights and refugee law.

The fulcrum of the Resolution is represented by parr. 5-7. In par. 5, the Council authorized member states, pursuant to Chapter VII of the Charter of the United Nations, “to inspect, as permitted under international law, on the high seas off the coast of Libya, any unflagged vessels that they have reasonable grounds to believe have been, or imminently will be used by organised criminal enterprises for migrant smuggling or human trafficking from Libya, including inflatable boats, rafts and dinghies”

The task of inspecting the flagless ships that the Council gives to states, at least from a purely operational point of view, does not add anything new to the right of access established by art. 110 UNCLOS to the provisions of art. 8, par. 7 of the Palermo Protocol which not only authorizes states to visit unmanned ships suspected of traffic, but also “to take appropriate measures in accordance with relevant domestic and international law”. The novelty is found, rather, in the fact that, while the aforementioned conventional texts limit themselves to attributing to states parties the faculty to inspect the flagless ships, the Resolution expressly recommends (calls upon) the intervention. What might also be asked is whether the Resolution gives states additional powers once the ship has been visited. As discussed extensively in chap. 2, in fact, some authors believe that a ship without a flag, being not subject to the jurisdiction of any state, is consequently subject to the jurisdiction of all states, which would include the exercise of powers that go beyond the mere right of access; while others deny the exercise of universal jurisdiction on flagless ships, limiting the powers of intervening states to visit only in order to verify the flag, except for the faculty to exercise coercive powers if there is an appropriate link between the unlawful act committed from the ship and the domestic law of the intervening state. On the other hand, as seen, not even the Palermo Protocol, as far as it implies, in art. 8, par. 7, through the expression “take appropriate measures” that states part of it can exercise on the international, regional or bilateral cooperation and dialogue and through a comprehensive and balanced approach, recognizing the roles and responsibilities of countries of origin, transit and destination in promoting and protecting the human rights of all migrants, and avoiding approaches that might aggravate their vulnerability [...].

91 A. Peulet, The charter of the UNO. A commentary, op. cit.
flagless ship suspected of being involved in the traffic of migrant powers that go beyond the right of access, does not clarify which nor to what extent. It is surprising, therefore, that not even Resolution 2240, which could have dissolved an important interpretative node, at least as regards the mission in question, is limited to inviting states to inspect flagless ships that could be involved in traffic activities of migrants, without defining unequivocally whether and what coercive powers states can exercise, and to what extent. With regard to ships regularly equipped with a flag, the Resolution invites the states “to inspect, with the consent of the flag state, on the high seas off the coast of Libya, vessels that they have reasonable grounds to believe have been, are being, or imminently will be used by organised criminal enterprises for migrant smuggling or human trafficking from Libya” (par. 6). Considering that, pursuant to art. 8, par. 6, of the Palermo Protocol, “each state party shall be designated as an authority or, where necessary, authorities to respond to requests for assistance, for the confirmation of the right to vessel to fly its flag and for authorization to take appropriate measures”, the inspection authorization should be simpler for the states party to Protocol. To facilitate the carrying out of operations among other states, on the other hand, the Resolution authorizes member states, also agents within the framework of regional organizations, to “inspect on the high seas that have reasonable grounds to suspect or to be trafficked from migratory smuggling or human trafficking from Libya, provided for in paragraph 7”. The faculty for states to intervene on ships bearing the flag of another state, no longer subject to prior authorization by that state but provided they have tried to obtain such consent in good faith, finds its justification in the humanitarian objective inherent in this paragraph, which concerns specifically, the cases in which the intervention is implemented “with a view to threatening lives of migrants or victims of human trafficking on board such vessels”. A further piece is then added to par. 8 authorizes member states, for a period of one year from the adoption of Resolution, “to seize vessels inspected under the authority of paragraph 7 which are confirmed to be migrant smuggling or human trafficking from Libya”. The authorization to inspect and seize the ships of which there is certainty that they are used for the trafficking of migrants suggests that these actions do not need to be subordinated to the consent by the state of nationality of the ship, although the obtaining of a explicit authorization is preferable. Therefore, in this case the Resolution would represent an instrument of international law in derogation of the principles of freedom of navigation in the high seas and of exclusivity of the jurisdiction of the flag state. In light of this, and returning to the considerations about the coercive powers that can be exercised on ships without a flag as for par. 6 of the Resolution, it would be a contradiction to believe that the Council gives
member states the power to exercise coercive powers against ships bearing the flag of a state and does not guarantee the same possibility for ships without nationality. Therefore, it is believed that par. 6 confers, albeit implicitly, coercive powers to states even against ships without nationality, although it remains unclear whether the time limit is the same, i.e. one year after the adoption of the Resolution, and the reason why the Council has not thought of making explicit the measures that can be taken against such ships.

§ 6 – THE USE OF FORCE AND PRACTICE OF THE UNITED NATIONS SECURITY COUNCIL, NAVAL OPERATIONS

Once established that the Resolution of the Security Council derogates from some rules of international law, including the rules of the law of the sea previously listed, it is interesting to take a step back and reflect if this derogation, in the form of authorization to exercise powers coercive on the private ships of others ex. Chapter VII of the UN Charter, whether to be considered fully legitimate or not. To this end, it is useful to reflect on the evolution of Security Council’s practice and the interpretation that it has given over time of the concept of “threat to peace”, as an act not completed but in fieri, therefore subject to an eminently evaluation discretion by the Board. On the one hand, in favor of unlimited discretion, it has been argued that the Charter does not define the three concepts since the ascertainment of the concrete case presupposes factual and political, rather than legal, assessments, as shown by the right of veto exercisable by the five members permanent and the absence of Council obligations; on the other, it has been argued that the indeterminacy of the three terms does not prevent them from being interpreted; that the very fact that art. 39 specifies three situations, rather than merely giving the Council a generic power, it denotes a desire to consider the discretion of the Board as limited; that an unlimited discretionary power would make the Council an authority capable of intervening in any situation internal to states; that otherwise the difference, drawn from the Charter, would fall between the conditions of Chapter VI and Chapter VII; and, finally, that the absence of obligations for the Board by itself does not necessarily imply unlimited discretion. Returning to the meaning of the three concepts expressed in art. 39, it is good to first ask what is meant specifically by threat or violation of peace. For peace, traditionally, and as far as can be deduced from the reading of the United Nations Charter, we mean the absence of international conflicts, although part of the doctrine tends to include also inter-state or internal conflicts. In recent times, moreover, some authors have tried to broaden the concept to human security: a set of political, social and economic
circumstances that prevent the onset of future conflicts. For violation of peace, therefore, in the most traditional sense of the term, it is meant that an international conflict is in place, without having reached the most serious level of the “act of aggression”.

Leaving aside the diatribes related to the concept of aggression that would emerge from the course of this study, we now come to the hypothesis that underlies not only Resolution 2240, but also most of the resolutions adopted by the Council pursuant to Chapter VII of the Charter, and which leaves more room for its discretionary power, namely the threat to peace. It is, in fact, a very vague and elastic hypothesis that is not necessarily characterized by military operations or involving more generally the use of war violence, nor by an international offense. Therefore, the resolutions adopted by the Council ascertain a threat to peace in the most varied situations, including situations internal to a state, international terrorism and, as regards specifically the present work, piracy and smuggling of migrants. What unites resolutions on so different themes is the increasingly frequent humanitarian nature of the intervention and the increasingly blurred boundaries between international war and internal war.

Certainly a reflection on the limits, and if any, on the discretionary power of the Council is necessary in relation to situations of threat to peace not characterized by military operations, which is particularly noteworthy if we consider that the coercive measures ex cap. VII escape the exception of domestic jurisdiction. Since art. 39 does not set any limits, as some authors note, in the abstract everything could constitute a threat to international peace and security, but not at any time: it is precisely for this reason that the Council is invested with the power to establish it case by case. Therefore, the only limit to the

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94 The Security Council has ascertained a rare violation of peace on rare occasions, and in all cases it was international conflicts: on the occasion of the Korean War (res. No. 82 of June 25, 1950); of the Falklands/Malvinas conflict (res. 3.4.1982 No. 502); of the war between Iran and Iraq (res. No. 598 of 20 July 1987); and the Gulf War (res. No. 660 of 2 August 1990).
95 Among the threats to peace that caused the Security Council to intervene in internal situations of a state are the racial segregation policies in Southern Rhodesia, in 1966, and in South Africa, in 1977; the violent oppression of a minority, as in the case of the Iraqi repression of the Kurds and Shiites in 1991; the serious and systematic violation of human rights and international humanitarian law in Bosnia and Herzegovina and in Croatia in 1993, in Albania in 1997 and in Kosovo in 1999; the genocide and the killing of civilians in Rwanda in 1994; the proliferation of chemical weapons in Syria in 2013; the spread of the Ebola virus in West Africa in 2014; and others.
96 The Security Council has also considered international terrorism, including ISIS, as a threat to peace, and the proliferation of nuclear weapons in favor of non-state entities—especially terrorist groups—regardless of specific states or specific crises. Hence the question whether the Security Council can exercise global “legislative” powers.

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decisions of the Council would be due to the reaction of the
generality of states of the international community to what the
Council proposes “in their name” (art. 24 UN Charter). Therefore, in the absence of significant disputes, it can be considered that the assessment of the Board is legitimized by all member states in whose name the Council exercises its responsibility.

It should also be noted that the discretionary power of the Council is not expressed only in ascertaining the existence or not of a threat to international peace and security, but also in the identification of coercive measures, pursuant to articles 41, and 42 which, once ascertained, it will decide to undertake.

In light of what has been said so far, from a strictly legal point of view, it is possible to state that Resolution 2240 (2015) is fully legitimate pursuant to art. 39 of the UN Charter, as the use of force was authorized in response to a humanitarian crisis, as per established Council practice.

§ 7 – MILITARY NAVAL OPERATIONS AUTHORIZED BY THE UNITED NATIONS SECURITY COUNCIL

The Resolution authorizing EUNAVFOR MED operation, in fact, represents in some ways a peculiar case in Security Council’s practice, as it stands at the crossroads between the fight against transnational organized crime, specifically the smuggling of migrants, and the intervention in response to a humanitarian crisis.

Part of the doctrine traces the era of Council resolutions focused on the intervention at sea at Resolution 665 (1990), with which the Council called upon the states that cooperated with Kuwait “to use such measures commensurate to specific circumstances [...] to halt all inward and outward maritime shipping [...] to inspect and verify their cargoes and destinations [...]”, thus extending, for the first time, the powers of interdiction of states in response to a threat to international peace and security.

In general, it is possible to identify four categories of resolutions adopted by UNSC in the maritime sphere: those that authorize the states involved in the missions to enter the territorial waters of the coastal state, as in the case of the operation to combat piracy in Somalia; those that allow intervention, in international waters, against ships flying the flag of a third state, without the consent of the flag state being required, as in the case of Resolution 1973 (2011) on Libya; those governing operations on the high seas but which, unlike the previous ones, establish the consent of the flag state as a sine qua non condition for the continuation of the intervention; and the resolutions that could

be defined as “hybrid”, since they govern operations on the high seas where, although it is expected that the consent of the flag state will be required, this however is not a necessary condition for the intervention to be completed.

An area in which the use of naval forces has recently assumed considerable importance, for example, concerns the execution of sanctions decreed by the Security Council. These operations – which in the jargon of the military navies have taken the name of Maritime Interception/Interdiction Operations (MIO)\(^98\) – can be framed within the exceptions to the prohibition of the use of force in international relations and as exceptions to the principle of freedom of the deep sea.

In the case of EUNAVFOR MED operation, only the second area is relevant, since the aim that the Council intends to pursue is to combat the smuggling of migrants and trafficking in human beings, to be implemented through police operations that derogate from the principle of freedom in the high seas, as well as in the exclusive jurisdiction of the state on the ship bearing its own flag.

Resolution 2240 (2015), in effect, represents the first case of authorization for coercive measures on the high seas, not against a specific country, but to counteract a criminal activity. Retracing the practice of the Council, in fact, it is clear that the measures of naval interdiction have been adopted mainly for the purpose of ascertaining compliance with the sanctions against some states. The recent resolutions of the Security Council on the visit of ships suspected of violating the embargo on the high seas do not derogate from the traditional principles of international law of the sea. Resolution 1874 (2009) relating to North Korea invited states to visit ships with suspect cargo, having acquired the consent of the flag state (par. 12)\(^99\). If the consent was denied,
the state would have to divert the ship to an appropriate port in order to inspect the cargo (par. 13). Resolution 2087 (2013) also confined itself to establishing a procedural mechanism for North Korean ships that refused to allow inspection. The power to inspect ships flying foreign flags was not even authorized by subsequent resolutions (2944 (2013); 2270 (2016); 2345 (2017))\textsuperscript{100}. Resolution 1929 (2010), concerning the embargo on Iran of nuclear material and other war material established that states could inspect a suspect cargo on the high seas only with the consent of the flag state, which was invited to cooperate (par. 15). Resolution 1973 (2011), adopted in relation to Libya, which authorizes inspection on the high seas of ships suspected of violating the embargo against Libya, including those flying the foreign flag (par. 13). In light of this, the Security Council proved to be more cautious in the drafting of Resolution 2292 (2016), which authorized EUNAVFOR MED to inspect foreign-flagged ships involved in arms trafficking only after having tried in good faith the attempt to obtain the flag state consent. The authorization is valid for a limited period of time and only for international waters off Libya. The rules of engagement of the mission, moreover, establish a time limit of four hours to allow the state of the flag to express its consent, at the end of which the ships used in the mission are authorized to intervene\textsuperscript{101}.

\section*{§ 8 – The Limits to Implementation of Coercive Measures Authorized by Resolution 2240}

Focusing now more specifically on provisions of par. 5-8 of Resolution 2240, it is clear that all the measures authorized by the Board must be subjected to prerequisites more or less clearly defined. Starting from par. 8, the Council introduces three types of limitations: ratione temporis, since the authorization is guaranteed to member states for a year from the moment of adoption of the Resolution, although, as stated in par. 19, the Board declared the intention “to review the situation and consider, as appropriate, renewing the authority provided in this resolution for additional periods”; ratione materiae, as established in par. 11, provisions of par. 7 and 8 “apply only with respect to the situation of migrant smuggling and human trafficking”, and as stated in par. 10 – which authorizes member states to act “nationally or through regional organizations to use all measures commensurate to the specific circumstances in confronting migrant smugglers or human traffickers in carrying out activities under sections 7 and 8 and in full compliance with international human rights law” – should apply “only in confronting migrant smugglers and human traffickers on the high seas off the coast of Libya”. The ratione materiae limit referred to in par. 8, that is the


\textsuperscript{101} UNSC, S/RES/2292 (2016), 14 June 2016.
fact that states have the right to seize ships of which there is certainty that they have been used for the trafficking of migrants, is closely connected, as well as consequent, to the provisions of par. 7, through which (visit and inspection of the ships suspected of being involved in traffic) it has come to have the certainty of an involvement of the ships that legitimizes the seizure actions. There is also a ratione loci limit as the inspections and seizures of the boats can only be carried out in “the high seas off the coasts of Libya” (italics added), in which waters the Resolution does not authorize any type of more robust contrast action (ex. destruction of traffickers vessels), unlike what was hoped for by EU Council Decision. If, on the one hand, it is clear that Resolution denies the possibility for states to act in Libyan waters, on the other there is no clear demarcation of this area, in particular it is not clear whether the Council uses the term “high seas” it also refers to the areas on which Libya claims its economic control powers. It must be borne in mind that in 1973 Libya declared that the Gulf of Sirte was part of its inland waters. The Gulf was annexed through a line of about 300 miles, along the 32nd 30’ parallel of north latitude.102 However, this claim was rejected by a large number of states, including the main EU members (France, Germany, Italy, Spain and the United Kingdom)103.

Following this incident, in February 2005, Libya also established, through a decision of the Libyan General People’s Committee,104 a fisheries protection zone, in compliance with the General People’s Committee Decision No. 37 of 2005105. Also in this case, the delimitation established by Libya met the protests of various states and EU Presidency: considering that Libya had claimed the Gulf of Sirte as part of its internal waters, the 62 miles of fishing area it claimed would be counted to starting 12 miles from the gulf closing line. Moreover, in 2009, Libya declared an EEZ “adjacent to and extending as far beyond its territorial waters as permitted under international law”, whose external limit has not yet been traced.

In light of this intricate legal framework and the grievances presented by European states with respect to the jurisdictional claims of Libya, one could, firstly, consider that in the context of EUNAVFOR MED operation the annexation of the Gulf of Sirte to Libyan inland waters be recognized, and, consequently, the extension of its territorial waters would be understood not to exceed 12 miles from the coastline. Secondly, the interpretation

of expression “high seas off the coasts of Libya” would lead us to believe with some certainty that the Council includes, in the sense of allowing the action, also the Libyan area of fisheries conservation. Now, from a strictly legal point of view, as seen in chap. 2, art. 86 UNCLOS, to which Resolution implicitly refers when it invites states to respect the rules of international law, establishes that the provisions of the Convention relating to the high seas apply “to all parts of the sea which are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state”. UNCLOS attributes sovereign and jurisdictional powers to the coastal state only as regards the economic exploitation of this area, the protection of the marine environment and scientific research, while reaffirming the freedom of navigation of all other states in that area. Therefore, considering that the authority conferred to EUNAVFOR MED by Resolution 2240 concerns the control of navigation in order to prevent the smuggling of migrants, this authority should extend to the sea area that Libya claimed as its Economic Exclusive Zone (EEC). On the other hand, this reflection seems to be confirmed also by the statement by the Libyan delegate at the time of the negotiations, who did not object to the deployment of European forces beyond the Libyan coast, although he requested “coordination and cooperation with the European Union and the countries concerned, particularly when it involves military operations in the exclusive economic zones of those countries”\(^{106}\).

Still dwelling on par. 8 of Resolution, it is important to ask about the second part, in which it establishes that “further action with regard to such vessels should be taken under the authority of any third parties who have acted in good faith”, to clarify to what further measures the Council alludes. Considering that in the first part of par. 8 the Council already authorizes the seizure of the boats involved in the traffic, it is plausible to assume that with this expression it refers to the confiscation of these boats by the national courts of member states, as well as to their destruction; this hypothesis is confirmed by the reference to Decision 2015/778\(^{107}\) which is found in the preamble to the Resolution. However, it is not to be excluded the possibility for member states to immediately destroy on the high seas the boat of which there is certainty that it has been used for the trafficking of migrants if, in good faith, the commander of the ship in service considers that offending boat cannot be conducted in a port due to the difficult sailing conditions. In this regard, it is worth noting that in the first six-monthly report of the

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EUNAVFOR MED operation the same commander stated that, in the period between January and December 2015, 67 boats had been destroyed and that, in general, the ships intercepted by EUNAVFOR MED were being destroyed at sea whenever it was not possible to take them to the port, pointing out that abandoning them at sea would have been a danger to navigation.

Returning now to par. 7 of the Resolution, there are additional prerequisites that states must meet in the implementation of the Resolution: the warships involved in the operation must act on the basis of “reasonable grounds to suspect” that the boats “are being used for migrant smuggling and human trafficking” and they must adopt “good faith efforts” to obtain the consent of the flag state of the ship suspected of being involved in traffic.

§ 9 – THE SCOPE OF SOPHIA OPERATION: THE RELEVANCE OF THE CONSENT OF THE ENTITLED PARTY

Since Resolution 2240 authorizes the military intervention of states only in international waters close to the Libyan territorial waters, the consent of the entitled party, i.e. Libya, would reveal only in the hypothetical case of the implementation of the third sub-phase (of the second phase) of EUNAVFOR MED operation. As stated, this consent acts as a cause for the exclusion of the offense in application of the willing principle not fit injury that, in order to be fully satisfied and not exploited by the states that allege it, however, it must be subordinated to some necessary conditions, which is worth remember below. First of all, the consent must be given by the government that is effectively representative, which is obviously complicated to verify if a prolonged civil war solution is in progress or if a coup d’état has taken place in the country where the intervention takes place. The expression of will of the territorial sovereign, then, must be valid, that is not affected by the willful defects (consent given by mistake, taken with intent or extorted violently), and expressed in accordance with the provisions of the domestic law of the territorial sovereign of fundamental importance. Once the conditions of consent deriving from the ordering of the lending state have been satisfied, it is essential that the action of the intervening state does not violate rules that oblige it to hold a certain behavior not only towards the territorial state, but also towards the others members of the international community. Finally, consent must not be contrary to a peremptory norm of international law. With the 2015/778 Decision, the Council of the Union called for an intervention of the European military force also in Libyan territorial waters through “any applicable UN Security Council Resolution or consent of the coastal State concerned”. As regards the consent of the state concerned, during the drafting of the Resolution draft, the then recognized Libyan Government, based in Tobruk, proved reluctant to grant any authorization in this regard; and in any case, the Government
of Tobruk did not control the entire Libyan territory, which would have complicated the conduct of operations in areas controlled by opposing factions, which exercised their authority in particular in the region of Tripoli and its ports. On the other hand, moreover, the Government of Tobruk had openly declared that it would not have given its consent if the Union had decided to negotiate with the opposing movements.

Considering, therefore, that it was at least improbable to be able to operate with an effective consensus on the part of Libya, from a strictly legal point of view the Security Council, acting under the aegis of Chapter VII of the Charter, could still have authorized coercive actions in the territory or in Libyan territorial waters, even without the government’s consent. However, as previously mentioned with regard to the negotiation phase, this possibility proved immediately impossible due to the position taken by two permanent members of the Council, China and Russia, and of the African and Asian states, who reaffirmed the need to respect fully the sovereignty and territorial integrity of Libya.

The question of consent, then, appears to be relevant also in relation to provisions of par. 7 of the Resolution, which allow member states to inspect the ship suspected of being involved in the smuggling of migrants as long as they “make good faith efforts to obtain the consent of the vessel’s flag state”. The prerequisite of acting “in good faith” imposed on states by the Resolution does not represent a novelty in the practice of the Council: for example, in par. 5 of Resolution 2146 (2014), still relating to the Libyan crisis, member states were authorized to inspect in the high seas ships suspected of illegally transporting crude oil from Libya, provided that they “before taking the measures authorized in paragraph 5, first seek the consent of the vessel’s flag state”; in that case, the authorization to perform the inspections, however, was reserved for the ships that had been previously identified by a committee of the Security Council. A second example can be found in Resolution 2182 (2014) on Somalia, in relation to the application of the ban on coal exports and the arms embargo. Paragraph 15 of this Resolution, in particular, authorizes member states to inspect, in Somali territorial waters and in international waters beyond the coast of Somalia, the ships of which there is a well-founded suspicion that they are violating the export ban or the embargo; the following paragraph then asks the states, before proceeding with the inspection, “to make good faith efforts to seek the consent of vessel flag state.”

108 UN Doc. S/PV.7531, in particular the declarations of Ciad (p. 3), Malesia (p. 4), Cina (p. 6) and Giordania (p. 7).
was adopted to meet the concerns of some Council member states about a possible erosion of the freedom of navigation and the principle of exclusive jurisdiction of the flag state. Returning to Resolution 2240 (2015), the text of par. 7 clearly implies that, before carrying out the inspection, warships must request permission from the flag state of the suspect ship. On the other hand, this provision also means that the inspection can take place even without the explicit consent of the flag state, provided that the intervening state has made efforts in good faith to obtain its consent. Having said this, the scope of the formula adopted by the Council raises considerable problems of interpretation, which could be clarified by the Operational Plan (OPLAN) of the operation and the Rules of engagement.

Still in the context of the hypotheses, given that certain answers cannot be obtained from the public documents on the transaction, it could be considered that the inspection, after efforts in good faith, can be completed in the event of failure to reply by the requested state. If this possibility is accepted as valid, the time frame within which this response should reach the requesting state, and not even in which way, that is to say in writing and in a more or less formal manner, remains uncertain within Resolution 2240. The only indication in this regard can be found in par. 9 of the Resolution, in which it is established that the states that have received a request pursuant to par. 7 and 8, are called “to review and respond to them in a rapid and timely manner”. Trying to summarize in a coherent manner the outlined so far, therefore, it could be considered that the intervening state acts in good faith if it transmits the request to the flag state of the ship suspected of being involved in the trafficking of migrants and, before approaching such a vessel, awaits for a period of time that is reasonable in relation to the specific and particular circumstances of the case.

Par. 8 of the Resolution seems to imply that there is no need for explicit consent by the flag state for the seizure of the ships for which there is evidence that they were used for the smuggling of migrants. One might ask, however, if the state should instead behave differently in the event of explicit refusal of inspection by the requested state. To answer this question, it is useful to refer to the interpretative criteria of the Security Council resolutions outlined by the International Court of Justice, according to

111 Res. 2182(2014), UN Doc. S/PV.7286, of 24 October 2014 and in particular the declarations of Gna and Argentina (p. 4 e 5).
112 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports, 2010, pp. 403 ss., par. 94: “The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.”
113 UN Doc. S/PV.7531, cit. supra, nota 54, pp. 6-7. “in those cases in which there exist reasonable grounds to suspect trafficking in migrants or human trafficking and always within the legal framework of the norms established by the United Nations Convention
which the interpretation of the Resolution must be linked to the declarations of member states during the negotiation phase. Returning, therefore, to the positions of Chile and Russia\textsuperscript{114}, which have repeatedly reiterated the need to interpret the Resolution in such a way as not to affect the principle of exclusive jurisdiction of the flag state, it is considered that the “good faith” formula efforts “represents a compromise between the model, sometimes adopted by the Council\textsuperscript{115}, characterized by the authorization to inspect the vessels without their consent, and the traditional norm according to which, before inspecting the ship, the requesting state must obtain consent from the requested state, confirmed also, as seen, from the Palermo Protocol. It could therefore be considered that if the consent is expressly denied by the flag state, the intervening state should desist from continuing the inspection and seizure operations.

§ 10 – THE ATALANTA OPERATION IN SOMALI WATERS

The repression of piracy and acts of robbery at sea off the Somali coast has been the subject of numerous Security Council resolutions. Resolution 1816 (2008), in particular, established that, for a period of six months, the states that cooperated with the transitional federal government of Somalia could enter the Somali territorial sea and exercise, in compliance with international law and specifically with law inoffensive passage, “any act necessary to suppress acts of piracy and robbery in the sea” (par. 7). Moreover, this Resolution allowed interventions to combat piracy off the coast of Somalia, but also authorized land-based operations, granting states or regional organizations notified by Somalia’s federal transition government to take “all necessary appropriate measures in Somalia” to prevent anyone from using Somali territory to plan, facilitate, engage in piracy. Furthermore, it authorized the states and regional organizations to cooperate in combating piracy by deploying ships and military aircraft, seizing and dispatching ships and weapons, following the letter of Somalia’s federal transitional government requesting international assistance to counter the resurgence of piracy.

The Resolution, as explicitly stated in par. 8 and 9, contained an intervention authorization justified by the inability of Somalia to provide for itself the repression of piracy in its territorial waters, and which, therefore, was based expressly on the consent of the


Somali transitional government, was valid only within the limits of the consent of Somalia, in respect of the principles described above which are the basis of the consent of the state as the cause of exclusion of the international offense. Therefore, it is to be excluded that this Council decision can be invoked in the sense of establishing a precedent for the formation of customary international law (paragraph 9).

Later, Resolution 1838 (2008) confined itself to inviting states to exercise the powers provided for by Resolution No. 1816 (par. 3) and to confirm its limits (par. 8). Resolution 1846 (2008), after having accepted the initiatives of states and regional organizations (including NATO and EU) to follow up the fight against piracy in Somalia (section 6), decided that, for a further period of twelve months, states and regional organizations that cooperated with the transitional federal government in the fight against piracy could exercise the powers already established by Resolution 1816 (2008) (par. 10), reiterating the limits of the authorization (par. 11). This authorization, and the exhortation to follow you, was reiterated with Resolution 1851 (2008), following the request by the Somali transitional federal government (section 6), again confirming the limits (section 10). All of these authorizations acted as recommendations aimed at urging states and regional organizations to combat piracy off the coast of Somalia. In fact, they are expressly valid only within the limits of the consent of the Somali Federal Transitional Government and the applicable law of the sea. However, just as for the EUNAVFOR MED operation, it is necessary to stress that the internal police force is authorized, with the consent of the local government, rather than the international force, so that the authorization comes close to those concerning the multinational presences involved in peace-keeping operations.

§ 11 – The FRONTEX Agency: Mandate and Evolution

The European immigration management strategy has focused, in particular in recent years, on trying to prevent the entry of migrants within EU borders. This attitude, as highlighted by some authors, has produced a twofold change, temporal and spatial, compared to the traditional immigration control; if, on the one hand, border surveillance takes place before the individual has reached the physical border, on the other hand control is increasingly carried out in an extraterritorial perspective.

In fact, the legal basis relating to the management of the external EU borders is attributable to articles 67 and 77 TFEU, relating, among other things, to the development of “a common policy on the control of external borders” which includes “the control of persons and the effective surveillance of the crossing of external borders”.

borders”, as well as the gradual establishment of an “integrated external border management system”\textsuperscript{117}. From this base, a slow and progressive development took place within the Union, culminating with the establishment of the FRONTEX Agency, established on 25 November 2004 as a security agency for the management of operational cooperation at the external EU borders of member states\textsuperscript{118}.

The Agency, a real community body with legal personality, has the task of coordinating operational cooperation between member states in this area; to assist them in the formation of national border guards, also by developing common rules on training; prepare risk analysis; follow the evolution of research on the control and surveillance of external borders; helping member states facing circumstances that require enhanced technical and operational assistance at the external borders and providing member states with the necessary support to organize joint return actions.

The task of managing external borders takes place through the organization of pilot projects or joint operations, which are more relevant for the purposes of this analysis, and which can start on the basis of a risk analysis conducted by the agency; when a member state proposes a joint action; if a member state finds itself in an emergency situation and requests the intervention of the Agency.

Given the aforementioned provisions, two key questions have been raised in the doctrine regarding the delegation of state immigration control powers to the European agency. The first is whether FRONTEX acquires executive powers in member states territory; the second is whether it can exercise binding decision-making powers towards the states during the organization of operations. As regards the second point, the founding regulation makes it clear that the Agency can promote initiatives independently or in agreement with the member states involved\textsuperscript{119}, thus excluding the obligation for states to participate in projects against their own will. Returning to the first question, instead, art. 10 of the regulation states that “the exercise of executive powers by the staff of the Agency and member states experts acting in the territory of another member state is subject to the national law of the Member State in question”, but a definition is missing specify what is meant by executive power.

An important evolution of the agency, strongly desired by the Union as explicitly stated in the European Agenda on migration, took place between 2015 and 2016, with the adoption of the

\textsuperscript{117} A. MANGAS MARTÍN, Tratado de la Unión Europea, Tratado de Funcionamiento, op. cit.


\textsuperscript{119} Art. 3 reg. EC 2007/2004: “The agency evaluates, approves and coordinates the proposals of the Member States relating to joint operations and pilot projects”. 

http://oj.sjimod.com/index.php/RIGO
Regulation (EU) 2016/1624, which established the transition from FRONTEX to a European Border and Coast Guard Agency (European Border and Coast Guard Agency, ECGBA). This reform has considerably innovated the previous system, with the declared intention of “guaranteeing an integrated European management of the external borders, with the aim of effectively managing the crossing of external borders” (article 1 of the regulation).

The proposed regulation was presented by EC in December 2015 as one of the key instruments to tackle an unprecedented migration crisis for the Union. Furthermore, ECGBA is not a legal entity, as it retains the legal status of the original FRONTEX. However, compared to the latter, it has been equipped with new tools and competences, with the consequence that its role in the institutional architecture is significantly extended.

The agency does not make use of its own staff, as the border guards it has are officials of member states, in a total number that must not be less than 1500 border guards or other competent personnel (art. 20, par. 5). Furthermore, it is envisaged that for rapid intervention member states missions should provide this staff no longer on a voluntary basis, but obligatorily, unless “they are faced with an exceptional situation that substantially affects the fulfillment of tasks national law” (art. 20, par. 3). In addition to what has been said, the regulation introduced an element of hierarchy in the system: the agency, in fact, has the task of defining an operational and technical strategy for the European integrated management of borders (article 3, paragraph 3), and to promote and ensure the implementation of this integrated management in all member states (article 3, paragraph 2). The respective national strategies, on the other hand, must align, or at least be compatible, with the European strategy.

The major novelty introduced by the regulation is the supervisory role attributed to ECGBA. In fact, it must carry out a

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vulnerability assessment to verify the capacity and readiness of member states to face challenges at their external borders. As part of its monitoring action, the agency, through its liaison officers located in member states, is in charge of collecting the information needed to assess the national measures taken at the border sections to which a high level of impact has been attributed. In the event of the inability of a state to guarantee control of the part of the border in question, the Board of Directors, on the proposal of the Executive Director, adopts a decision that establishes the necessary corrective measures to be taken by the member state concerned (art. 13, paragraph 8). If the latter does not take the appropriate measures within the prescribed period, the Commission proposal envisaged the possibility of adopting further initiatives, including the adoption of a Commission implementing decision which envisaged direct action as a last resort of the agency, through, among other things, the preparation of rapid interventions as well as the activation of European coast guard and border teams.

However, this right of intervention has raised doubts about compatibility with the primary law of the Union which, as is known, reserves the functions of maintaining public order and protecting national security in the exclusive competence of member countries; consequently, with regard to the matter, important objections have arisen from the Council, which amended the proposal on this point by adopting the implementation decision regarding direct intervention (art. 19).

§ 12 – COORDINATION BETWEEN FRONTEX AND EUNAVFOR MED: FROM TRITON TO THEMIS

In response to the two Lampedusa massacres, the operation, under the command of the Chief of Staff of the Defense on 15 October 2013 delegated to the Italian Navy, in addition to having the declared objective of avoiding the repetition of massacres. Its purpose was to act as a deterrent against those who organize human trafficking, intercepting them before they could abandon their passengers at sea and seizing them, therefore, in full flagrante delicto. In fact, this mission strengthened an existing device engaged in the Constant Vigilance Operation (OCV), which began in 2004 to ensure the control of migratory flows.

The new Italian border control operated jointly and in synergy with the activities planned by the European Agency FRONTEX and with EUROSUR, the pan-European system of land and

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123 Within EUROSUR, operational since 2 December 2013, all European operations are carried out, including FRONTEX joint missions, and Member States can exchange information and data, so as to better define intervention strategies. EUROSUR is also supported by a signaling service facilitated by satellites and drones and each State involved must have a national control center for this new surveillance system (EU Press Release, “EUROSUR Part: new tools to save migrants’ lives and preventing crime at the borders of the European Union”, Brussels, 29 November 2013. The EUROSUR apparatus has a cost of about 35 million euros a year, but part of the sum is absorbed.
sea borders, established following the European summit in October 2013 in which Italy had called for the strengthening of FRONTEX agency in the Sicilian Channel.

The noble intentions of the mission, however, gave rise to two main criticisms: the first concerned the fact that the operation, born as an emergency, was still managed as such, without having obtained any additional help or having found a more effective coordination with other European states (with the exception of Slovenia) under the auspices of FRONTEX; the second criticism concerned the fact that the humanitarian mission was carried out by a military body of the state. In fact, even then they argued that it would be necessary to clarify the procedures for the first identification of migrants which, in order to decongest reception centers where refugees refuse to be fingerprinted for many days, can be performed directly on ships. According to art. 18 EURODAC\(^{124}\), in fact, the states, before proceeding with the taking of fingerprints, must inform the person about the identity of the controller and possibly his representative; on the purposes for which the data will be processed within EUROdac; on data recipients; on the existence of a possible obligation to take fingerprints; of the existence of a right of access to the data concerning him and of a right to rectify such data. Carrying out such procedures on board patrol boats on the high seas is complicated and even more serious if real interrogations had been carried out on board the Mare Nostrum operation, without any procedural guarantee, even in light of the conditions psycho-physical in which foreigners surviving a shipwreck are found.

As regards the repression of the crime of trafficking in migrants, also inherent in the objectives of the operation, the police activity led to the arrest of dozens of smugglers and the seizure of two “mother ships” operating off the coast of Italian coasts.

The establishment, on 1\(^{st}\) November 2014, of the joint operation FRONTEX Triton, therefore, coincided with the definitive

by the credits disbursed for FRONTEX. The first country to join was Finland, whose Prime Minister ensured that surface units would be sent to help Italian ones, while on 25 October, during the European summit in Brussels, two more important adhesions came from France and Holland, which they arranged the strengthening of FRONTEX through the dispatch of aircraft.

\(^{124}\) “Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 establishing ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) no. 604/2013 which establishes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection presented in one of the Member States by a third-country national or a stateless person and for requests for comparison with the Eurodac data submitted by law enforcement authorities of the Member States and by Europol for law enforcement purposes, and which amends Regulation (EU) no. 1077/2011 which establishes a European agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast)” in OJ, L 180/1 of 26 September 2013. The EURODAC System allows the countries of European Union to help identify asylum seekers and people apprehended in connection with an irregular crossing of an external EU border. By comparing fingerprints, EU countries can verify whether an asylum seeker or a foreign citizen, who is illegally present on his territory, has already submitted an application in another EU country or if an asylum seeker has illegally entered an territory of the Union.
EUNAVFOR MED mission and collateral EU operations for the fight against smuggling of migrants – Dimitris Liakopoulos

closure of the Italian operation Mare Nostrum, and took place at the request of the Italian authorities themselves. In July 2015, the mission’s operational plan underwent the first enlargement, with the extension of the operations area and the inclusion in the mandate of the implementation of police operations for the repression of trafficking in human beings and migrant trafficking125.

As emerges from the operational plan of the Triton operation, the men who were engaged provided to board and visit the flagless ships suspected of being involved in the trafficking of migrants and, once this involvement was confirmed, they informed the Italian authorities to be adopted “further appropriate measures”, directly or with the assistance of the flag state that had carried out the boarding. The coercive measures that can be adopted by the ships used in the FRONTEX operation included the seizure of the ship, its hijacking, or the transport of the boat and its cargo to an Italian port. With respect to ships flying foreign flags that are in international waters, unlike the provisions of EUNAVFOR MED operation, which, as seen, is authorized by Resolution 2240 (2015) of the United Nations Security Council, any type of coercive measure, including boarding and inspection, could only be adopted with the prior permission of the flag state126.

With regard to the trafficking, this task was expressly included in the mandate of the Triton operation, whose operational plan ordered its delivery to the Italian authorities, even where the capture had taken place in international waters. Although replacing Triton, Themis has a broader mandate than its ancestor: the most important news concerns the fact that the rescued migrants will have to be landed in the port closest to the point where the sea rescue was carried out, and not most compulsory in Italy. Two new patrolling areas in the Mediterranean are also planned: one to the east – for migratory flows from Turkey and Albania – and one to the west – for those departing from Libya, Tunisia and Algeria. From February 1, then, the Italian naval unit patrol line will be placed at the 24-mile limit from our coasts, reducing Italy’s operational area from the current one.

In addition to continuing the search and rescue activities, intelligence activities and other measures aimed at identifying terrorist threats at the external borders have been included.


126 See Joint Operation EPN Triton 2014, Annexes of the Operational Plan, cit. above note 47, p. 14 et seq. Moreover, these provisions fully correspond to the provisions of the European regulation on the surveillance of external maritime borders, valid for all the missions coordinated by FRONTEX.
§ 13 – EUROPOL’S CONTRIBUTION TO COMBATING MIGRANT SMUGGLING

Council’s Decision establishing EUNAVFOR MED operation has repeatedly stressed the importance of coordination between military mission and other EU agencies, including EUROPOL\(^{127}\), with a view to identifying and dismantling the trafficking networks of operating migrants in the Mediterranean sea. Such coordination between the various entities, however, is invoked repeatedly but never explicitly clarified from the operational point of view. For this reason, it is necessary to reconstruct the general framework, as far as possible through the information made public by the Union and therefore available, starting from the initiatives that the various agencies have adopted individually in the fight against the smuggling of migrants.

Starting from EUROPOL, in 2016 the agency made a significant commitment in this regard, establishing the European Migrant Smuggling Center (EMSC), in order to “proactively support EU member states in dismantling criminal networks involved in organized migrant smuggling.”\(^{128}\). EMSC, a clear demonstration of the urgency perceived by member states to stem the phenomenon of migrant smuggling, was established on the model of two other specialized centers, already existing within Europol: the European Cybercrime Center (EC3) and the European Counter Terrorism Center (ECTC). It is also within the ambit of this new center that the hotspot model envisaged by the 2015 European Agenda on Migration, set up to assist national authorities in the field of identification, support for asylum requests, information exchange, investigation and prosecution of traffickers. Furthermore, EMSC has incorporated the Joint Sea Operational Team (JOT Mare), adopted by Europol in March 2015 and composed of a group of experts united by the objective of combating the trafficking of migrants in the Mediterranean, which continues to collect today, analyze and circulate information aimed at supporting investigations on the smuggling of migrants by sea to destination countries, which include not only EU states, but also the United States and Canada.

According to what emerges from the report produced by EMSC, which provides a summary of the action carried out by

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\(^{127}\) However, with the adoption of the Council decision (2009/371/JHA) that EUROPOL acquires the status of the Union Agency 562, together with greater organizational flexibility in the face of the new needs that arose in the complex scenario of police cooperation. Specifically, one of the main changes with respect to the past is the possibility for EUROPOL to assist the competent authorities of the Member States in the fight against certain serious forms of crime, regardless of the existence of concrete indications of the involvement of a criminal structure or organization, requirements that were previously required for its activation.

EUROPOL in the context of combating smuggling over the past two years, EMSC officials (European Mobile Investigation/Analyze Teams, EMIST/EMAST) were located in the areas of greatest concentration of arrivals of irregular migrants, in particular in Catania and in the port of Piraeus, in Greece. Moreover, particularly relevant, again in relation to the controversial relations between EU and Libya, is the fact that EMSC has sent an analyst to EUBAM in Libya, which has developed a strategic cooperation and has prepared the bases for a future collaboration with local authorities in Libya and the region.

In addition, an Information Clearing House (ICH) was established, a sort of information gathering platform, on the one hand, and useful for consolidating support for the police forces of partner countries, with a particular focus beyond EU borders and transit countries. ICH recovers the already existing means and structures and acts as a bridge to third countries. It is extremely important to highlight, in view of the particularity that characterizes the whole system of combating the smuggling of migrants set up by EU from 2015 to today, the declared intent of ICH “to initiate or further develop cooperation with less-traditional partners in the field of common law and defense policy (CSDP) missions and operations, such as the European Union Naval Force (EUNAVFOR MED) and the European Gendarmerie Force (EUROGENDFOR)”.

Moreover, thanks to the entry into force of the new Regulation of 11 March 2016, EMSC is increasingly projected towards cooperation with the key authorities of the countries of origin and transit of migration flows, thanks to the creation of regional partnerships, together with a strengthening of the collaboration with Interpol and, in particular, with Interpol’s Specialized Operational Network (ISON), FRONTEX and Eurojust.

An important evolution with reference to the scope of application of the agency was recorded on 11 May 2016, with the entry into force of Regulation 2016/794, which, replacing 2009/371 Decision, establishes the European Union Agency for Law Enforcement Cooperation. The changes introduced by this regulation, which required three years of negotiations, as “substantial in terms of number and nature”, made it necessary to completely replace the previous decision 2009/371. Summarizing the salient points of the regulation, it is appropriate to highlight the four most important changes that have taken place with respect to the competences of Europol. First of all, art. 6 appears to be relevant as it provides the possibility for Europol to start a motu proprio investigation, proposing to two or more member states the formation, under its aegis and its own coordination, of regional task forces for specific subjects or areas.

of investigation. Secondly, art. 7, establishes the obligation for member states to form national units which will then be subject to scrutiny through annual reports by Europol. These reports must also be transmitted to Parliament, the Council and the Commission, which inevitably leads to more binding than voluntary cooperation between states, all with a view to strengthening security measures by extending Europol’s tasks. A third important aspect concerns the facilitation of the exchange of information, previously limited by the fact that the personal data contained in the Europol database were kept for no more than three years, except in exceptional cases and following specific requests and cumbersome procedures. The greater fluidity in the exchange of information, however, should not be to the detriment of the rights of protection of personal data, since the regulation provides for tight control by designated national data protection officers, in support of the work of the person in charge of the protection of data from Europol and the Data Protection Supervisor.

To conclude, and remaining on the involvement and the contribution that Europol confers on the European system to combat the smuggling of migrants, it is interesting to mention, by way of example, some of the most recent operations coordinated by the agency in this field.

With the “Maverick operation”, the Greek police, supported by Europol, dismantled an organization involved in the theft and falsification of travel documents in order to facilitate the arrival of irregular migrants from third countries to Europe. During this operation, seven houses were searched, eleven people arrested and 939 travel documents confiscated.

In “Moulti pass/Traumfabrik operation”, on the other hand, France, in coordination with Germany and with the support of Europol, has dismantled an organization involved in aiding and abetting illegal immigration of Indian citizens, through the falsification of official documents, and in the labor exploitation of the same. Traffickers used a travel agency in their country of origin, which provided visas to migrants by sending them to consulates with falsified documents. The organization made sure that the victims traveled to the suburbs of Paris, to then be transported to East Germany, where they were forced to work for very low wages and to stay longer than the period granted to them by the visa.\(^\text{130}\)

During the “Taurus operation”, once again the investigation led to the identification of an organization involved in document fraud and trafficking of migrants by air from Greece to the United Kingdom through false documents.

Finally, with “Halifax operation”, the investigation led to the identification of an organization headed by Afghan citizens who

trafficked migrants from Afghanistan, Iraq and Pakistan in vehicles adapted specifically for transport and headed for the United Kingdom.

§ 14 – EU POLICY TOWARDS THIRD COUNTRIES OF ORIGIN AND TRANSIT OF MIGRANTS

On an EC proposal\textsuperscript{131}, a new Migration Partnership Framework (MPF) was established by the Council in June 2016, with the declared objective of strengthening relations with third countries with a view to more effective management of migration flows\textsuperscript{132}. The short-term actions, as can be seen from a report of the Council in July 2016 concerning the results and actions aimed at tackling the problems connected with immigration, would consist in safeguarding human lives in sea and desert; in dismantling the networks of traffickers; in increasing the repatriation of those who are not entitled to stay in Europe; in reducing dangerous journeys; and in opening legal access routes to Europe for those in need of protection. In the long term, instead, the main objective would be to find and address the roots of irregular and forced immigration, through greater support for the economic, social and political development of third countries. Precisely in relation to this last aspect, however, it is necessary to specify that the Union and its member states subordinate development cooperation to the effective control by third states of the exits from their territory useful to prevent new arrivals in Europe. As stated explicitly by the Board, in fact, the new MPF is based on effective incentives and adequate conditionality, so much so that cooperation on readmission and return will be a key test of the partnership between EU and (its) partners.

On the basis of MPF, the European Council drafted the Malta Declaration on 3 February 2017 concerning in particular the containment of migratory flows from Libya to Italy, as demonstrated by the priorities defined by it: training, equipment and support for the Libyan national coast guard and other relevant agencies; efforts to dismantle traffickers’ business model through enhanced operational action, as part of an integrated approach involving Libya, other countries along the route and relevant international partners; support for the development of local communities in Libya, particularly in coastal areas and at Libyan land borders along migratory routes; commitment to guarantee adequate capacity and reception conditions for migrants in Libya, together with UNHCR and IOM; support for IOM to significantly intensify assisted voluntary repatriation activities; reinforcement of information and awareness campaigns aimed at migrants in Libya and in countries of origin and transit, 

\textsuperscript{131} Establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM (2016) 385 final, 7 June 2016.

\textsuperscript{132} European Council Conclusions, 28 June 2016.
notably to counter traffickers’ business model; aid for the reduction of pressure on Libya’s land borders, collaborating with Libyan authorities and Libya’s neighbors; monitoring of alternative routes and possible deviations of traffickers activities; ongoing support for the efforts and initiatives of individual member states directly engaged with Libya; deepening of dialogue and cooperation on migration with all neighboring countries with Libya, including better operational cooperation with member states and European Border and Coast Guard regarding the prevention of departures and management of returns.

EU and Turkey signed an agreement on 18 March 2016 that took the characteristics of a press release so as not to produce legal effects, with which Turkey accepted “rapid return of all migrants not in need of international protection crossing from Turkey to Greece and to take back all irregular migrants intercepted in Turkish waters”. The agreement provides that migrants arriving in Greece will be registered and that their asylum request will be processed in accordance with Directive 2013/32/EU and that for every Syrian, from Greece, to be readmitted to Turkey, another Syrian will be resettled from Turkey to EU, with priority for those who previously did not enter or did not attempt to enter EU irregularly.

§ 15 – PROVISIONS FOR THE PROTECTION OF TRAFFICKED MIGRANT IN THE LEGAL INSTRUMENTS FOR COMBATING SMUGGLING

The Protocol for the fight against the traffic of migrants by land, sea and air reserve, to articles 16 and 19, a space for safeguard clauses against migrants involved in traffic activities. Before going into the specifics of these two provisions, it should be remembered that, retracing the history of drafting the Protocol, the principles of assistance and protection against trafficked migrants were raised throughout the course of negotiations, including the first discussions concerning treaty adoption.

However, despite the insistence of some states on the need to devote specific attention to protection and assistance of migrants


134 The first draft of the Protocol presented by Austria and Italy referred, in the Preamble, to illegal trafficking and transport of migrants as a “particularly heinous form of transnational exploitation of individuals in distress” (“Draft elements for an international legal instrument against illegal trafficking and transport of migrants (Proposal submitted by Austria and Italy)”, UN Doc. A/AC.254/4/Add. 1, Dec. 15, 1998). Other references to the need to guarantee protection to trafficked migrants can be found in the preparatory work with regard to the Preamble, the objectives, the application, the aggravating circumstances, the training, and the development of an article specifically aimed at protection (“United Nations Convention on Drugs and Crime, Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention on Drugs and Crime and the Protocols Thereto, 2006).
within the Protocol. The issue was not considered a priority by most states, so much so that the High Commissioner United Nations Human Rights Commission explicitly requested states to preserve and protect fundamental rights that all people own, including illegal migrants. Specifically, the High Commissioner pointed out various problematic aspects in the initial draft of the Protocol, reiterating that: Despite the acknowledgment in the preamble to the draft Protocol that is illegal trafficking and transport of migrants is a particular form of transnational exploitation of individuals\(^{135}\). The High Commissioner believed that the omission of any protection clause within the Protocol would reduce the scope of application of the instrument itself and recommended that it be inserted a provision such as to impose on states parties respect and protection of human rights of trafficked migrants, as established by international law, with particular reference to the right to life, the prohibition of torture or other cruel, inhuman and degrading treatment, and to non-discrimination principle.

A further request for attention with respect to the protection of human rights was then raised by an informal group of United Nations agencies, coordinated by the Office of the High Commissioner, as well as, separately, by the United Nations High Commissioner for Refugees (UNHCR) and a coalition of non-governmental organizations\(^{136}\).

As emerges from the preparatory work of the Protocol, the insistence of the High Commissioner and civil society have had effects above all in the final phase of negotiations. The latest version of the Protocol, in fact, includes a series of forecasts aimed at protecting the basic fundamental rights of trafficked migrants. The most explicit recognition of the risks of violation of human rights caused by smuggling is already found in the objectives set by the Protocol, namely preventing migrant smuggling and promoting international cooperation “while protecting the rights of smuggled migrants” (art. 2). In addition to this, as seen above, art. 5 of the Protocol, is relevant which excludes the indictment of smuggling migrants simply because they entered the state illegally. If states cannot prosecute the migrants on the basis of the Protocol, on the other hand, it does not act as a protection against such persons since it does not exclude that the states can adopt, in their own internal system, criminal penalties for cases such as illegal entry, stay, or possession of fraudulent travel documents. An explicit rule to

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protect trafficked migrants is found, within the Protocol, in art. 16, which interprets the “principle of protection” recommended in time of negotiations by the High Commissioner for Human Rights. As stated in the legislative guide, art. 16 “is intended to set an appropriate standard of conduct for officials who deal with smuggled migrants and illegal residents and to deter conduct on the part of offenders that involves danger or degradation to migrants”.

The first part of this article is aimed at states parties responsibility to protect and preserve the rights of trafficked migrants under international law, with particular reference to a series of pre-existing fundamental rights which, as such, also apply to those involved in traffic. The right to life and prohibition of suffering torture or other forms of inhuman and degrading treatment. In this regard, the preparatory work makes it clear that the intention to list certain rights, but the provision should not be interpreted as excluding or derogating from any other not listed rights. It is also important to note that states parties responsibility also extends to the adoption of legislative measures to guarantee adequate protection for migrants.

In addition to the general obligations referred to above, art. 16 establishes further three more specific ones that require states parties to: adopt adequate measures to protect migrants from acts of violence related to smuggling, “whether by individuals or groups” (art. 16, par. 2); guarantee assistance to migrants whose lives or safety are endangered by traffic activities (article 16, paragraph 3); with respect to migrants in detention, make sure that they are aware of their right to access their country’s consulate (art. 16, par. 5).

As noted by reading paragraphs 2 and 3 of art. 16, particular forms of protection aimed at migrants involved in trafficking are closely linked to cases in which they suffer violence in traffic contexts. This clarification again highlights the difference between the ad hoc protection granted to victims of trafficking, which are protected precisely because of the status they acquire and considerably lower protection envisaged for migrants subject to trafficking, who, in fact, are recipients of special assistance only if they have suffered violence because of and during perpetration of criminal action in which they are involved.

This consideration leads to questioning on another fundamental question, namely to what extent there is a legal obligation for states to prevent and suppress violence, abuse, and forms of exploitation against trafficked migrants, whether committed for traffickers hand, by state officials, or third parties. If on the one hand, in fact, the provision of article 16 can extend to a high number of cases of violence inflicted by traffickers on migrants, on the other, unlike Protocol’s provisions, it does not provide for migrants subject to smuggling specific forms of assistance if they have suffered violence during the crossing, using the vague expression “appropriate measures” in relation to protection...
obligations. As some authors believe, the imprecise and extensive formulation of this obligation, on the one hand, allows states greater flexibility and discretion in the intervention, on the other, however, it weakens their scope and makes it extremely difficult to verify compliance or, if in the case, the possible violation.

§ 16 – THE RIGHT TO LEAVE: AN ASYMMETRIC RIGHT

From a strictly legal point of view, it is known that states exercise sovereign power, widely recognized by international law, to control the entry of foreigners into the territory under their jurisdiction. The right of every person to leave any state, including their country of residence, is also recognized. What has not found recognition, as it would go against the sovereign powers of states mentioned earlier, is a corresponding right for people to enter and reside in a state of which they are not citizens, subject to refoulement prohibition.

The Committee performs at par. 10, suggesting that the outsourcing of migration flows would potentially violate the right to leave: “The practice of states often shows that legal rules and administrative measures adversely affect the right to leave, in particular, a person’s own country. It is therefore of the utmost importance that states parties report on all legal and practical restrictions on the right to leave which they apply both to nationals and foreigners, in order to enable the Committee to assess the conformity of these rules and practices with article 12, paragraph 3. States parties should also include information in their reports on measures that impose sanctions on international carriers which bring to their territory persons without required documents, where those measures affect the right to leave another country.”

By transposing what has been analyzed up to now to the current strategies to contain migratory flows, in general, and to smuggling operations in particular, the risk that the right to leave is violated appears more than plausible, at least with reference to the externalization of borders through bilateral agreements with the countries of origin and transit from which migrants leave. Various authors, on the other, have identified in the practice adopted by states in recent years a violation of the right to leave, both through the interception of ships at sea, and through more restrictive requirements for issuing visas or stricter controls before the departure, up to the most extreme cases in which

137 Office of the High Commissioner for Human Rights, CCPR General Comment No. 27: Article 12 (Freedom of Movement), Adopted at the Sixty-seventh session of the Human Rights Committee, on 2 November 1999, CCPR/C/21/Rev.1/Add.9, General Comment No. 27 (General Comments) (Contained in document CCPR/C/21/Rev.1/Add.9).

some states have adopted sanctions against people who have left their country without authorization\textsuperscript{139}. In general, however, it is clear that this right is liable to be violated in various ways because of that asymmetry mentioned at the beginning: anyone, except for the restrictions mentioned above, has the right to leave, but not that of being accepted in an alternative place to that of citizenship. In this regard, despite the wide interpretation that the Committee for Human Rights has adopted, the right to leave can still be limited by the states with wide discretion. An example in this sense can also be found in ECtHR jurisprudence which, in Xhavara v. Italy and Albania\textsuperscript{140} sentence, did not recognize art. 2 No. 4 of Protocol additional to the European Convention on Human Rights (ECHR). In the case in question, concerning the story of the Albanian ship Kates I Rades, sunk on 28 March 1997, with 54 people on board, after being rammed by an Italian military ship, the Sibyl, the plaintiffs invoked the violation of the right to leave its own country following the bilateral agreement signed between Italy and Albania in order to contain the migration wave of 1997\textsuperscript{141}. Starting from the stipulation of this agreement, Italy assumed extensive explicable coercive powers on the high seas and in the Albanian territorial waters, not only against ships flying the Albanian flag, but also ships flying the flag of a third state that are connected in some way to Albania. The Italian navy armored, in practice, the Adriatic with a naval blockade of the coasts, according to a scheme called “Albania 2”, and articulated on three lines: a coastal device operating in Albanian territorial waters and entrusted to the 28th Naval Group, armed and ready to respond to fire if provoked; a second band, consisting of offshore vessels, with the task of monitoring the maritime space between Albania


\textsuperscript{140} Xhavara and Fifteen Others v. Italy and Albania of 11 January 2001, par. 3.

\textsuperscript{141} The agreement, which consisted more properly in an exchange of letters between the two countries, and bearing, precisely, “Exchange of letters relating to cooperation for the prevention of illegal acts that undermine the legal order of the two countries and the immediate humanitarian, when the lives of those trying to leave Albania are put at risk”, was concluded between the then Italian Foreign Minister Lamberto Dini and the Albanian Foreign Minister of the time, Bashkim Fino. The exchange of letters referred to the repeated request for military assistance from the Albanian government to European countries to strengthen controls at the Albanian ports of departure. The Italian Government, determined as much as and more than the Albanian Government to prevent illegal immigration, offered its cooperation in response, which was expressed through “the arrest in international waters and the diversion into Albanian ports by units of the Italian Naval Forces of the fleet flying the Albanian flag or in any case attributable to the Albanian State, as well as the arrest in the Albanian territorial waters of any flag that carries Albanian citizens who had escaped the controls exercised on the Albanian territory by the Authorities in charge” (Protocol between the Minister of the defense of the Italian Republic and the Albanian Minister of Defense in implementing the Exchange of Letters concerning the cooperation for the prevention of illegal acts that undermine the legal order of the two countries and the immediate humanitarian aid, when the life of those who try to leave Albania, GU Suppl., No. 163, July 15, 1997).
and Italy, in order to locate illegal transport vessels, and a third device that had to act to contain illegal immigration in Italian waters.

The Court ruled that «les mesures mises en cause par les requérants ne visaient pas à les priver du droit de quitter the Albanie, mais à la empêcher d’entrer sur le territoire italien» (paragraph 3). However, if it is true that the intent of Italy was to prevent the arrival of Albanian population on the Italian territory, through the extraterritorial control of flows, in fact the naval barrier it deployed prevented the movement of the Albanian population from its own Country of origin, consequently limiting the right to leave. In light of the above, this decision was rightly criticized by some authors for not recognizing the fact that the obligations deriving from the right of every person to leave do not only fall on the country of departure but on all states parties of the conventions in which this right is established, and even more so on those states that exercise their control and power outside their jurisdiction.⁴\\n
§ 17 – OTHER FORMS OF INTERNATIONAL PROTECTION PROVIDED FOR BY EU LAW

The gaps in the Geneva Convention in relation to groups of people who can enjoy international protection have been resolved, at least within EU, by legal instruments that have introduced alternative forms of protection. The international protection system for asylum seekers in EU is in fact divided into three forms: a) temporary protection, governed by Directive 2001/55/EC; b) subsidiary protection and c) refugee status, both provided for in Directive 2004/83/EC. Directive 2001/55/EC regulates temporary protection in the event of a mass influx of displaced persons from third countries in which they cannot return, with the exception of those who have committed particularly serious crimes or acts contrary to the purposes of the United Nations (art. 28). It lasts one year and can be renewed for a further year; it does not prejudice also the possible recognition of refugee status in accordance with the Geneva Convention (articles 3 and 4). In temporary protection, member states apply respect for human rights and non-refoulement obligations (article 3). The rights granted to temporary protected persons (articles 8-16) include the right to a residence permit, to receive information in a known language, medical assistance, access and right to work, adequate accommodation, education and family reunification. Temporary protected persons may apply for asylum at any time in the member state that has accepted the transfer of the person in

need of international protection in their territory. Temporary protection ceases at the end of the maximum duration or by decision of the Council on a proposal from the Commission and at the request of the member state concerned, by means of repatriation to the state of origin of the temporary protections and in respect of human rights and non-legal obligations concerning refusal of entry (article 6).

Directive 2003/9/EC, “reception”, establishes the minimum standards for the reception of asylum seekers in member states, expressly recalling the Geneva Convention and its optional Protocol. According to art. 3 it is aimed at all third-country nationals and stateless persons who present their asylum application at the border or in the territory of a member state with the authorization to stay as asylum seekers and, furthermore, extends to family members if included in the asylum application. The rights granted to asylum seekers are: i) the right to information within a maximum period of 15 days after the presentation of the asylum application (art. 5); ii) the right to possession of a document which demonstrates the status of an asylum seeker and which authorizes the asylum seeker to stay in the territory of the member state, within three days of the presentation of the asylum application (article 6); iii) the right of residence and free movement (art. 7); iv) the right to maintain the family unit (article 8); v) the right to education of children (article 10); vi) the right to enter the labor market (article 11); vii) the right to professional training (article 12); viii) the right to reception and health care (articles 13-15); ix) the right to appeal in the event of refusal of status (article 21). Furthermore, the “reception” directive provides for special provisions for vulnerable categories such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of torture.

Directive 2004/8/EC, “qualifications”, has as its main purpose to ensure that all member states adopt common criteria in the examination of an asylum application in order to guarantee a minimum level of recognized standards for asylum seekers in all EU states. Therefore it establishes a set of minimum allocation rules applicable to third country nationals, stateless persons or to another person in need of international protection. The “qualifications” directive takes over the Geneva Convention in general and, in particular, with regard to the list of “requirements” to be considered a refugee (articles 10 and 11) in a completely consistent manner. Article 11 lists the reasons for the cessation of refugee status, which are subject to two conditions, as the change of circumstances must be significant and not temporary, including: a) if the person decides to use state protection again citizenship or b) if, having lost citizenship, he has voluntarily repurchased it; c) if he has acquired a new citizenship and enjoys the protection of the country of new citizenship; d) if it is voluntarily re-established in the state of origin; e) if he can
no longer renounce the protection of the country of which he is a national, as the circumstances that led to the recognition of the status have ceased; f) in the case of a stateless person and the circumstances for the recognition of the status cease, if he is able to return to the country where he was habitual resident.

Furthermore, if, in application of art. 11 lett. e), state authorities intend to withdraw from the individual the status, recognized by them, the causes which had led to such recognition and new causes of persecution (distinguished from those founding for the recognition of the status), the individual in question may invoke the application of art. 4, par. 4.

Regarding the exclusion from protection, art. 12 introduces various criteria, including, in particular, the commission of a crime against peace, a war crime or a crime against humanity, as well as the commission, outside the host country, of a serious crime of common law before being recognized as a refugee or a particularly cruel act, with a declared political objective, which falls within the case of a serious crime of common law and finally the commission of an act contrary to the aims and principles of the United Nations.

Of particular importance is the fact that the “qualifications” directive introduces, in addition to the protection deriving from the recognition of refugee status (article 13), subsidiary protection (articles 15-17) that can be recognized to the person who is the recipient of sentenced to death or victim of torture, inhuman and degrading treatment and punishment or who has received a serious and individual threat “resulting from indiscriminate violence in situations of internal or international armed conflict”. Although art. 15, under par. b) and c), present similarities with art. 3 ECHR, the Court of Justice of the European Union (CJEU) in expressing itself on M. Elgafaji, N. Elgafaji v. Staatssecretaris van Justitie case has interpreted art. 15, combined with art. 2 lett. e) in the sense that: a) the

143 As regards the verification of the change of circumstances in the country of origin of the refugee, the CJEU in the case C-175/08, Aydin Salahadin Abdulla and others v. Bundesrepublik Deutschland of 2 March 2010, ECLI:EU:C:2010:105, 1-01493, stated that the Member State must ensure that the competent national authorities of the refugee's State of origin have adopted the means necessary to prevent persecution, since they operate in an effective legal system for the discovery, prosecution and sanction of acts that constitute acts of execution and therefore the individual in question will benefit from the necessary protection if you cease to have refugee status. Therefore the persons in charge of protection can also include organizations that have control over the territory of the State or over a significant portion of it, as well as multinational forces present in the territory of that State. For further analysis see: A. ABASS, F. IPPOLITO, Regional approaches to the protection of asylum seekers: an international legal perspective, ed. Routledge, London & New York, 2016.

144 Article. 4 (4) of Directive 2004/83/EC establishes: “The fact that an applicant has already suffered persecution or serious damage or direct threats of such persecution or damage constitutes a serious indication of the validity of the applicant's fear of suffering persecution or risk effective to suffer serious damage, unless there are good reasons to believe that such persecution or serious damage will not be repeated [...].”


146 Article. 2 (c) of Directive 2004/83/EC states: “e)” person eligible for subsidiary
existence of a serious and individual threat to the life of the applicant for subsidiary protection is not subject to the condition that the same must provide evidence of being expressly subject to threat due to factors inherent to his personal conditions; b) the existence of a possible threat can exceptionally be considered in order to establish that the degree of indiscriminate violence that characterizes an armed conflict in act asserted by the competent national authorities before the application for subsidiary protection. The latter has been presented or ascertained by the courts of the member state to which the negative decision regarding this request can be attributed. It has reached a level such that there are substantial reasons to believe that the applicant is protected, if repatriated to the state in question or, as in the case in question in the region of that state, it could, due to its presence alone on the territory of the state or the region, suffer a real risk of threat to life and to its safety. Therefore, in this second case, the exceptional nature of the threat that can constitute a real risk for the integrity of the applicant contributes to widening the margin of appreciation of the protection offered by EU legal order as it extends to risks beyond those envisaged by the Geneva Convention and ECHR.

The rights that the “qualifications” directive grants to holders of international protection are many. In addition to the right to information (article 22), they reveal the right to the maintenance of the unity of the family (article 23), the right to permission of stay (art. 24), the right to a travel document (art. 25), the right of access to employment and education (articles 26 and 27), the right to social assistance (art. 28), the right to health care (art. 29), the right to adequate accommodation (art. 31), the right to free movement in the territory of the member state (art. 32), the right of access to integration tools (art. 33) and finally the right of repatriation (art. 34). A special mention deserves the “Dublin system”, which draws its origins from the 1990 Dublin Convention. This Convention was adopted with the aim of determining EU member state involved in the examination of asylum applications and recognition of refugee status, thus placing a brake on the phenomena of asylum shopping, that is the simultaneous request for asylum in several states, and the so-called “immigrants in orbit”, or those who are transported from one state to another pending an adequate provision. The Convention was replaced by Regulation (EC) No. 343/2003 (better known as Dublin II Regulation) on 18 February 2003 which defined “the criteria and mechanisms for determining the protection: “a third-country national or stateless person who does not meet the requirements to be recognized as a refugee but against whom there are reasonable grounds to believe that if he returned to the country of origin, or, in the case of a stateless person, if he returned to the country in which he had previously had his habitual residence, he would run a real risk of suffering serious damage as defined in Article 15, and to which no ‘art. 17, paragraphs 1 and 2, which cannot or, because of this risk, does not wish to avail itself of the protection of said country [...]’

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http://ojs.imodev.org/index.php/RIGO
member state responsible for examining an asylum application presented in one of member states by a citizen of a third country”. The purposes of the Regulation follow the line of the previous Convention and in particular, with regard to the limitation of asylum shopping, some innovations are introduced in terms of procedures for processing the application itself and guarantees for maintaining the unity of the family of applicant. Among these, the “humanitarian clause” (art.15), which establishes that “any member state can, although not competent in application of the criteria defined by this regulation, proceed to reunification of members of the same family and other dependent relatives, for humanitarian reasons, based in particular on family or cultural reasons. In this case, this member state shall examine the asylum application of the person concerned at the request of another member state”. If on the one hand article 15 acts in favor of the humanitarian cause, on the other there are provisions which, with respect to the Convention, are detrimental to the applicant. First of all art. 3, par. 2, according to which “if a member state other than that to which the examination is based decides to examine the request it is not necessary for this purpose the consent of the interested party”. And again in article 18, par. 4: “the test requirement should not go beyond what is necessary for the correct application of this regulation”. This implies a significant reduction of the level of proof required for the definition of the competent state to examine the application, to which is added the aggravating circumstance that, unlike what was expressed in the preamble of the 1990 Convention, the Regulation does not offer any guarantee that the applicant’s asylum is actually examined by a member state. The Dublin II Regulation was in turn replaced by Regulation (EU) No. 604/2013, known as Dublin III on 26 June 2013, which is based essentially on the principles of the previous regulations and conventions. Some noteworthy changes concern: the obligation to always consider the best interests of the child; the explicit prohibition to transfer an applicant if there is a well-founded risk that he may be subjected to inhuman or degrading treatment; obligation to provide more information to applicants and conduct a personal interview with them; possibility of appeal against a transfer decision; introduction of limits, including temporary ones, to the detention of persons subject to the Dublin procedure; obligation for states, before a transfer, to exchange data, including health data, on applicants; introduction of a “mechanism for rapid alert, preparation and crisis management” in the event of a risk of special pressure on a country’s asylum system and/or in case of problems in the functioning of the same.

§ 18 – THE PROHIBITION OF REFOULE PURSUANT TO ART. 3 OF THE CONVENTION AGAINST TORTURE
The principle of non-refoulement is expressly provided for in art. 3 of the United Nations Convention against Torture, which, in par. 1, states: “No state party shall expel, return (‘refouler’) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture”. This provision, together with the possibility of individual recourse before the Committee against Torture (article 22), constitutes a valid complementary instrument to the protection from the prohibition of refoulement also in the case of individual forced transfers.\textsuperscript{147}

The mechanism of individual appeal provided for by art. 22\textsuperscript{148}, in fact, is likely to be used by the asylum seeker, as well as his relatives and possibly his representatives\textsuperscript{149} against the state in which he fears to be persecuted, but also against the state that intends to extradite him or expel him to the latter. However we remind you that this right is subject to ratification by the state in question of the Convention, as well as to the express declaration of acceptance of the competence of the Committee, established by the same Convention.

The prohibition of refoulement provided for by this Convention does not meet the limits set by the Geneva Convention or art. 1 A (2) or even art. 33 par. 2. In fact, art. 1 A (2), as seen, traces the well-founded fear of being persecuted to ethnic origins, religion, nationality, belonging to a social group or political opinions. While the protection granted by art. 3 of the Convention against Torture does not require the presence of such conditions to be guaranteed the principle of non-refoulement.\textsuperscript{150}

Another important difference between the two conventions under examination, which also affects the actual application, consists in the lack of a supervisory body in the Geneva Convention, which performs both the auxiliary function of interpretation of the Geneva Convention and its Protocol- for this purpose art. 38\textsuperscript{151} of the Convention which submits the

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\item \textsuperscript{147} P. Freshwater, “The obligation of non-refoulement under the Convention against torture: when has a foreign government acquiesced in the torture of its citizens?”, in Georgetown Immigration Law Journal, 19 (4), 2005, pp. 585-608.
\item \textsuperscript{148} J. McAdam, Complementary protection in international refugee law, Oxford University Press, Oxford, 2007, pp. 111-112.
\item \textsuperscript{149} L’art. 22 par. 1 of Convention against torture declares that: “A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party to the Convention which has not made such a declaration”.
\item \textsuperscript{150} H. Lambert, “Protection against refoulement from Europe: human rights law comes to the rescue”, in International and Comparative Law Quarterly, 51, 1999, pp. 515-545, which is affirmed that: “[A]rticle 22 of the Torture Convention explicitly provides for communications to be submitted not only by individual alleged victim but also by relatives, designated representatives (e.g. NGOs) or others on behalf of an alleged victim when it appears that the victim is unable to submit the communication himself, and the author of the communication justifies his acting on the victim’s behalf [...]”.
\item \textsuperscript{151} D. Weissbrodt, I. Hörtreiter, “The principle of non-refoulement: article 3 of the Convention against torture and other cruel, Inhuman or degrading treatment or
solution of any eventual controversy regarding the interpretation or application of the same to the International Court of Justice.

both the control function in the application of the same through individual and state appeal procedures, as well as the examination of reports annual. In fact the Convention against Torture provides for the establishment of a Committee against Torture with the task of monitoring its application and the protection of the rights guaranteed by it.

With specific reference to the prohibition of rejection in accordance with the Convention, the Committee against Torture, on 9 February 2018, published the General Comment No. 4 on the implementation of article 3 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment of 1984 in the context of article 22. In particular, the new General Observations, which replace the General Comment No. 1 of 1997, aim to draw up guidelines taking into account the obligation of non-refoulement and its application in contexts such as the current ones in which migration flows increase with a related increase in asylum requests and an increase in risks for applicants. First of all, the Committee specified the notion of deportation pursuant to the provisions of article 3 which provides that no state can expel or reject a person of another state where there are serious reasons to believe that it would risk being subjected to torture, also specifying the obligations of national authorities to determine the existence of risk reasons. The Committee, also in the light of the practice concerning individual communications, stressed that the prohibition of refoulement is of an absolute nature like the prohibition of torture. Therefore, states have the obligation to carry out individual examinations and to assure to the applicants the proper guarantees of a fair proceeding, foreseeing the right of appeal against negative decisions. The Committee also puts a brake on the practice that gives good assurances from the state of origin because these cannot affect the obligation to respect the principle of non-refoulement linked to the obligation of individual examinations. Essential, then, that the competent national authorities to decide on asylum applications consider that the applicants can be victims of post-traumatic stress (PTSD) and, therefore, reluctant to disclose details about their situation and the torture they have suffered. It is necessary, therefore, that the examination of individual cases is carried out without pre-established credibility parameters. Then, the so-called “internal


152 Art. 17 par. 1 of Convention against torture declares that: “There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of 10 experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience”.

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alternative flights” failed, i.e. the deportation of a victim of torture in an area of the state which, unlike others, should not run the risk of persecution. This, the Committee writes, is an unreliable practice and not able to guarantee the obligations set by the Convention. The Committee has identified some preventive measures to ensure full compliance with the non-refoulement obligation and has also analyzed aspects related to extradition.

§ 19 – THE PROHIBITION OF REFOULEMENT AND COLLECTIVE EXPULSIONS IN ECtHR JURISPRUDENCE

The first case of indirect protection of the foreigner on the basis of the Convention provisions dates back to 1989, with the Soering v. United Kingdom case of 7 July 1989 in which ECtHR was to decide on an extradition proceeding to the United States against a German citizen in England. On that occasion, ECtHR established that, if there are serious reasons to argue that the foreigner could be subjected to torture or other inhuman or degrading treatment in the state where he would be extradited, in violation of art. 3 ECHR the state cannot adopt removal orders. This sentence represents a precedent that was later used by ECtHR also with regard to the expulsion of migrants who arrived irregularly in the territory of a state adhering to the Convention153, in compliance with the principle of non-refoulement. The notion of protection of the foreigner from the risk of conduct contrary to art. 3 was then interpreted extensively by ECtHR and concerns, in addition to the protection from the acts that may come from the public authorities of the third country, also a protection from acts put in place by fighting political factions. ECtHR considers contrary to art. 3 also the expulsions in case of diseases that could not be adequately treated in the destination country, as evidenced by two sentences, D. v. United Kingdom of 1997 and B.B. v. France of 1998154, in which ECtHR considered that the states in question had the obligation not to expel two foreign citizens affected by AIDS virus in their countries of origin.

ECtHR has also strengthened, through Conka v. Belgium of 2002, the principle of non-refoulement by establishing a series of

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153 ECtHR, Cruz Varas and others v. Sweden of 20 March 1991. This case, which paved the way for subsequent judgments on the matter, concerned the illegal entry into Sweden of a Chilean citizen, an opponent at home of General Pinochet’s regime. Varas, after suffering arrests and persecution in his own country, was illegally repaired in Sweden, where he had requested political asylum. However, Sweden had denied the right to asylum and requested an expulsion procedure against her.

procedural guarantees to protect the foreigner, including the right to an effective remedy, as provided for by art. 13 of the Convention. In the same sentence, it also intervened on the time available to an irregular foreigner to apply for asylum before an expulsion procedure was adopted against him, believing that a too short term represents a violation of the aforementioned art. 13. On the subject of fair trial, however, in Hermi v. Italy sentence of 28 June 2005 ECtHR, appealing to art. 6 of the Convention, condemned Italy for not having allowed a Tunisian citizen to attend a trial that concerned him, despite the latter’s declared intention to take part in it. It must however be borne in mind that, in general terms, based on Protocol No. 7 of the Convention, procedural guarantees are provided for in case of expulsion only for the foreigner regularly residing in the territory.

ECtHR had to analyze the respect or violation of article 3 by Italy in two different aspects. The risk taken by the applicants to undergo inhuman or degrading treatment in Libya and that of being repatriated to Somalia and Eritrea. With regard to the first aspect, the applicants claimed that they had been victims of arbitrary refoulement and that they had not had the opportunity to oppose their referral to Libya or to request international protection from the Italian authorities, even after expressly expressing the will of not be delivered to the Libyan authorities. In light of the multiple reports issued by international organizations regarding the conditions and treatment reserved for refugees in Libya, ECtHR rejected the thesis of Italy that considered Libya a safe country and stressed that “the existence of internal texts and ratification of international treaties that sanction the respect of fundamental rights are not sufficient, on their own, to guarantee adequate protection from the risk of ill-treatment when, as in this case, reliable sources represent the practices of authorities – or tolerated by them – manifestly contrary to the principles of the Convention” (par. 128). ECtHR also reiterated that the mere formal provision of an obligation to protect fundamental rights in another state could not exclude the liability of a Contracting State under ECHR, when there are sufficient elements to question the veracity of these assumptions. With respect to the hypothesis expressed by the applicants to be repatriated to their country of origin, ECtHR established that it was the task of the state that proceeds to the refoulement to ensure that the “intermediate” country offers sufficient guarantees that allow to prevent the interested person from being expelled to your country of origin without assessing the risk you would encounter.

In expressing a negative opinion against the excuses given by Italy, ECtHR recalled its own jurisprudence, in particular M. S. S.

v. Belgium and Greece sentence of 21 January 2011, at which ECtHR had accepted the appeal of an Afghan citizen who, having fled his country of origin to avoid possible retaliation by the Taliban regime, had requested asylum in Belgium, after being entered Europe from Greece. The Belgian authorities, in application of the Dublin II Regulation, had requested that Greece – the first country in which it arrived – to deal with the asylum request, and for this purpose they had transferred the applicant to a Greek detention center. In M.S.S. asserted that the conditions of his imprisonment pending the asylum request had been such as to violate the prohibition of inhuman and degrading treatment of which in art. 3 ECHR.

He also complained that the Greek legal system denied him the right to an effective remedy (art. 13 ECHR) against the state of detention, as well as against the possible rejection of the asylum request, which would have led to refoulement to a country in which his safety would have been at risk. The appeal was also directed against Belgium, responsible for having transferred M.S.S. despite the Greek legislation on refugees and the implementation practices by the Greek responsible structures were insufficient to guarantee the fundamental rights of the persons concerned. On that occasion ECtHR established that, although Greece had adhered to the 1951 Geneva Convention, compliance with the rules on the treatment of asylum seekers by Greek authorities was deficient and partly damaging to the rights of migrants. As far as Belgium was concerned, however, European judges considered that the deficiencies of the Greek asylum system were known, or that they should have been known, to the Belgian authorities and, therefore, excluded that the applicant had the burden of proving beyond any reasonable doubt the existence of the danger that, once arrived in Greece, the authorities of that country would expel him to Afghanistan in violation of art. 3 ECHR.

Returning to the Hirsi case, the applicants also reported art. 4 of Protocol 4 of the Convention, concerning the prohibition of collective expulsions, although, as evidenced by the Italian Government, the guarantee of this provision comes into play only in the case of people who are in the territory of a state or who have illegally crossed the national border.

On the occasion of the ruling in question, ECtHR is found for the first time to have to analyze a case of collective expulsion of foreigners, expelled towards a third state, but that had never entered national borders. ECtHR has taken into consideration the logical obstacle posed by the government and has observed that the aforementioned art. 4, Protocol 4 indicates with the notion of “collective expulsion” any measure of the competent authority

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that orders the removal of a group of foreigners from the national territory, not adopted following and on the basis of a reasonable examination and objective of the particular situation of each individual. Furthermore art. 4 in fact does not contain any reference to the concept of “territory”, therefore there are no reasons to exclude its extraterritorial application. Since, as described above, ECtHR has recognized Italy’s extraterritorial jurisdiction over the events in question, in relation to art. 1 of the Convention, it is possible to attribute extraterritorial significance also to the concept of “expulsion”.

ECtHR also considered that, in the light of events that already occurred in the context of migration flows, if article 4 should apply only to collective expulsions carried out from the national territory of states parties to the Convention, an important part of contemporary migratory phenomena would be removed from this provision, putting at risk the life of an ever increasing number of people.

The Hirsi case, a previous example that comes closest to the scenario that could be repeated during the operations of Operation Sophia, does not represent the only sentence in which ECtHR has ascertained the violation of art. 3 ECHR, in relation to the rejection of irregular migrants arriving in European territory. For the sake of completeness, the Saadi v. Italy case of 23 February 2008 is recalled, in which ECtHR had already stated that a state may incur the violation of the prohibition of torture and inhuman treatment if there is good reason to believe that, if transferred, the person would risk suffering such treatments in the destination country. The Ilias and Ahmed case is more recent. In Hungary on 14 March 2017, in which ECtHR has identified the violation of art. 3 ECHR due to the fact that the applicants had been expelled to Serbia without having effective guarantees against the risk of suffering torture or inhuman treatment. With reference to the violation of art. 4, Protocol 4, in the opposite direction went the pronunciation of the Grand Chamber on the Khlaifia v. Italy case of 15 December 2016. The applicants claimed to have been victims of a collective expulsion in the sense outlined by ECtHR jurisprudence, or on the sole basis of their nationality and without any consideration about their individual situations, in application of the simplified procedures provided for Italian-Tunisian bilateral agreement. They complained in particular that they had never been heard by the Italian authorities, which would have limited themselves to identifying them and taking their fingerprints, an activity that was then repeated shortly before embarking to Tunisia in the presence of the Tunisian Consul; not even the refusal of entry, drafted according to a standard form, showed traces of an in-depth examination of their condition. Furthermore, the applicants pointed out that a further proof of the existence of a collective expulsion was provided by the large number of Tunisians contextually repatriated, by the fact that the repatriation operation
had been announced by a special ministerial note, by standardization of the rejection orders and the difficulty for the applicants to make contact with a lawyer. While the second section of ECtHR had accepted applicants’ argument by stating the violation of art. 4, Protocol No. 4 ECHR. Of a completely different opinion was the Grand Chamber, which considered that the massive presence in the center of external and qualified personnel had offered migrants sufficient opportunities to highlight the possible peculiarities of their case; and therefore argued, in a rather surprising manner, that the prohibition of collective expulsions does not imply in every circumstance a real right to an individual interview, but only that the foreigner is offered a real and effective possibility to assert the arguments contrary to the expulsion, and that these are adequately examined by the authorities, in the reform of the sentence of first instance, the Grand Chamber has therefore not recognized the violation of collective expulsions prohibition.

Recent and noteworthy, then, is N.D. and N.T. v. Spain case of 3 October 2017 in which, for the first time, ECtHR ruled on the issue of summary rejections of migrants at the land borders that separate the autonomous city of Melilla from the Kingdom of Morocco. In this case, ECtHR unanimously acknowledged the violation of art. 4, Protocol 4 ECHR, reiterating once again that by collective expulsion must be understood any measure that forces foreigners as a group to leave a country, except in the case where this measure is adopted on the basis of an objective and reasonable examination of the particular situation in which each of the individuals making up the group is located (paragraph 98 of the sentence).

ECtHR, then, again clarifies that the main purpose of the provision is to prevent states from removing a certain number of foreigners without carrying out any investigation into the personal situation of each and without allowing them to assert the reasons contrary to the measures adopted by the competent authority towards them (par. 99).

§ 20 – THE PROHIBITION OF ARBITRARY DETENTION

Extremely relevant, as it is often exposed to violations in the context of control of irregular immigration, is the prohibition of arbitrary detention and inhuman detention conditions. The international standards in relation to this prohibition are fixed in art. 9, par. 1, the Pact on Civil and Political Rights: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law”.

Furthermore, similar provisions are found in other international
legal instruments\textsuperscript{157}, as well as in the main regional agreements on human rights. For the purposes of this work, particularly relevant is art. 5, par. 1 ECHR, which clearly establishes the cases in which a person can be legally deprived of his freedom.

However, it is important to remember that the right to personal freedom is not absolute, since international law grants states the right to take measures that limit the freedom of persons, including imprisonment for illegal entry into their territory. Therefore, deprivation of liberty is not allowed in two specific cases: when it is arbitrary and when the conditions of detention do not meet the criteria of humanity.

With regard to the first point, states must provide within their regulations a clear definition of cases in which the limitation of freedom is envisaged, but not only, they must also refrain from applying this law in an arbitrary manner. Pursuant to the agreement, the deprivation of liberty provided for by the law must not be manifestly disproportionate to the circumstances of the case, unjust or unforeseeable. Furthermore, a situation of detention that was originally not arbitrary can become so if prolonged for excessive time without adequate justification.

Coming now to consider the specific case of personal freedom limitation of irregular migrants, including asylum seekers, the Human Rights Committee has clarified that the detention of such groups of people cannot be considered arbitrary in itself\textsuperscript{158}. Furthermore, with particular reference to the administrative detention of asylum seekers, the Committee confirmed that “the fact of illegal entry may indicate a need for investigation and there may be other factors such as the likelihood of abortion and lack of cooperation, which may justify detention for a period”\textsuperscript{159}, clarifying unequivocally that “without such factors can be considered arbitrary, even if entry was illegal”\textsuperscript{159}. The Committee has also established that any detention measure must be subjected to a periodic review, so as to “reassess the necessity of detention” and that the detention “should not continue beyond the period for which the state party can provide appropriate justification”\textsuperscript{159}.

The states must then demonstrate that “there were no less invasive means of achieving the same ends”. In addition to the pact and the related decisions of the Committee, important provisions regarding the detention of asylum seekers come from article 31 of the 1951 Geneva Convention: “The contracting states shall not apply to such movements necessary and such

\textsuperscript{157} See art. 16, par. 4 of Migrant Workers Convention, which is affirmed that: “Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law”\textsuperscript{158}.

\textsuperscript{158} A. v. Australia, UNHCR Comm. No. 560/1993, UN Doc. CCPR/C/59/D/560/1993, 30 April 1997, par. 9.3: “there is no basis for the [...] claim that it is per se arbitrary to detain individuals requesting asylum [...]”.

restrictions shall be applied until their status in the country is regularized or they obtain admission into another country. The contracting states shall allow such refugees to take place in another country” (par. 2). In the wake of this article, UNHCR has asserted that “detention of asylum-seekers should normally be avoided and be a measure of last resort”[^160], where the extreme causes that could justify such provision would be due to: the need to protect public order; protect public health; guarantee national security. In summary, UNHCR believes that, in order for detention of asylum seekers to be legal and not arbitrary, it is failure to consider coercive or intrusive the means that could make detention arbitrary.

ECHR, on the other hand, provides among the eligible cases for detention to be legal “the lawful arrest, detention of a person with a preventive effect on an authorized entry into the country to deportation or extradition” (article 5, letter f), a provision also reiterated in ECtHR jurisprudence[^161]. Relevant for the purposes of this work, with reference to the interception measures adopted during EUNAVFOR MED operations, it is once again the decision of the Grand Chamber on Khlaifia case, in which ECtHR confirmed the traceability of the deprivation of liberty suffered by the applicants to the scope of application of letter f) of art. 5, par. 1 ECHR, as evidently aimed at controlling the entry of foreigners into the national territory. On the basis of this premise, ECtHR noted the absence of a suitable legal basis for detention, noting that, as claimed by the applicants, no internal regulation provided for the deprivation of liberty in the reception centers such as the one where the applicants had been detained, and excluding also that the Italian-Tunisian agreement of April 2011 could carry out this function, on the basis of which repatriations had been carried out but which did not contain any reference to deprivation of liberty. ECtHR therefore considered art. 5, par. 1, ECHR[^162].

Beyond the question of respect for the principles of legality and non-arbitrariness linked to the deprivation of personal liberty, there is respect for the minimum requirements of humanity that must be guaranteed to people in detention, including irregular migrants. This obligation, in fact, summarizes in itself the duty to respect various human rights: with specific reference to migrants, for example, notes the prohibition of discrimination. Furthermore, several bodies that protect human rights at international and regional level have highlighted the link with the prohibition of torture or other inhuman and degrading


§ 21 – THE DIVISION OF COMPETENCES BETWEEN MEMBER STATES AND INTERNATIONAL ORGANIZATIONS IN ECtHR JURISPRUDENCE.

A first attempt to resolve the issue of division of competences between EU and ECHR dates back to the time of ECHR – starting from 1 November 1998 with the entry into force of Protocol No. 11 ECHR – when, with M & Co. v. Federal Republic of Germany sentence of 9 February 1990. The Commission first developed the principle of equivalent protection. In this case the Commission, having affirmed its lack of competence to receive appeals against the European Communities, clarified that the national judicial authorities, even if they carry out an activity bound by Community rules, do not act as community bodies, thus escaping control of the Convention, but as internal organs and, as such, in the exercise of their jurisdiction pursuant to art. 1 ECHR.

The theory of equivalent protection was then reaffirmed and elaborated more fully by ECtHR in the Bosphorus judgment, which concerned the alleged responsibility of Ireland for violation of property rights (article 1, Protocol no. 1 ECHR), following the adoption of a seizure measure imposed by a community regulation which, in turn, gave effect to a Resolution of the Security Council. In this case, Strasbourg judges confirmed the conclusions reached in M & Co. case, namely that the Convention does not prohibit the contracting states from transferring powers to international organizations, but also that the latter are responsible, pursuant to art. 1 ECHR, for all the acts and omissions of their organs, and that the distinction between the internal or international nature of obligations to be fulfilled is not relevant. However, ECtHR, in balancing the interest in international cooperation and effectiveness of ECHR, stated that “state action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their application...”

163 In case Tabesh v. Greece of 26 November 2009 is declared that: “The measures which deprive an individual of his or her freedom inevitably involve suffering and humiliation. This is a situation which cannot be avoided and that is not, in and of itself, a violation of the prohibition of torture and cruel, inhuman or degrading treatment or punishment. Nevertheless, this article requires a State to ensure that the conditions in which a person is detained are compatible with respect for human dignity, that detention arrangements do not cause distress or hardship to degree that exceeds the inevitable level of suffering inherent in such a measure, and that, in terms of the practical aspects of confinement, an individual’s health and well-being are provided for adequately [...].”

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observance, in a manner which can be considered at least equivalent to that for which the Convention provides” (par. 155), leaving the responsibility of the state unaffected “for all acts falling outside its strict international legal obligations” (par 157). The theory of equivalent protection has been repeatedly taken up in ECtHR jurisprudence after the Bosphorus case. Among the other aspects that have been clarified, for example, is the fact that the applicant must also demonstrate that the protection offered by the international organization, of which the state that would have violated its rights is a member not, as a whole, equivalent to that provided by ECHR. It has also been established that the presumption of equivalence applies not only to national acts implementing the obligations deriving from participation in the international organization, but also to internal procedures adopted by the organization itself, provided that there is an involvement of state organs capable of founding the jurisdiction of the state party pursuant to art. 1 ECHR. In Gasparini v. Italy and Belgium case of 12 May 2009, ECtHR further clarified that when ECHR states parties transfer some of their sovereign powers to an international organization they must check that these rights guaranteed by the Convention receive equivalent protection within that organization. On the same occasion ECtHR stated that a state cannot be held responsible for a violation of ECHR by virtue of a decision of the international organization of which it is a member if the lack of equivalence has not been proven or at least asserted and if that state does not intervened directly or indirectly in the commission of the disputed act.

Once the question of the division of competences between EU and its member states in ECHR has been resolved, it is necessary to dwell on the possible violations of guarantees offered by the European Convention committed by the national authorities in execution of resolutions of the United Nations Security Council. Transposing what has been analyzed so far to Operation Sophia, it should be kept in mind that it has an even more peculiar character, since it falls within CFSP acts of EU. If, on the one hand, in fact, article 21 TEU establishes that EU’s external action “is based on the principles that have informed its creation, development and enlargement and that it aims to promote in the rest of the world: democracy, the rule of law, universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, principles of equality and solidarity and

165 ECtHR, Boivin v. France and Belgium and other 32 member states of Council of Europe of 9 September 2008.
respect for the principles of the United Nations Charter and international law, on the other, CJEU cannot exercise its authority over any human rights violations committed within CFSP, and therefore the effective remedies to them must be provided by the national law of member states.

The case of violations committed in the context of collateral missions to EUNAVFOR MED is different, specifically the Triton operations, now Themis, of FRONTEX, whose degree of responsibility will be deepened in the following paragraph. Once it is excluded that EU is responsible, pursuant to ECHR, for violations of human rights during Operation Sophia, it must be borne in mind that this operation was authorized through a Resolution pursuant to Chapter VII of the Security Council, and therefore it is useful to ask whether the responsibility for any acts contrary to human rights in the context of EUNAVFOR MED could be attributable to the United Nations.

ECtHR has been called several times over the past few years to rule on appeals filed by individuals who complained about the violation of guarantees offered to them by ECHR committed by national authorities in execution of UN Security Council resolutions. The problem was posed for the first time with the Behrami and Saramati v. France case of 2 May 2007, in which ECtHR was called upon to rule on some violations of the right to life, personal freedom and fair trial that had taken place in Kosovo by soldiers and officials of the Kososvo Force (KFOR) and of the United Nations Mission in Kosovo (UNMIK). On that occasion, Strasbourg judges considered that the facts underlying the proceedings were attributable to actions and omissions by KFOR and UNMIK and that, consequently, the conduct of the national contingents was attributable to UN.

Specifically, the delegation conferred to KFOR would have been sufficiently limited to attribute to the delegating body the acts performed by the delegated body, so that UNSC would maintain the authority and the final control over the mission. However, in this case ECtHR failed to verify the level of discretion that states would enjoy in executing the Resolution, thus admitting that whenever the state acts for the maintenance of peace and international security it could not be responsible for any human rights violations. Grand Chamber judges, in fact, reiterated that ECHR cannot be interpreted and applied in the legal vacuum but that it is necessary to take into account the relevant norms of international law, making explicit reference to articles 25 and 103 of the Charter of the United Nations (par. 147). Even more
relevant, then, is the imperative nature that ECtHR has recognized for the main objective of UN, namely the maintenance of international peace and security (par. 148).

The orientation adopted in the Behrami sentence was partially revised in Al-Jedda v. United Kingdom case of 7 July 2011\(^1\), in which ECtHR had to first verify whether the conduct reported by the applicants was attributable to the United Kingdom or the United Nations, which had adopted the formula “by any means necessary”, to authorize the use of the strength in order to contribute to the maintenance of peace and stability in Iraq\(^2\).

The case concerned a former Iraqi citizen, exiled from the regime of Saddam Hussein, who had obtained political asylum in the United Kingdom and, therefore, British citizenship. Immediately after the fall of the regime, he had returned to Iraq with four of his sons and here, on 10 October 2004, he had been arrested by US military, based on secret information received from British intelligence, which suspected him of being actively involved in the preparation of terrorist attacks against coalition forces in Iraq, procuring explosives, recruiting foreign fighters and favoring their clandestine entry into Iraqi territory. The arrested was then handed over the British military authorities, who had detained him in a detention center run by the British army in Basra until his release on 30 December 2007. No trial had been started against him, but the continuing necessity of his detention had been subjected to periodic reviews by special commissions, starting from 2006 also composed of representatives of the provisional Iraqi government, which – on the basis of secret evidence provided by the intelligence – had always considered that there were reasonable reasons that the prisoner was actually involved in terrorist activities. On the basis of the same evidentiary material, the British government withdrew his British citizenship in 2007, with provision against which the interested party unnecessarily placed an appeal before the competent administrative jurisdiction.

Unlike the Behrami case, on this occasion the Grand Chamber ruled that in the case in question the United Nations had effective control or authority and final control over the acts or omissions of the multinational force and that, therefore, the violation was attributable to the United Kingdom (paragraphs 84-86).

In establishing the degree of discretion of states participating in the multinational force, ECtHR stated that the goal of peacekeeping should in some way be balanced with the achievement of international cooperation in the promotion and encouragement of respect for human rights and of fundamental freedoms, pursuant to art. 2, par. 3 of the UN Charter. Once again, therefore, ECtHR has not clarified whether and to what


extent ECHR should be subordinated to the Charter. An important ruling in this sense can be found in Nada v. Switzerland case of 12 September 2012, in which ECtHR for the first time ruled on the compatibility between Convention and individual sanctions imposed by UNSC. In this case, ECtHR considered that the alleged violations were attributable to Switzerland, as these were measures adopted by the state within the national framework and, therefore, in the exercise of their jurisdiction (par. 120-122). However, according to ECtHR, it was not the fact that the obligations deriving from the Resolution were explicitly contrary to ECHR, but the way in which they were carried out within the member state. The judges observed, in fact, that UN Charter does not indicate to member states how to execute CDS resolutions adopted under chapter VII, which is why, even if the obligations of CDS appeared stringent, Switzerland still enjoyed a margin of discretion (par. 180).

The most recent is Al-Dulimi and Montana Management Inc. v. Switzerland case of 26 November 2013, again on the compatibility between the sanctions regime imposed by CDS and human rights guaranteed by ECHR, in which, for the first time, ECtHR resorted to the theory of equivalent protection with reference to the division of responsibilities between UN and its member states. First of all, the judges considered that the appeal was ratione personae admissible, since the confiscation order, although imposed by CDS resolutions, had been adopted by Switzerland in the exercise of its former jurisdiction ex art. 1 ECHR.

Subsequently, ECtHR argued that the situation lent itself to be analyzed in the light of the principle of equivalent protection, since the appeal concerned national measures potentially damaging to ECHR, whose adoption, however, had been necessitated by obligations conventionally assumed by the state that did not leave the authorities any margin of appreciation about their execution. In assessing the application of this principle, Strasbourg judges relied on the observations formulated by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms in the fight against terrorism, which revealed that the two human rights protection regimes would not be comparable. In his second annual report presented to the General Assembly, Special Rapporteur Benn Emmerson stated, in fact, that despite the progress made on the level of procedural rights of individuals affected by the sanctioning regime against Al-Qaeda, thanks to the introduction of Mediator’s Office. This regime does not always guarantee

173 Reference is first made to resolution No. 1730 (2006) of December 19, 2006, which established the c. Focal Point, in charge of receiving requests for cancellation from the lists of the Sanctions Committees sent by the registered subjects and to transmit them to the governments of the State that requested the registration, as well as to those of nationality and residence of the interested party. The latter, even through the
compliance with the minimum standards of protection provided by international law. A fortiori, ECtHR infers that in the absence of the figure of the Mediator within the framework of Resolution No. 1483 (2003), the system of protection that in the present case is offered to the applicants would be even less equivalent to that of ECHR, and this also taking into account the fact that these deficiencies would not have been filled at national level by any effective instrument of protection, since the Swiss Federal Court had refused to check the merits of the confiscation order. For all the reasons listed above, therefore, the presumption of equivalence could not be applied within the United Nations.

Chamber’s sentence, however, was again overturned by the Grand Chamber174, which did not consider the ‘contrast’ between the obligations under the Convention and those deriving from Resolution 1483, such as to require the use of hierarchical criteria (such as art. 103 of the Charter of the United Nations or the ius cogens notion), or the reference to the theory of equivalent protection. Contrary to what was argued by the Chamber, in the opinion of Grand Chamber judges, Switzerland maintained a margin of maneuver, if not in the application of Resolution 1483, at least in its interpretation. For this reason, denied at the root the existence of a regulatory conflict, the Grand Chamber opted for the argumentative model inaugurated with the Al-Jedda case, based on the presumption of conformity of the Security Council resolutions with the human rights protected by the Convention and on their harmonic and systemic interpretation in the light of ECHR.

Summing up the above, it could therefore be concluded, on the basis of the most recent ECtHR jurisprudence, that when UNSC leaves a margin of discretion to states in the implementation of obligations imposed by resolutions, it is the states, and not the organization, attributable to acts or omissions contrary to ECHR. More complex is the case in which the resolutions ex Chapter VII of the Charter impose more stringent obligations, which the states must implement within their own jurisdiction, as ECtHR as demonstrated by the decision of the Grand Chamber on the Al-Dulimi case, yes still reluctant to use the equivalent protection test.

By transposing these considerations to Resolution 2240 (2015), which authorizes the deployment of EUNAVFOR MED, in the

intermediation of the Focal Point, are required to consult, but the final decision on deletion from the list remains the responsibility of the Sanctions Committee. The res. 1904 (2009), followed by the resolutions 1989 (2011) and 2083 (2012), then replaced the Focal Point, relative to the sanctioning regime against Al-Qaeda, with the Office of the Mediator (Ombudsperson), able to address recommendations to the Sanctions Committee provided by res. 1267 (1999) regarding the desirability of any de-listing, which can then lead, in the event of non-contestation, to the automatic cancellation of individuals from the list. See also: G. SULLIVAN, M. DE GOEDE, “Between law and the exception: The UN 1267 Ombudsperson as a hybrid model of legal expertise”, in Leiden Journal of International Law, 26, 2013, pp. 833 ss.

event of violations of the guarantees provided by ECHR, the issue would seem to be resolved rather easily. As emerges from the text of the Resolution, in fact, CDS does not impose measures on states that would explicitly produce a violation of the guarantees provided by ECHR. Furthermore, as seen, there are certain provisions concerning the inspection of ships and the detention of traffickers, which are left vague in the text of Resolution, and which, therefore, in their application leave ample room for discretion to states that are part of it. For these reasons, more than plausible to believe that, when violations of the Convention occurred in the context of EUNAVFOR MED operation, the responsibility would refer to state that exercises jurisdiction over the person pursuant to art. 1 ECHR.

§ 22 – PROTECTION OF FUNDAMENTAL RIGHTS WITHIN FRONTEX, THE NEW COAST GUARD AND EUROPEAN FRONTIER

In addition to the jurisdictional issues resolved by ECtHR in the Hirsi case, sufficiently clear and indisputable appears the extraterritorial exercise of the jurisdiction in relation to violations of the rights of migrants committed by organs of the sending state on the territory of the foreign state, if, in application of agreements with this state, they exercise exclusively executive or judicial functions such as to affect the enjoyment of the guaranteed rights and therefore have full de jure and de facto control of the situation that led to the infringement.

The question becomes more complex when the European state participates in activities that are potentially harmful in a more marginal way, leaving the territorial state the main control or participating in the unlawful act together with other states or EU officials, as in the case of joint operations of police or rescue at sea in which military personnel of the European State cooperate with Union officials or forces of the third state.

Postponing for the moment the first hypothesis in the following paragraphs, it is good to dwell now on the unresolved question of the responsibility of FRONTEX agency, today Coast Guard and European Frontier (ECGB), in the case of illegal acts and violations of human rights during operations jointly coordinated.

The FRONTEX Founding Regulation, as anticipated, does not set out particular provisions with respect to the division of responsibilities between the agency and states that cooperate with it. It is only in 2007, with the Founding Regulation of Rapid Border Intervention Teams (RABIT), Rapid Intervention Teams, that mention is made to safeguarding the rights of refugees. RABITs regulation, however, has contributed to a
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growing militarization of Union’s external borders without defining an effective division of the protection responsibilities between FRONTEX and member states, causing frequent discharges of responsibility by the agency to the detriment of EU member states, and vice versa.

In light of these persistent critical issues, the applicable legal framework has undergone a further revision with Regulation No. 1168/2011, which introduced detailed rules for the management of agency operations, as well as a series of measures for the protection of human rights and division of responsibilities. The Regulation expressly declares that FRONTEX is required to perform its tasks in full compliance with EU law, including the Charter of Fundamental Rights, the rules of international law, including the Geneva Convention on the right of refugees, in addition to guaranteeing the compliance with the principle of non-refoulement by the authorities involved. Special consideration is also addressed to the needs of children, victims of trafficking, vulnerable people or those requiring medical assistance, as established by European and international standards. The regulation also requires the creation of a Consultative Forum within the agency, with the task of assisting the Executive Director and the Board of Directors in matters involving fundamental rights, as well as the appointment of a Human Rights and Drafting Officer of a Code of Conduct governing the operations coordinated by FRONTEX. Although the Regulation represented an important attempt to incorporate the protection of human rights in FRONTEX. These improvements have not unequivocally clarified the degree of legal responsibility of the agency in the case of joint operations. In particular, FRONTEX legal system continues not to guarantee a mechanism of appeal or procedures for the compensation of migrants whose rights are violated in the period of acceptance by the agency.

The shortcomings set out above were, moreover, the subject of an inquiry conducted, on its own initiative, by the European Ombudsman (European Ombudsman) in 2012176, which highlighted the absence of an effective mechanism within FRONTEX, aimed at compensating possible violations of the fundamental rights of migrants during the operations it coordinates. Following consultations with representatives of non-governmental organizations, including Amnesty International, Caritas, Statewatch and Migreurop, the Ombudsman issued a draft Resolution in which he recommended to FRONTEX some desirable actions to be taken in short and long term. In particular, the agency is requested to: clarify whether it considers itself responsible for any violations of fundamental rights during its

operations and, if so, in what terms; to define, in the Code of Conduct, the law applicable to the conduct of all participants in the transactions; to establish specific data protection systems for the intercepted migrants; to draw up specific guidelines for participants in joint repatriation operations, regarding the possible conditions of difficulty in which the intercepted migrants could come to find themselves.

FRONTEX did not accept Ombudsman’s recommendations, citing as the main reason that any incidents involving individuals involved in the operations it coordinates are ultimately attributable to member state responsibility under the jurisdiction of which the accident occurred is verified.

This position, strenuously defended by the agency, not only clashes with Ombudsman’s point of view, but also with the statements issued by the Committee on Migration of the Parliamentary Assembly of the Council of Europe, in April 2013\(^\text{177}\)\footnote{A. Pontéon, Frontex and the EBCGA – A question of accountability, Wolf Legal Publishers, Oisterwijk, 2017.}. Resolution draft, unanimously approved by the Committee on 4 April 2013, while acknowledging the efforts made by the agency in outlining a Fundamental Rights Strategy, in drafting a Code of Conduct and appointing a Head of Fundamental Rights, raises serious doubts about it to the completeness of these measures for the effective protection of human rights. The Committee also strongly criticizes the discharge of responsibility by the agency towards member states and calls for it to recognize its duties as owner or co-owner of the projects it coordinates.

Further recommendations worthy of note are the provision of adequate assistance for victims of trafficking, minors or vulnerable persons intercepted during the operations, as well as the guarantee of a fair, human and non-discriminatory treatment for all the persons subject to joint repatriations. Finally, these provisions should be integrated into an effective human rights monitoring system, promoting transparency and public disclosure of information relating to the operations undertaken by FRONTEX and raising awareness among agency’s operators, but also the officials responsible for border control, about the importance of effective protection of human rights.

The new role of the Border Guard and European Coastal Agency assumed by FRONTEX in 2015 for the purposes of this analysis, in particular relief are the new powers attributed to it inherent to the adoption of coercive measures against the intercepted ships (stop, visit to board, inspection and seizure), which should be subject to the jurisdiction of the state whose flag they are flying, and of persons on board (inspection, detention, arrest and repatriation). Indeed, the objective stated in recital No. 2 of the founding regulation of the new Agency, in addition to the effective management of the crossing of external borders, it
extends to making a contribution in the fight against serious crime with a cross-border dimension, such as international terrorism, in order to contribute to raising the level of internal security of EU.

Also in the context of Regulation 2016/1624, full respect for human rights is presented as a necessary “reference context” within which EBCGA must move to achieve the aforementioned objectives. Furthermore, the regulation states that the Agency actively contributes to the continuous and uniform application of EU legislation, including the EU acquis on fundamental rights, to all external EU borders. In this regard, collaboration with the European Agency for Fundamental Rights (article 52 of the Regulation) is also envisaged.

The reference to the respect of fundamental rights, then, is expressly provided for in articles 21, par. 4, 36 and 34 of the Regulation, with particular attention to full compliance with the principle of non-refoulement, both direct and indirect. In carrying out its duties, EBCGA must ensure that no one has landed, is obliged to enter or be brought into a country, or otherwise delivered or returned to its authorities, in violation of the principle of non-refoulement, or to a country in which it exists a risk of expulsion or repatriation to another country in violation of this principle.

From this point of view, then, the agency must take into account the particular needs of minors, unaccompanied minors, people with disabilities, victims of trafficking in human beings, people in need of medical assistance, of international protection, people in danger at sea and anyone in a particularly vulnerable situation.

Furthermore, with reference to the tasks of the new agency, it should also be remembered that the coordination and technical-operational assistance activities of member states in repatriation procedures must take place “in compliance with fundamental rights and general principles of EU and international law, including obligations regarding the protection of refugees and children’s rights” (article 27, paragraph 1). With regard to repatriations, a “code of conduct” has also been drawn up through Recommendation (EU) 2017/2338 which describes standard procedures, designed to simplify the organization of operations and repatriation operations and to guarantee that they carry out in a human manner and with full respect for fundamental rights, such as human dignity, prohibition of torture and inhuman or degrading treatment or punishment, the right to liberty and security and the right to protection of personal data, and of not discrimination.

Coming now to the aspect that mainly concerns the present work, that is joint operations at the external borders, that the executive

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director of FRONTEX and the host member state, in consultation with the participating member states, coordinate an operational-binding plan for the agency, the host member state and the participating member states pursuant to art. 16, par. 3-which defines in detail the organizational and procedural aspects of the joint operation. It also includes a description of the duties and responsibilities also with regard to respect for fundamental rights (paragraph 3, letter d), as well as a framework of reports and assessments containing the parameters for the evaluation report, also for how much concerns the protection of fundamental rights (paragraph 3, letter i).

Then there are the cases of technical and operational cooperation between member states and third countries, which FRONTEX facilitates and encourages pursuant to art. 54, within which respect for fundamental rights is guaranteed by the “status agreement”, to be concluded, pursuant to art. 54, par. 4, between Union and the third country concerned with regard to all aspects of the execution of the activities. The choice of third countries with which to cooperate, however, is subject to the requirement established by art. 55, that EBCGA liaison officers are employed “only in third countries whose border management practices comply with the minimum standards of human rights protection”. It is undeniable, however, and on this point we shall return to the following paragraphs, that this conditionality clause, clearly established on paper, is not always respected in practice.

Once again, therefore, the question naturally arises as to whether, once established that fundamental rights must be respected, EBCGA has adopted a control mechanism to verify its effective protection and if, in case of violations, a definitive methodology of allocation of responsibilities has finally been established.

§ 23 – EBCGA CONTROL MECHANISM

With regard to the first question, articles 34 and 35 of the 2016/1624 Regulation prepare the basic legislative parameters in relation to which some internal monitoring tools should operate. Specifically, art. 70 re-establishes the “consultative forum on fundamental rights”, already established by the Frontex Management Board in September 2012, which assists the executive director and the board of directors in matters related to the protection of fundamental rights, guaranteeing them independent advice. The forum, in the exercise of its functions, has effective access to all information concerning the respect of fundamental rights, including through site visits during joint operations or rapid border interventions with the agreement of the host member state, as well as at crisis points or during operations and repatriation operations.

At the same time, another independent figure was set up, charged with contributing to Agency’s fundamental rights strategy, monitoring compliance with these rights and promoting
compliance with fundamental rights by the Agency, reporting directly to the board of directors and collaborating with the advisory forum.

In addition to the figure specially designed to monitor effective respect for human rights, other bodies of the Agency also carry out this function, albeit a few later. The coordinating officer, pursuant to art. 22, par. 3, lett. b, is responsible for monitoring the protection of fundamental rights in the context of the correct implementation of the operational plan, reporting to the Agency in this regard. The Executive Director, then, if he considers that there are violations of fundamental rights or obligations concerning international protection of a serious nature or destined to persist, after consulting the human rights officer and informing the member state concerned, he has the power to revoke the financing of a joint operation, or a rapid border intervention, a pilot project, the deployment of migration management support teams, a return operation, an intervention or an operational return agreement, or suspend or cease all or part of these activities, pursuant to art. 25, par. 4, of the institutional regulation.

Finally, pursuant to art. 7 of the regulation, the Agency is responsible for its work in the European Parliament and in the Council.

In addition to the supervisory bodies just discussed, the individual complaint mechanism, established on 6 October 2016 by the Executive Director of the Agency, deserves special mention in consultation with the person responsible for fundamental rights and in accordance with art. 72 of the Regulation, with the aim of monitoring and ensuring compliance with fundamental rights in the context of activities carried out by FRONTEX. Any person who is directly affected by the actions of staff involved in a joint operation, a pilot project, a rapid border intervention, the deployment of migration management support teams, an operation can make a complaint repatriation or intervention, and believes that it has been the subject of a violation of its fundamental rights”. The complaints, which must be submitted in writing, using a form available on the FRONTEX website, are entrusted to the responsibility of human rights manager, who has the task of registering the admissible complaints, forward them to the executive director, transmit them, if concerning the staff of the teams, the member state to which they belong, informing the authority or body responsible for the fundamental rights of a member state, and registering and ensuring the follow-up of the complaint by the Agency or that member state (art. 7, paragraph 4).

The individual reporting mechanism, however, presents some critical issues, starting from the difficult accessibility that was also detected by the Commission already in its second operational report, in which it underlined the need for FRONTEX to increase the disclosure of information on the matter.
A second problematic aspect concerns the conditions of admissibility of the complaints, since “only proven claims concerning concrete violations of fundamental rights are admissible” (art. 72, par. 3).

As some authors note in this regard, first of all, the burden of proof, at least with regard to border operations, is extremely burdensome for people who are sent back to a third country and who should be able to draw concrete evidence to support their own complaint. With regard to the conditions of admissibility in strict sense the provision of art. 72 does not provide specific details, and it could therefore refer to the jurisprudential orientation according to which, in order to guarantee legal certainty and a correct administration of justice in the assessment of admissibility of an appeal, it is necessary that the essential elements of fact and law on which it is founded, even if only briefly, from the introductory act itself.

The lack of transparency regarding the outcome of complaints, in the opinion of the writer, makes the mechanism ineffective and contradicts the objectives of the Commission. This, in the same report, stated that, in 2017, the person in charge of human rights should have been provided with additional personnel, who would support her in her duties: even in this case, it is impossible to find information in this regard.

Once clarified what ECGBA foresees, at least formally, regarding the protection and control of fundamental rights within its operations, it is necessary to turn our gaze to an even more critical aspect, namely the division of responsibilities between Agency and member states in the event such violations are ascertained.\footnote{Report from the Commission to the European Parliament, the European Council and the Council on activities to make the European border and coastal guard fully operational, COM (2017) 47 final, Brussels, 25 January 2018.}

§ 24 – THE DIVISION OF RESPONSIBILITIES BETWEEN ECGBAS AND MEMBER STATES IN THE MANAGEMENT OF EXTERNAL BORDERS

With Regulation 2016/1624 there was an attempt to better clarify the Agency’s accountability profiles. In art. 5, there is a “shared responsibility between the Agency and national authorities responsible for border management, including coast guards”. However, it emerges from the provisions as a whole that, in fact, member states retain primary responsibility for managing their external border sections and must do so in their own interest and in the common interest of all member states, in full respect of EU law and in close cooperation with the Agency. ECGBA, on the other hand, supports the application of EU measures related to the management of external borders “strengthening, evaluating and coordinating member states actions” in the implementation.
of these measures, as well as in repatriation. Furthermore, in the case of search and rescue operations related to maritime border surveillance operations, ECGBA continues to play the role of technical and operational assistance in support of member states and third countries. In these circumstances, therefore, it would appear that the responsibility for violations of human rights, or for any damage caused to persons intercepted at sea, is attributable to the host member state or participant which, in most cases, is represented by the state of the ship of the Operating Coast Guard.

If the case of violation can be said to be resolved in this sense, the situation in which responsibility for omission in search and rescue at sea should be attributed appears more complex. If, on the one hand, in fact, given that the obligation to provide aid at sea has nature, as well as contractual, even customary law, the States involved in the operations coordinated by the Agency have the duty to fulfill them, on the other also in this case does not result from the regulation if, and to what extent, the Agency is to be considered guilty in case of failure to rescue. Regulation, therefore, does not mention specific hypotheses of direct responsibility on the part of FRONTEX, but some violations of fundamental rights, such as, among others, the right to protection of personal data, could be attributable exclusively to the FRONTEX staff (arts. 45-50 of Regulation). In fact, pursuant to art. 47, ECGBA can only process some personal data, and only in the specific cases provided for by art. 47 par. 2, and exclusively for the purposes listed in art. 46. In particular, the transmission of personal data to authorities of third countries or parties is expressly prohibited; pursuant to art. 50, specific safety rules must be applied in the treatment of classified information or non-classified sensitive information; pursuant to art. 52, par. 4, the Commission, the other EU institutions, the European External Action Service and the other EU agencies involved in border control and in the fight against the smuggling of migrants use the information received from FRONTEX exclusively within the limits of their skills.

§ 25 – Extraterritorial Migration Control: Violations of Human Rights in the Light of Agreements Between EU and Third Countries

EU agreements, with regard to the training of the Libyan Coast Guard, Italy, with the Memorandum of Understanding, have entered into with Libya have been examined. As anticipated, it is clear that the ultimate aim of these agreements is to have all the measures of law enforcement carried out by the third state, avoiding the direct involvement of European states in activities detrimental to human rights.

The adoption of these policies is linked to the concept of “borders externalization”, which has always been closely
EUNAVFOR MED mission and collateral eu operations for the fight against smuggling of migrants – Dimitris Liakopoulos

connected to states in order to make their borders secure in the areas of migration. This concept was first used in relation to asylum requests and associated with the proposal of the British Government of March 2003 to create transit centers where to analyze asylum applications outside Europe\textsuperscript{180}; in order to avoid the illegal entry of migrants into Europe. Britain suggested establishing “protected areas in third countries in which to transfer asylum seekers arriving in EU member states, so that their requests could be assessed”.

Secondly, the principle was applied to migration policies in general, with reference to EU’s attempt to “project” its territorial borders into the surrounding states and regions by exporting its migration and asylum policies to it. This procedure has been defined by some authors as “distance policy”, as the mechanisms for controlling state borders are exercised outside the borders of the state through international security professionals.

In addition to the aforementioned ad hoc agreements, the outsourcing process includes a wide range of different policies: a case in point is the readmission of migrants and asylum seekers to alleged safe third countries, outside EU, through which refugees have transited. In this regard, various criticisms have come from scholars and organizations in defense of human rights, which consider these policies a discharge of responsibility on the part of Europe towards third countries.

Coming to the agreements between Italy and Libya, already with the 2008 Treaty, Italy had adopted financing measures that minimally relegated Italy’s responsibility in controlling the Libyan borders. In fact, Italy simply collaborated in strengthening the already existing Libyan police force and security apparatus.

Regarding the refusals of migrants at sea, ascertained by ECtHR in the Hirsi case, Italy had transferred to Libya the responsibility to provide assistance to the intercepted migrants.

Although, in addition, the border control practice was in the hands of Libya, Italy had set up a representative office for the Minister of the Interior in Libya. In this way it contributed to the exportation of surveillance techniques and skills to Libya, so as to facilitate the exchange of sensitive security information on a bilateral level.

Now on the basis of what has been stated so far, it should be noted that the Memorandum of Understanding signed between Italy and Libya goes even further in the direction of a complete “outsourcing” of borders, so that some authors come to talk about contactless control of irregular immigration.

\section*{§ 26 – Italy-Libya Memorandum of Understanding: Is it Possible to Configure the Complicity of States for Violation of Human Rights?}

\textsuperscript{180} E. Paoletti, \textit{The migration of power and North-South inequalities. The case of Italy and Libya}, Palgrave Macmillan, London, 2011.
What has been said so far is particularly relevant with reference to the recently presented appeal to ECtHR by the Global Legal Action Network in collaboration with the Association for legal studies on immigration, the US university of Yale and ARCI, based on testimonies survivors of the shipwreck of a boat on November 6, 2017, in which 20 migrants drowned. Six months after this shipwreck, May 3, together with sixteen other survivors presented an appeal against Italy to ECtHR, accusing it of endangering his life, of delaying relief by entrusting them to the Libyan coast guard and to have “repealed by proxy” 47 migrants through the action of the Libyan patrol boat, donated to Tripoli by Rome in May 2017, as foreseen by the Memorandum of Understanding signed by the two countries. Of the 17 migrants who presented the appeal, in fact, fifteen were brought to Italy and two were rejected in Libya where they were taken to a detention center in Tagiura. For two months they were subjected to violence, abuse, torture, extortion and rape, were sold and tortured with electricity. Finally, the two asked to participate in Organization’s voluntary repatriation programs. According to the survivors and the college of lawyers and experts who followed them in their appeal to ECHR, the Italian government would be legally responsible for the “proxy repulsions” operated by the Libyan coast guard, which violate numerous articles of the Convention. In fact, Italy has donated the patrol boats to the Libyan coast guard and financed the formation of patrol boats following the agreement signed with Tripoli in February 2017. The Italians coordinated, finally, through the operations center of the coast guard of Rome the interventions that have resulted in the rejection of migrants in Libya. 

The applicants call the Hirsi sentence to justice, relying on “proxy” responsibility of Italy, as everything would have taken place under the control and coordination of the Italian authorities. The emergency call had arrived at the Italian coast guard operations center, which called the NGO Sea Watch, Sea Watch 3, at 6 am to call for intervention. So Italy had the responsibility that the rescued people should not suffer violations. Moreover, from a more general point of view, Italy would have put Tripoli in a position to make these rejections by proxy, donating the patrol boats, forming patrol boats and coordinating the Libyans from a naval ship stationed in Tripoli. The reference to Hirsi case, however, appears inadequate, since, in 2012, Italy had operated directly with the Italian Navy ships, while in this case it would have acted through the intervention of the Libyan coast guard, and would result at least complicated to root the Italian jurisdiction on the reasons given by the applicants. At the level of international law, the question that could be asked,
rather, is whether, as claimed by some authors\(^{181}\), the support given to third states through the provision of military means suitable for the control of their own borders and the repatriation of those who they try to leave, the training of police forces in order to make the repressive and preventive action of emigration more effective, the financing of the construction of detention centers for migrants-behaving, in relation to the violations of human rights that this cooperation it follows, a responsibility for complicity of EU member states, pursuant to art. 16 on states responsibility, or, in the case of acts attributable to EU, of art. 14 on international organizations responsibility.

Now, for this type of responsibility to take shape, three conditions are necessary. The state that provides the aid is aware of the circumstances that make the behavior of the state, assisted internationally, illegal. The aid or assistance is provided with the aim of facilitating the commission of the unlawful act, and has actually facilitated it. The act would be unlawful even if committed by the state providing the aid, i.e. that the offense constitutes a violation of a binding rule for both states. Furthermore, it is shared opinion by several authors that complicity can be traced back to cooperation based on agreements, even less formal, such as MoUs, between states or between states and agencies.

Returning to the conditions that qualify complicity for human rights violations, with regard to the first point, there are various elements that testify the fact that Italy, like EU, was, and still is, aware of the violations of human rights that have occurred and still take place on Libyan territory. This situation, in fact, was not only documented by multiple reports and complaints from non-governmental organizations, but also by reports from various international institutions.

As for the condition that the violated rule must be binding on all the actors involved, it is noted that most of the rules protecting human rights that are violated have a common value, starting from the prohibition of torture or inhuman and degrading treatment. Furthermore, if it is true that Libya has never ratified the 1951 Geneva Convention. The principle of non-refoulement, as already stated above, is recognized as a norm of customary law by the international community.

From a probative point of view, the requirement that the complicit state should be willing to facilitate the commission of the unlawful act appears more complex. In fact, it could be considered that Italy, whose purpose is to oppose the trafficking of migrants and to control migratory flows, has no intention of violating the fundamental rights of migrants, all the more so given the inclusion in the agreements of clauses explicitly designed to guarantee respect for human rights. However, the

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opinion of some authors can be shared according to which, due to the rather vague wording of the provisions contained in the agreement, and the fact that there is no control or sanction mechanism for the violation of these rules, it could be considered that the level of awareness of the situation in third countries with which these agreements are concluded is such, the aid aimed at the extraterritorial delegation of migration control constitutes a deliberate act which, although not specifically aimed at the commission of the offense, accepts it as a probable consequence.

CONCLUDING REMARKS

The impulse to carry out this research was born from the felt need to frame at the legal level the actions taken by states in the fight against the traffic of migrants, which culminated, at European level, with the deployment of EUNAVFOR MED Operation Sophia in the central Mediterranean.

A necessary result, first and foremost, to clarify the concept of smuggling of migrants which, although widely repeated on a national and international scale, in fact still contains, in its specificity, different areas of shadow, essentially relating to three aspects: definition; modalities of effective contrast; and repercussions that law enforcement activities have on the human rights of migrant traffickers.

On the level of legal instruments of international law specifically aimed at combating smuggling of migrants, it was noted that, despite the clear definition adopted by the Protocols, in practice significant criticalities remain in the distinction between the types of migrant trafficking and in human beings. This indeterminacy, which is also expressed in the incorrect use of terms at a socio-political level, has repercussions on the effective protection of victims. Furthermore, although the smuggling protocol requires states to provide protection for migrants “at risk”, the degree of assistance that states should provide is far from defined, resolving the obligation to adopt “appropriate measures to afford migrants protection”, where the appropriate term does not even clarify for who and what. It is clear, in fact, that in practice it is difficult for a migrant, especially if it can be traced back to a vulnerable group such as women and children, particularly if they come from countries generally recognized as fertile ground for trafficking (ex. women and girls from Nigeria) can enjoy the protection and assistance measures that are instead reserved for confirmed victims of trafficking, particularly from a medical, psychological and social standpoint.

Once the problems of pure definition have been overcome and we have analyzed the tools made available by the Protocol to favor cooperation between states in the fight against traffic, we have focused on the issues that specifically concern the type of smuggling on which we have decided to concentrate, namely the traffic by sea. Retracing the rules of the law of the sea that are
relevant to the deployment of law enforcement operations, the long-standing questions relating to the identification of the contiguous zone in general and of the Italian one in particular, in light of the recent courts jurisprudence have been highlighted. Italians concerning the exercise of Italy jurisdiction on foreign ships involved, or suspected of being involved, in the crime of smuggling.

The lack, within UNCLOS, of a clear definition of how states should provide for the establishment of their own contiguous area has left ample room for the discretion of states. An example, among others, is Italy, whose reluctance to establish a well-defined contiguous zone has produced a fluctuating and uneven jurisprudence on the subject. Closely related to this aspect, then, is the right of pursuit, as well as the “constructive presence”, which several authors consider – and we can support this hypothesis – as the institution of the first.

However, the critical issues related to the exercise of jurisdiction over ships suspected of traffic have been partly overcome through the adoption of the Protocol – which obviously has value only for the states that are part of it – and, in the specific area of EU, through law enforcement powers, notwithstanding UNCLOS, which have been attributed to states parties to EUNAVFOR MED through Resolution 2240 (2015) of the United Nations Security Council. However, the Security Council has remained vague in regulating the actions that states can take against ships that do not deliberately lend themselves to visits and inspections, citing the “good faith effort” principle which, once again, if on the one hand it leaves more discretion to states, on the other it represents a dangerous power. What we asked ourselves, in particular, is whether the Resolution gives states additional powers once the ship has been visited. In fact, we can assume that a ship without a flag, being not subject to the jurisdiction of any state, is consequently subject to the jurisdiction of all states, which would include the exercise of powers that go beyond the mere right of access; while others deny the exercise of universal jurisdiction on flagless ships, limiting the powers of intervening states to visit only in order to verify the flag, except for the faculty to exercise coercive powers if there is an appropriate link between the unlawful act committed from the ship and the domestic law of the intervening state. On the other hand, not even the Palermo Protocol, as far as it implies, in art. 8, par. 7, through the expression “take appropriate measures” that the states part of it can exercise on the flagless ship suspected of being involved in the traffic of migrant powers that go beyond the right of access, does not clarify which or to what extent. It is surprising, therefore, that not even Resolution 2240, which could have dissolved an important interpretative node, at least as regards the mission in question, is limited to inviting states to inspect flagless ships that could be involved in traffic activities of migrants, without defining unequivocally whether and what
coercive powers the states can exercise, and to what extent.

Beyond the questions of jurisdiction and the exercise of coercive powers against traffickers, EUNAVFOR MED operation has been analyzed in further aspects, from the mandate that established it to its evolution, from May 2015 to today. The interest in this operation stems from the fact that it represents a unicum difficult to classify in the wake of the previous practice, as it is a law enforcement operation that provides for the active collaboration between military and police forces of EU member states. Furthermore, as we have seen, the operation is fully part of Union CFSP acts which, as is known, are subject to a special regime, but, on the other hand, it involves Union agencies that actively collaborate in finding the information and patrols of the central Mediterranean.

Even more peculiar, then, is the fact that the operation was authorized ex post through Resolution 2240 (2015), which derogates from some rules of international law, including those of the law of the sea. This Resolution also represents the first case of authorization for coercive measures on the high seas, not against a specific country, but to counteract a criminal activity. The novelty is also identified in the fact that, while the previously analyzed conventional texts simply attribute to states the faculty to inspect the flagless ships, the Resolution explicitly recommends (calls upon) the intervention.

The ways in which the mission is deployed, as well as the policies implemented by the Union, have raised doubts about the protection of human rights of trafficked migrants, which nevertheless call into question the division of responsibilities between member states and EU, as well as the United Nations Security Council.

Since Sophia is a foreign EU policy operation, authorized through a Resolution of the Security Council, the issue becomes more complex in terms of responsibility, and calls into question the division of powers between member states, EU and UN.

Having ruled out that EU is responsible, pursuant to ECHR, for human rights violations during Operation Sophia. We had to keep in mind that this operation was authorized through a Resolution under Chapter VII of the Security Council, and, therefore, we asked ourselves if the responsibility for any acts contrary to human rights under EUNAVFOR MED could be referred to the United Nations.

By transposing these considerations to Resolution 2240 (2015), which authorizes the deployment of EUNAVFOR MED, in the event of violations of the guarantees provided by the ECHR, the issue would seem to be resolved rather easily. As emerges from the text of the Resolution. In fact, CDS does not impose measures on states that would explicitly produce a violation of the guarantees provided by ECHR. Furthermore, as seen, there

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182A. PEILET, The charter of the UNO. A commentary, op. cit.
are certain provisions concerning the inspection of ships and the detention of traffickers, which are left vague in the text of the Resolution, and which, therefore, in their application leave ample room for discretion to the states that are part of it. For these reasons, more than plausible to believe that, when violations of the Convention occurred in the context of the EUNAVFOR MED operation, the responsibility would refer to the state that exercises jurisdiction over the person pursuant to art. 1 ECHR.