The right to life of the migrants crossing the Mediterranean to reach European shores: a case study on the application of the right to life at sea in human rights European and International law context

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Abstract

The research question of this paper was inspired by the article "Wasted Lives. Borders and the Right to life of People Crossing Them" written by professor Thomas Spijkerboer, which I studied at the recommendation of professor Clemens Kaupa during the Legal Methodology course.

The idea of researching whether the right to life of the irregular migrants is protected during their perilous journey on the Mediterranean Sea consolidated during the investigation I have carried out to compose a Policy Brief regarding the irregular migrants and the principle of non-refoulement on the high seas, within the Transnational Law in Social Context course. Examining the research gathered on the subject made me realise that many of the migrants coming to Europe by boat never reach the continent’s shores even though the European Union and its Member states are aware of this problem. The most shocking of all was reading "The Left-to-die-boat" report formulated by the Forensic Oceanography which reconstructed the events of March 2011, when a boat transporting seventy-two migrants was left adrift for 14 days on the Mediterranean Sea, despite their plea for assistance to the various ships and aircraft that passed them by. It was like the migrants on the boat were floating on a merciless sea, where not even the most basic of human rights are applicable.

This incident led me to research what is the status of the rights to life of the irregular migrants in the Mediterranean Sea at the European and International Law level. My finding evidenced there is a considerable number of legal regimes overlapping and a great number of actors involved in the various maritime operations in the region. In essence, what are the measures taken by the European Union and the coastal Member States to preserve the right to life under the international maritime law and under the European and International human rights law? Is there a positive obligation for the European Union and the coastal Member States to protect the right to life extraterritorially?

The purpose of this thesis is to raise awareness of the plight of the migrant deaths occurring in the Mediterranean Sea on their journey to Europe in search of a better life. It is my belief that the players involved in the border management and migration control operations at the European Union’s maritime frontiers have an obligation to take the necessary steps to conserve the right to life of the ‘boat’ migrants found at sea. In my reasoning, in the region there are numerous legal regimes superimposed, including human rights law, which makes it, so the notion of borders does not have the same meaning as before. To claim that the right to life should only be protected within the borders of the state or supranational organisation appears somewhat artificial taking into account the practical reality where the European Union together with the Member States are performing activities extraterritorially to safeguard the frontiers and to stem the migration flow.

I want to express my appreciation and gratitude to professor Galina Cornelisse, who was patient and guided me in writing this thesis.
<table>
<thead>
<tr>
<th>Abbreviation</th>
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<tr>
<td>ARIO</td>
<td>Articles on the Responsibility of International Organisations</td>
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<td>ASR</td>
<td>Articles on the Responsibility of States</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>CESCR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<td>EU</td>
<td>European Union</td>
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<td>EBCG</td>
<td>European Border and Coast Guard</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>EUCFR</td>
<td>European Charter of Fundamental Rights</td>
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<td>FRA</td>
<td>Fundamental Rights Agency</td>
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<td>Frontex</td>
<td>European Border and Coast Agency</td>
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<td>HRC</td>
<td>Human Rights Committee</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>IMO</td>
<td>International Maritime Organisation</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>SAR</td>
<td>Search and Rescue</td>
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<td>SOLAS</td>
<td>The International Convention for the Safety of Life at Sea</td>
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<td>MGD</td>
<td>Maritime Guidelines Decision</td>
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<td>MSR</td>
<td>Maritime Surveillance Regulation</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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What Hannah Arendt pointed out about the Rights of Man in 1951 still holds true today: “[…] it turned out that the moment human beings lacked their own government and had to fall back on their minimum rights, no authority was left to protect them and no institution willing to guarantee them […].”¹ For even though the human rights of the irregular migrants attempting to reach European shores by the Mediterranean route are acknowledged by the entire world, the moment they find themselves at sea their right to life becomes unenforceable with both states and international organisations disclaiming any responsibility for the migrant deaths at the European maritime frontiers.

The purpose of this thesis is establishing

to what extent the right to life of the migrants travelling to Europe by boat applies in the Mediterranean space?

To answer the research question, it is necessary to understand why migrants’ lives continue to be lost in the Mediterranean space I have to identify what actors are involved in maritime operations in the region. Taking into account the multitude of actors present at sea, I have decided my paper should focus on the participation of the European Union, the Member States and slightly on the relationships these players have developed with third countries with maritime shores in the Mediterranean Sea. These countries are departure or transit states for boat migrants and collaborate on a different basis with the European Union and the Member States to combat sea migration.

At the beginning of my research, it was not clear whether there were any policies in place aimed at saving the lives of the boat migrants. It appeared that the migrants were drifting on a cruel sea without any state to save them and protect them from losing their lives. In order to clarify this vagueness, I analysed European law from a doctrinal and non-doctrinal perspective. The assessment of the policies applied by the European Union and the Member States regarding migration at sea was necessary to determine their interaction with human rights, in general, and the right to life, especially. This is why in Chapter 2, I examine the integrated border management policy, including Triton Operation headed by Frontex and Operation Sophia – a military sea operation under the Union’s Common Foreign and Security Policy (CFSP) and their relationship with the human rights of the migrants encountered at sea, especially their position towards saving the migrants. As important is to examine whether the protection of the lives of undocumented migrants is considered in the agreement signed between the European Union and third-countries or between coastal Member States and third-countries.

After establishing the various actors involved in maritime operations in the Mediterranean Sea, my next task was to determine how is the right to life presented in the European and International law, as well in the jurisprudence of the judicial bodies created through human rights instruments. As a consequence, I have reviewed the case law of the Human Rights Committee and the European Court of Human rights as well as the literature found on this issue. At the same time, considering the space within which the lives of migrants are lost, it occurred to me that it was necessary to find out whether human rights, in general,

were applicable at sea, extraterritorially. For this reason, I have analysed the notion of jurisdiction within the meaning of the ECHR and the ICCPR, as well as I have scrutinised European and International law from the perspective of the case law existent and referring to the scope of application of the right to life in general and especially at sea. I discuss these problems, as well as the approaches adopted in scholarship in Chapter 3 of this paper. Taking into consideration that the migrant deaths are happening at sea, also in Chapter 3 I have pondered the provisions of the international law of the sea that suggest that there is an obligation to rescue people in distress at sea, as well as how the human rights of the migrants and ultimately the right to life are regarded in human smuggling context, in international and European context. I use the migrant smuggling aspect of the maritime operations at sea as an example of how conflicting interpretations of the law within different legal regimes negatively impact the right of the migrants to be saved at sea.

The jurisprudence of the human rights bodies indicates that there might be a manner through which the EU and the Member States could be obliged to protect the right to life, deriving from a positive obligation to take the appropriate steps to uphold this human right. For this reason, in Chapter 4, I explore the possibility of applying the right to life extraterritorially based on a positive duty to the EU and the Member States have to preserve life. Another issue I deal with in the same Chapter is whether there is a legal basis to engage the responsibility of the EU, and the Member States for the migrant deaths occurring in the area. Also, I propose another approach to extend the right to life in the Mediterranean Sea considering the universality of this human right, the principle of the international cooperation from ICESCR and the Maastricht Principles using analogy as a legal method. To claim otherwise would be to consider that migrants at sea are in a state of ‘bare life’, without access to ‘concrete life’.²

Chapter 5 is a reflection of the conclusions I have drawn on the research question as well as proposes a few policies that should be applied to stop the drowning of the clandestine migrants in the Mediterranean region.

There is no generally agreed upon definition of the notions of ‘irregular migration’ and ‘irregular migrant’. The International Maritime Organisation (IMO) defines the term ‘irregular migration’ as “movement that takes place outside the regulatory norms of the sending, transit and receiving countries”.³ Another attempt at defining the ‘irregular migration’ has been made by the Migration Observatory at the University of Oxford which specifies that ‘irregular migration’ is “a flow of people who enter the country without the country’s legal permission. In contrast, the term ‘irregular migrants’ typically refers to the stock of migrants in a country who are not entitled to reside there”.⁴ The European Migration Network describes an ‘irregular migrant’ as “a person who, owing to irregular entry, breach of a condition of entry or the expiry of their legal basis for entering and residing, lacks legal status in a transit or host country. In the EU context, a third-country national present on the territory of a Schengen State who does not fulfil, or no longer fulfils, the conditions of entry as set out in the Schengen Borders Code, ² See G. Agamben, “Homo Sacer. Sovereign Power and Bare Life” (1995), Stanford University Press, pp. 183.
or other conditions for entry, stay or residence in that Member State”. Thus, based on the above definitions, the notion of irregular migration refers to the operation of migrating, and the rate at which migration rates increase and decrease and the term of ‘irregular migrant’ concerns the status of a person. Hence, in this paper, I will use the notion of irregular migration to apply to persons attempting to cross the European maritime borders clandestinely and the term irregular migrant to refer to an undocumented person attempting to reach Europe by boat. As such the notions of irregular/undocumented/clandestine migrant, I have used in connection with the manner of travelling across the Mediterranean, in a broad sense, to include refugees, persons in need of international protection and economic migrants coming to Europe in search of a better life. While the migrants are en route, the coastal authorities do not have the necessary information to judge their legal status. In my view, the protection of the right to life should not be conditioned by the type of migrant one is.

Chapter 2 European Union and Members States' policies concerning the right to life of the irregular migrants trying to reach Europe by the Mediterranean Sea route

European Union policies concerning irregular migration have as a purpose to prevent the irregular migrants from entering. Although the majority of the states with maritime borders acknowledge the human rights of the irregular migrants who seek access to the European border as a matter of policy, there are no sanctions provided for the, sometimes, drastic measures taken to prevent irregular migration flows. The migrants undertaking the dangerous Mediterranean route have convincing reasons for choosing to do so, and the fact that the highest number of people seeking asylum in the European Union in 2018 is of Syrian nationals confirms this argument.7

This chapter represents an overview of the policies developed and implemented by the European Union and the Member States with maritime borders in the Mediterranean Sea to stave off the irregular migration occurring at sea. In Section 2.1., I will examine the notion of ‘integrated border management’ as a reflection of the EU position with regards to irregular migration occurring in the Mediterranean region. As a part of this policy, Frontex’s role in maritime activities will be analysed in Section 2.2., using as an example Triton operation. Another type of sea mission is Operation Sophia focused mainly on combating migrant smuggling and trafficking, under the direct supervision of the EU, discussed in Section 2.3. Another dimension of the border policies aimed at controlling migration, advanced by the EU and the Member States, is the cooperation with third countries of origin or transit, which will be assessed in Section 2.4 and Section 2.5. represents the conclusion of my findings related to EU and Member States policies concerning the right to life of the boat migrants.

Section 2.1. The integrated management of the border as a policy meant to consolidate security at the shores of the Union

In their attempt to safeguard their border, the European Member States endeavour to maintain their authority over migration control issues, but simultaneously acknowledge the necessity of a common migration policy within the Union to regulate matters pertaining to the open internal border and to consolidate the external maritime frontiers.8

The necessity of developing a coherent approach regarding the management of external European borders, including by sharing information, enhanced cooperation and signing agreements with third countries was highlighted by the European Commission, in 2001.9 The desideratum of elaborating an effective and integrated management of the

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European Union external frontiers was accentuated again by the Laeken European Council Conclusions of December 2001.\textsuperscript{10} The notion of ‘integrated border management’ (IBM) was advanced by the European Commission in a Communication to the Council and the European Union.\textsuperscript{11} This concept was further developed and included in the Lisbon Treaty,\textsuperscript{12} and represents one of the principal policy objectives related to the enforcement of the Union’s external borders. The most important documents regarding the protection and organisation of the European Union borders were adopted in 2002, respectively the Commission Communication “Towards an integrated management of external borders”\textsuperscript{13} and the “Plan for the management of external borders”\textsuperscript{14} forwarded by the Council without advancing any concrete strategies on how this could be achieved. These documents illustrate that the primary goal of the integrated management of the external borders of the EU is to ensure the internal security of the freedom of movement in the Schengen area by fighting terrorism, illegal migration and human trafficking and there is no mention of the need to uphold human rights related to external border security activities.

In 2006, the notion of integrated border management was explained by the Council as including border control, prevention of crime, cooperation between agencies and coordination of the Member States and the European Union external border activities.\textsuperscript{15} The Council affirmed that the stated purpose was to be realised through a common legislative framework, contained by the Schengen Borders Code; active cooperation between the Member States, along with cooperation regarding operations initiated by Frontex and solidarity with the view of creating an External Borders Fund.\textsuperscript{16} The migration problem was described as a ‘crisis’ situation, and the strategies used by the Member States and the European Union have been to develop and implement policies aimed at bringing it under control, by reinforcing the maritime frontiers.\textsuperscript{17} The problem is that the 2006 Conclusions did not stipulate the necessary procedure to integrate EU and national border administration, nor it did mention how the

\textsuperscript{10} European Council, “Presidency Conclusions of the Laeken European Council of 14 and 15 December 2001”, SN 300/1/01, para 42.
\textsuperscript{13} European Union Finish Presidency, “Council Conclusions of 4-5 December 2006”, Press Release 15801/06, pp 27.
\textsuperscript{15} Ibid. 13, pp 26-27.
powers, competences and responsibilities should be distributed between the Union and the Member States, taking into account the differences encountered at national level.¹⁸

Until 2009, based on Article 11(1) of the TEU, as part of the Common Foreign and Security Policy, the external frontiers management was within the scope of the European Security and Defence Policy, entitling the Council to sign treaties, on a recommendation of the Presidency with the goal of carrying out the Common Foreign and Security Policy.¹⁹

The Lisbon Treaty included the European Union third pillar, i.e. Police and Judicial Cooperation in Criminal Matters (Title VI TEU) which meant broader European Union competencies regarding the external border management along with maritime surveillance. For the first time, Article 77 of TFEU provided the legal frame based on which the European Union was empowered to progressively institute an integrated management system for the external frontiers, including adopting the necessary legislation related to common policy visas and residence permits and regulating the checks acted on the persons crossing the external borders of the Union.²⁰ Despite extending the European Union competency to immigration and border control matters, the legal provisions underline that the desideratum of not interfering with the competence of Member States in respect to the geographical delimitation of their frontiers, as recognised under the international law.²¹

The most recent Frontex Regulation further details the notion of European IBM and affirms that it is a “fundamental element of the Freedom, Security and Justice area” and that it should be elaborated based on “the four-tier access model” outlined by the Council in 2016.²² The four-tier model consists of actions in third-countries, cooperation with origin and transit countries, border control, measures concerning free movement and return.²³ In doctrine, it was highlighted that the notion of IBM should be interpreted in accordance with the principles of sincere cooperation²⁴ and solidarity.²⁵ Based on the principle of solidarity border and migration control issues are supposed to be dealt with under a common policy, and the legislation adopted to enact these policies should describe the necessary procedure to enforce this principle.²⁶ Therefore Frontex Regulation should have clarified how responsibility should be attributed between the Union and the Member States regarding the IBM of the maritime borders, which means that it has not become obligatory for the Member States.²⁷

²¹ Ibid. 13 Article 77 (4).
²³ Ibid. 13, pp 27.
²⁴ Article 4, TEU.
²⁵ Ibid. 18, pp 389-390.
²⁶ Article 80, TFEU.
²⁷ Ibid. 18, pp 389-390.
Another problem stemming from the lack of bidding guidelines regarding maritime operations is that Article 3 of the EBCG Regulation empowers the Management Board of Frontex to elaborate a strategy for the IBM considering the particularities of the Member States and their geographical position.\textsuperscript{28} It implies that an EU agency has the right to make policies without the oversight of the European Parliament, which in turn would be contrary to the principle of “institutional balance” between EU institutions. This leaves open the possibility that the Member States may choose to avoid observing human rights with regard to migration control. The European Court of Justice (ECJ) stated in the \textit{ESMA Shortselling} case that EU institutions are authorised to ‘delegate powers’ to establish rules of general application in areas where the Member State do not have discretion.\textsuperscript{29}

As the EU agency charged with safeguarding the maritime borders of the Union in the Mediterranean Sea, Frontex is heading various missions that are active in the region, including operation Triton, which covers the Central Mediterranean. In the following section, I will examine how the agency has come into being and what is its relationship with human rights, especially its stance concerning saving the migrants travelling to Europe by boat.

\textbf{Section 2.2. The Joint Operations organised by Frontex in the Mediterranean Sea are concentrated on preventing access to Europe}

The proposal to create Frontex came against the backdrop of the increasing fear of terrorism which coupled migration issues with securitisation of the external borders.\textsuperscript{30} Frontex was founded by the Council of the European Union on 26 October 2004, soon after the March 2004 bombings from Madrid.\textsuperscript{31} The external borders protection was entrusted to European Union border guards tasked to safeguard the interests of the Union also at maritime frontiers, until then entirely national borders.\textsuperscript{32}

The initial legislation established that the control and surveillance of external borders are a common concern of all the member states, regardless of their geographical position.\textsuperscript{33} Frontex was set up with the purpose of consolidating national borders where controls were problematic, to eliminate the threats to the European Union on the inside (illegal migration, human trafficking and terrorism).\textsuperscript{34} The Agency became operative in 2005 with a modest budget, which reached € 320 million by 2018, with the headquarters in Warsaw but its policies continue to be coordinated from Brussels, the administrative centre of the European Union.\textsuperscript{35}

\begin{footnotesize}
\textsuperscript{28} Article 3, EBCG Regulation.
\textsuperscript{29} United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union, Judgment of the Court (Grand Chamber), 22 January 2014, Case C-270/12., ECLI:EU:C:2014:18.
\textsuperscript{32} Ibid. 30, pp 781.
\textsuperscript{33} Ibid. 30, pp 781.
\textsuperscript{34} Ibid. 30, pp 781.
\end{footnotesize}
Frontex Regulation established a cooperation system among the Member States – including assistance to Member States for technical and operational matters related to the management of the European Union external borders – intending to inhibit as well as control irregular migration at the external borders, including at the maritime borders, without making any distinction between the different categories of irregular migrants.\(^3^6\)

From the beginning, Frontex’s relationship with human rights was a subject of intense debate.\(^3^7\) Despite the fact that its first Regulation stated the agency’s intention to respect the human rights enumerated in the EUCFR, there is no clear explanation on how this goal should be achieved.\(^3^8\) This ambiguous approach is evident from the wording used by Frontex in its General Report from 2009, where it states that it agreed to promote human rights as a “strategic choice”.\(^3^9\)

Incrementally, the EU position regarding the application of human rights during sea operations changed, but even though it appears that the border security actions are in agreement with human rights standards, the issue whether human rights apply extraterritorially remains an unsettled one.\(^4^0\)

From the creation of Frontex until the adoption of the 2010 Maritime Guidelines Decision the EU (MGD), the agency and the Member States have rejected the possibility that human rights and the correlative obligations that they involve apply at sea.\(^4^1\) This position demonstrates that the EU and the Member States have attempted to decouple human rights matters from external border security issues from the start.\(^4^2\) After the MGD was adopted, the agency proposed to remedy the situation at the EU borders through maritime operations under its coordination, slowly introducing human rights vocabulary to the measures taken in the Mediterranean region. The 2011 Frontex Regulation did not shed any light on how the obligation to respect human rights principles during maritime operations in agreement with the EUCFR to be translated into practice, through concrete procedures.

One of the most relevant judgements related to the human rights of the boat migrants is the ECtHR Judgement in the Hirsi case, which will be further discussed in another part of this thesis.\(^4^3\) However, at this point it is pertinent to note that in this Judgement the ECtHR expressed strong disapproval towards the push-back practices employed by Italy, the MGD was replaced by the Maritime Surveillance Regulation (MSR), which brought new policies in

\(^3^6\) Recital 22 from the Preamble, Frontex Regulation 2004.
\(^3^8\) Recital (2) Frontex Regulation 2004.
\(^4^0\) Ibid. 37, pp 123.
\(^4^2\) Ibid. 37, pp 123.
\(^4^3\) Hirsi Jamaa and Others v. Italy, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012.
the field. While the MSR provided that operational plans should specify the measures necessary to be taken to guarantee that persons in need of international protection are offered access to assistance, if the migrants are prevented from reaching the territorial waters of the coastal Member States, this is entirely unnecessary.

Section 2.3. Operation Triton towards an effective border control

The crisis caused by the Arab revolutions and the migration plight was perceived as a threat to the security and territorial integrity of Europe. The revolution in Tunisia alone has brought to Europe’s maritime borders 20,258 Tunisian migrants in the first months of 2011. In May 2011, the European Commission noted that the political unrest in North Africa has led to 25,000 of migrants to travel to the shores of Malta and Italy. More than that, according to the information gathered by the European Commission between 2011 and 2016, more than 13,000 irregular migrants lost their lives in the Central Mediterranean.

The creation of Frontex and the actions taken had no immediate impact on the European Union’s border policies and the measures taken to stem the flow of irregular migration in the Mediterranean had remained a response to crisis situations. As a consequence some member states have created and conducted operations intended to plug the migration flow, such as Italy’s Mare Nostrum, a one-year long operation, started on 18 October 2013, as a reaction to the crisis subsequent two mass drownings off the coast of Italy in October 2013, in which over 600 migrants have lost their lives. Mare Nostrum carried out 421 search and rescue operations, in an area of over 27,000 square miles and Italy spent around 9 million Euros per month. The operation was terminated due to the suspicions manifested that it was stimulating smugglers and migrants to organise more trips to Europe.

The next operation in the region, Triton, was coordinated by Frontex under Italian heading and was supported by human and technical resources supplied by 21 Member States. However, Triton did not genuinely substitute Mare Nostrum since it had a budget of 2.9 million Euros per month. Its vessels were guarding or surveying only 30 miles off the Italian shores.

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51 Ibid. 37, pp 126.
and it was unable to prevent tragedies occurring off the coast of Libya. \(^{52}\) In 2014, the Commission made it clear that Frontex is supposed to assist the Member States in safeguarding the borders in the Mediterranean Sea as well as aid them to fulfill their duty to rescue persons in distress at sea, but it is not a search and rescue operation. \(^{53}\) Therefore, only the Member States were bound by the duty to save persons in distress at sea, under international maritime law as operation Triton had no search and rescue capabilities. \(^{54}\)

In April 2015, as a consequence of successive shipwrecks, the number of lives lost in the Mediterranean region increased once again to around 1500 migrants, in just a few days. \(^{55}\) After these incidents, on 20 April 2015, the Council advanced a Ten-point action plan on migration, which concentrated on strengthening joint sea operations in the Mediterranean region, by increasing the financial resources and the enlargement of the operational area but ‘within the mandate of Frontex’. \(^{56}\) The increase of Frontex’s budget and the enlargement of the geographical scope of the joint operations at sea was announced by the Commission, through The European Agenda on Migration. \(^{57}\) Based on the Agenda, saving lives of the migrants trying to cross the Mediterranean sea is presented as an essential part of the European strategy at the maritime borders. Frontex is described as having ‘a dual role’, respectively managing border operations through offering assistance to the Member States confronted with migratory pressures and ‘helping to save the lives of the migrants at sea’. \(^{58}\) Still, from the wording of the Agenda, it is obvious that greater importance is given to border reinforcement and saving human lives at sea continues not to be considered a priority but an event that occurs sporadically, unpredictably, in emergency situations. In scholarship, it was pointed out that as long as Frontex’s Director at the time in discussion insisted that rescuing migrants at sea is outside of the scope of the agency’s attributions, the saving of lives objective could not be achieved. \(^{59}\)

The 2016 EBCG Regulation reaffirms the EU and the Member States’ commitment to uphold human rights but falls short of mentioning any procedures concrete policy to transform it into reality during the maritime operations carried out in the Mediterranean Sea, at the external borders of the Union. \(^{60}\)

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\(^{58}\) Ibid.


\(^{60}\) Articles 1, 6(3), 34, EBCG Regulation.
In February 2018, operation Triton was replaced with operation Themis, without any explanation. According to the information available at the moment, Themis is meant to assist Italy in surveillance operations, in the Central Mediterranean. Regarding this sea operation, Frontex has stated that search and rescue activities are a central element of the mission but the ‘law enforcement focus’ demonstrates that the primary goal remains to enhance border security.

That the focus was on enhancing border security rather than saving lives at sea is evident from the establishment of the military sea operation EU NAVFOR Med which is meant to combat migrant smuggling.

Section 2.4. Operation Sophia and migrant smuggling in the Mediterranean Sea

The European Union’s response to the irregular migration at sea had only started to materialise after the mass-drownings which had taken place in the Mediterranean in April 2015, once again in answer to a ‘crisis’ situation. Europe’s response concretised in the 10 Point Action Plan adopted on 20 April 2015, during a Joint meeting of the Foreign and Home Affairs Council, which concentrated on various aspects of irregular migration at sea, among which human rights issues were raised, as well as improving cooperation between European Union member states with third-countries and preventing and fighting smuggling. Following the adoption of the Plan on 23 April 2015, the European Union acted to advance and promote an overall framework designed to solve the maritime migrant smuggling issue. At the centre of this framework was the prevention of illegal migration flows, the effort to limit movement of people and to dissuade migrants from taking the risks involved with crossing the Mediterranean Sea.

In order to advance the European Union’s policy of combating smugglers, the Council of Ministers of the European Union has created a military operation – EU NAVFOR Med – on 22 June 2015 as part of the policy to respond to the urgent need to save lives and to deal with the root of irregular migration. The mission’s goal from the beginning was to combat human smuggling and trafficking industry that was flourishing in the Central Mediterranean. For the realisation of its stated mission, the operation purposed to identify, capture and destroy boats and other assets used or under suspicion of being used in human smuggling and trafficking activities.

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65 Ibid. 49, pp 139-144.
67 Ibid. 66, Recital 3.
The operation was projected to be carried out in four successive phases in line with international maritime law and international human rights law. The first phase regards deployment of forces to build a comprehensive understanding of smuggling activity and methods, completed between 22 June – 7 December 2015. The second phase entails the boarding, search, seizure and diversion of smugglers’ vessels on the high seas under the conditions provided by the international law and international maritime law. The goal is to expand the range of the operation into the territorial waters of third-countries with their agreement, under a United Nations Security Council Resolution. The third phase expands the operation’s activity to include taking operational measures against vessels and related assets suspected of being used for human smuggling or trafficking inside the coastal states’ territory, with the necessary legal framework established by UNSCR and following coastal state consent. The fourth phase consists of the withdrawal of forces and completion of the operation.68

It is encouraging that the Council Decision on which the operation is built on affirms the Union’s dedication to take action aimed at preventing loss of human lives as a consequence of the smuggling of persons in the Mediterranean region as well the fact that it states this maritime mission is supposed to carry out its activities in agreement with the international law, international maritime law and international human rights law.69 Until you realise that this pledge is inserted in the preambular part of the Decision and never repeated into the operational one.70 Moreover, the operation is conducted under the Common Foreign and Security Policy (CFSP) of the European Union, which entails that it is not a Frontex mission. As a result, it was argued that it evades the legal overview of the Court of Justice of the European Union concerning future human rights breaches that may occur in the course of the operation’s activities at sea.71 Essentially, it means that migrants or the families of those lost to the sea have no legal recourse against the human rights violation that happen in the Mediterranean.

Another legal basis for the EUNAVFOR Med is represented by the United Nations Security Council Resolution from 9 October 2015. Resolution 2240/2015 was adopted following the discussions in the United Nations Security-Council to authorise a European Union operation, under Chapter VII, to use all necessary means to inspect, seize and dispose of the vessels when there is a suspicion that they are participating in the smuggling of migrants.72 In the preamble of the Resolution, it is mentioned the need to prevent the human tragedies or more people from dying at sea and reinforces the necessity that the operation has to be conducted with the utmost observance of the international human rights law and international maritime law.73 Even though combating human smuggling and trafficking is to be

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69 Ibid. 66, Recital 1 and 6.
71 Ibid. 70, pp 184-185.
73 Recitals 10-12, SCR 2240 (2015).
carried out by considering the human rights of the migrants the Resolution does not further
detail the measures necessary to enforce human rights during maritime operations. In the
Mediterranean, the reality is that frequently during operations of combating smuggling
migrants have lost their lives in obscure conditions.

Section 2.5. Safeguarding the borders through cooperation with third-countries that are
departure or transit point

As discussed in the previous sections, the policies forwarded by the EU and the
Member States concentrate on safeguarding the maritime borders of Europe. Although the
public discourse always highlights the necessity to save the lives of the irregular migrants
choosing the Mediterranean route, in practice little is being done to enforce their right to life.
Frontex as the Union’s agent in the Mediterranean region is not only charged with securitising
the frontiers by carrying out sea operations but has the power to conclude working agreements
with third-countries that are origin and transit points for migration. Furthermore, the Member
States themselves are encouraged to cooperate with the interested third-countries to stem the
migration flow. In this section, I will analyse the problems raised by collaboration with third-
countries, as well as the EU-Turkey Statement.

Section 2.5.1. Frontex’s cooperation with third countries

In 2010, the Commission emphasised that cooperation with third countries constitutes
an essential element of the integrated border management policy and it ‘can support the
successful implementation of joint operations, enhance the added value of risk analysis, and
support capacity building in third countries’. The Commission’s view is today reinforced by
the legal provisions of the EBCG Regulation related to the concept of IBM supported on a
four-tier access control approach, which includes cooperation with third-country agreements
regarding the control of the external frontiers. The cooperation with third countries does not
include only departure or transit countries (Tunisia and Libya) but neighbouring countries as
well (Turkey). As such, the Commission’s approach and the legal text of the EBCG seem to
suggest that operational cooperation with departure and transit countries is of paramount
importance.

Starting from 2010, Frontex endeavoured to conclude working agreements with
various neighbouring countries, to offer technical and operational support, with the aim of
preventing the illegal crossing of the Union’s maritime frontiers, to combat cross-border
criminality and prevent further lives being lost at sea. Nevertheless, the EBCG Regulation
underlines that Frontex and the Member States have the duty to fully observe human rights

74 Ibid. 37, pp 124.
75 Sea Watch, ‘Sea-Watch is pressing charges against Libyan Coast Guard’ (16 November 2016)
visited on 14 February 2019 and ‘Libyan navy is risking lives of Sea-Watch crew and refugees during
watches-crew-refugees-into-danger-during-an-illegal-return-operation/ last visited on 14 February
2019.
77 Recital 3, EBCG Regulation
78 Article 4(f), EBCG Regulation.
79 See Recital 5, MSR Regulation.
standards throughout their cooperation with third countries even when it takes place on the latter’s territory. It is noteworthy that, despite the consideration shown for upholding the fundamental rights guaranteed by European primary law, there is no explanation of how this goal should be achieved on the ground. As a consequence there is no mechanism to review possible infringements of human rights, especially to investigate the reason lives continue to be lost in the Mediterranean Sea.

At first, the working agreements were signed directly between Frontex and the authorities representing the third country and they related to border control management matters exclusively. In 2011, the Frontex Regulation was modified to include references to the necessity of observing human rights principles related to this type of agreements between the Agency and third countries. These provisions were once again included in the EBCG Regulation which establishes that the agreements are part of the external policy of the EU and as such, they should grant the same consideration to fundamental rights as provided in the EU law. Currently, working agreements have been signed between Frontex and around twenty third-countries from the Balkan region, East of Europe and Caucasus, including with Turkey, with the purpose of stemming the migration flow in Eastern Mediterranean. More than that negotiations are carried out with Northern African countries famous for human rights infringements such as Libya, Tunisia, Morocco, Senegal and Mauritania.

In literature, the legal nature of the working agreements was deemed ambiguous from a human rights protection perspective. Almost all the working agreements were perfected by 2011, before the introduction of the obligation of Frontex and the Member State to respect human rights within the applicable legislation. Thus, the legal provisions of Article 54 of the EBCG Regulation cannot be applied retroactively, and so far, no amendments were brought to the agreements. In truth, the agreements concluded after the human rights standards became applicable contain just an unremarkable clause that dryly states that “Frontex and the competent authorities of the [third-country] afford full respect for human rights”.

The Agency itself has qualified the working agreements concluded with third countries as “letters of intention” that are not as legally binding as other legal instruments such as

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80 Recitals 15 and 46, Article 54(1) and (4), EBCG Regulation.
81 Ibid. 54, pp 174.
83 Article 54(2), EBCG Regulation.
86 Ibid. 54, pp 175.
treaties. For this reason, the working agreements do not give rise to mutual rights and obligations and do not have the same binding force as treaties.

From a fundamental rights perspective, the uncertain legal nature of the working agreements highlights the fact that they are primarily aimed at combating migration and cross-border criminality and the protection of the human rights of the migrants remains discretionary. As a consequence, there is a legal gap regarding the protection afforded to the lives of the migrants crossing the Mediterranean Sea to reach European shores. While it is clear that Frontex has to comply with human rights standards during maritime operations, most of the coastal third countries have a shaky relationship with human rights, at best.

Human rights protection continues to be an abstract concept in the EBCG relationship with third parties, whether they are third countries, bodies of the Union or international organisations. Articles 52 and 54 of the new Regulation assign the EBCG the mission to collaborate with Union’s institutions and agencies, third countries and international organisations to advance the integrated border management policy. Essentially, the purpose of this cooperation is the improvement of how migration issues are handled, with a focus on preventing and detecting migrant smuggling, human trafficking and terrorism.

Section 2.5.2. Member States cooperation with third countries

Mediterranean states, members of the European Union, such as Malta, Spain, Italy and Greece, strongly impacted by irregular migration originating from Asia and North Africa have sought to conclude bilateral treaties with third countries, to divert the migration routes from the Eastern and Central part of the Mediterranean. The critical issue is that most of the agreements signed are not divulged to the public. For instance, Italy has signed agreements related to migration and security with Egypt, Gambia, Ghana, Morocco, Niger, Nigeria, Senegal and Tunisia, while Spain has co-operation agreements on migration with Cape Verde, Gambia, Guinea, Guinea-Bissau, Mali and Mauritania, as well as Turkey.

Especially notable is Libya’s case which is the centre of migration from other African countries and has become a transit country for nationals from Eritrea, Ethiopia, Somali, Sudan, Iraq and Palestine attempting to reach Europe. Italy and Libya have concluded various agreements on migration starting from December 2000, focused on combating terrorism, organised crime, illegal traffic of drugs and irregular migration.

89 Ibid. 54, pp 197-198.
90 See Articles 52 and 54, EBCG Regulation.
93 Ibid. 92, pp. 5.
The revolutions in Libya and Tunisia during 2010-2011 led to a dramatic increase in irregular migration at sea and according to the data provided by the Committee on Migration, Refugee and Displaced Persons, during this period, around 1,500 of migrants lost their lives attempting to reach European shores. As a consequence, on 5 April 2011, the Italian government concluded an agreement with Tunisia concerning cooperation in preventing further departures and the accelerated repatriation of this state’s nationals. Following the ECtHR Judgement in Hirsi Jamaa case where Italy was warned of the possibility of incurring responsibility for human rights breaches, the Italian government decided to suspend its agreement with Libya.

In 2017, under financial crisis, Italy rekindled the cooperation with Libya by singing on 2 February, a new Memorandum of Understanding to combat the illegal migration, human trafficking and smuggling and to reinforce the security of the borders. The Memorandum has been met with controversy and sparked debate based on the fact that the two states’ Parliament did not approve it. While on 2 March at the meeting in Malta the European Council backed up the MoU concluded between the two countries, on 22 March 2017, the Tripoli Court of Appeal suspended the application of the Memorandum, on reasons of legality. The Foreign Minister of the UN-proposed government, Mohammed Sayala, appealed the ruling at the Supreme Court, which changed the Court of the Appeal’s ruling and declared the Memorandum legal.

According to Article 5 of the MoU, the state parties have agreed to observe in the application of the agreement their international obligations and the human rights instruments that they have adhered.

In 2018, Human Rights Watch gathered evidence which suggests that in reality, Libyan coast guards do not have the technical and operational capacity to save lives at sea and strongly rely on the assistance and surveillance capacities of the Italian authorities and that the ambiguities existent around who should rescue the migrants often lead

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97 Hirsi Jamaa and Others v. Italy.
99 Ibid. 94, pp 9.
102 Article 5, Ibid. 98.
to unnecessary deaths.\textsuperscript{103} This is a consequence of the vague approach adopted by these countries concerning the concrete measures that need to be taken to ensure that migrant lives are protected in the Mediterranean Sea.

Section 2.5.3. The EU-Turkey Statement a new type of cooperation?

The EU-Turkey Statement illustrates the EU efforts to solve the irregular migration problem by searching for external solutions.\textsuperscript{104} The legal nature of the EU-Turkey deal has raised serious concerns.\textsuperscript{105} In April 2016, two Pakistani and one Afghan national living in Greece lodged an application with the ECJ in Luxembourg in which they inquired whether the EU-Turkey Statement was legal.\textsuperscript{106} The General Court ruling has taken the shape of Court Orders NF, NG and NM v European Council, T-192/16, T-193/16 and T-257/16, through which it concluded that the EU-Turkey Statement was signed between the heads of state or government of the Member States and their Turkish counterparts and therefore was an agreement under international and was thus beyond the jurisdiction of the ECJ based on the argument that it was not authorised by EU institutions. On 12 September 2018, the appeals against the orders were dismissed by the ECJ.\textsuperscript{107} In scholarship, the CJEU subterfuge to emit a press release to pronounce itself on the matter of the legality of the Statement was criticised and considered an affront to democracy and the distribution of power within the European legal system, especially regarding the ability of the EU to conclude international treaties.\textsuperscript{108}

Additionally, it was pointed out that the EU-Turkey deal is not binding from a legal point of view, on the grounds that it has not been adopted following the procedures provided by the European law, thus eluding the democratic scrutiny of the European Parliament.\textsuperscript{109} As a consequence, there is no dispute settlement mechanism at the disposal of the irregular migrants to engage the responsibility of the EU for human rights violations, occurring as a result of this agreement.

Initially the EU-Turkey deal seemed to contribute at preventing irregular migration into the Greek islands, as arrivals reduced from 1,700 to around 81 migrants per day but blocking migration on this route did not have the effect of discouraging migrants from traversing the Mediterranean Sea and the number of irregular migrants continued to be as high as before, which meant that the number of lives lost on the Mediterranean Sea increased to new heights.


\textsuperscript{105} See S. Carrera, L. den Hertog and M. Stefan, “It wasn’t me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal”, published in CEPS Policy Insights No 2017-15/April 2017, pp 1.


\textsuperscript{107} See C-208/17 P, C-209/17 P and C-210/17 P, NF, NG and NM v European Council.

\textsuperscript{108} Ibid. 105, pp 8-9.

\textsuperscript{109} Ibid. 104, pp 9.
with 3,783 deaths reported in 2015, and 5,143 in 2016.\textsuperscript{110} Primarily, the influence of the EU-Turkey Statement on the declining of arrivals in Greece has been questioned, and rightly so, considering that only the number of migrants returned in 2016 was 2,224 and only 153 between 2017-2018.\textsuperscript{111}

Another criticism brought to the agreement between the EU and Turkey was the fact that it offered temporary protection only to Syrian nationals, leaving migrants with other nationality unprotected against human rights violations under refugee law, on account that Turkey recognised the 1951 Geneva Convention, but not the Protocol.\textsuperscript{112} Also, Human Rights Watch has warned that Turkish border guards are shooting the Syrian refugees and asylum seekers trying to cross into Turkey.\textsuperscript{113} Amnesty International has remarked that the EU-Turkey agreement has not further improved the guarantees offered to Syrian nationals, as the Turkish authorities continued to expel to Syria around 100 Syrian migrants per day, against national, European and international law.\textsuperscript{114}

In essence, to achieve the goal set up in the Statement, Turkey must prevent the migrants from crossing the maritime border to Greece.\textsuperscript{115} This means that the EU and the Member States are seeking to avoid responsibility. From a legal point of view, this presents some challenges. For instance, in case one of the Member States performs activities in Turkish territorial waters or the international waters block migrants from crossing the frontier, to gain access to international protection and as a consequence migrant lives are lost. The challenge is attributing responsibility to Turkey, the EU or the Member States performing activities in the region.

\textbf{Section 2.6. Concluding remarks}


\textsuperscript{115} See Dr. R. Lehner, “The EU-Turkey – ‘deal’: Legal Challenges and Pitfalls” (2018), International Migration, published by J. Wiley & Sons Ltd., pp 2-3.
The summary of the EU and the Member States policies has evidenced that the main preoccupation continues to be the securitisation of the external borders. While Frontex could perform search and rescue operations in the Mediterranean, to save migrant lives, there are no clear and coherent measures in place. The focus remains on preventing irregular migration from happening.

Operation Sophia is calibrated to combat smuggling, and there is no information available about the steps that are taken to protect the lives of those smuggled. In fact, it is unclear what human rights body is supposed to review eventual human rights infringements that could occur during this type of maritime operation.

The agreements concluded with third-countries are not aligned with human rights standards and lack transparency. The aim of the agreements is to stop migration at the point of embarkation, which means that they fail to acknowledge the most obvious issue: the migrants choosing to cross the Mediterranean have compelling reasons for doing so. Preventing them to from leaving origin or transit countries, forces them to look for clandestine and dangerous way of travelling to Europe.

Analysing and interpreting the EU and Member States’ policies in the Mediterranean region has served to build an imagine of the protections existent for the migrants crossing the sea to Europe due to the external dimension of the maritime operations carried out in the region. Taking into account the shortcomings identified when applying the right to life in the region, it raised the question whether the EU and the Member States, are bound by the obligation to uphold the right to life in the Mediterranean space, based on the provisions of the international and European human rights law, which will be discussed in Chapter 3. In the same Chapter, I will examine whether there is a link between the right to life and the duty to rescue persons in distress at sea from the international maritime law and the negative impact the lack of harmonisation between the Migrants Smuggling Protocol and the Facilitating Directive has on the saving life, in smuggling context.
Chapter 3 An overview of the right to life in international and European law human right law as well as the international law of the sea

The migrants were drifting on the Mediterranean Sea, and there was no one in sight to save them. The more time passed the more drastic their situation. Sometimes a ship would stop and give them water or a bit of food, but nobody wanted to take on the difficult task of saving them. This is not only a scenario, it happened in 2011 when sixty-three migrants died after they were left to fend for themselves for fourteen days at sea.\textsuperscript{116} From a legal perspective, such incidents raise questions regarding the protection of the right to life, in general, and especially, in the Mediterranean region. In order to find out what the protection of the right to life requires from the actors involved in maritime operations in the interest area, I analysed how this human right is viewed in international and European human rights law and the case law produced by the corresponding human rights bodies, in Section 3.1.

Several human rights instruments refer to the necessity that states take the necessary measures to guarantee the enjoyment of the right to life, but it was not apparent whether the states parties were required to protect it outside their border, as well. As such in Section 3.2., I discuss the scope of the human rights protections afforded in international and European human rights law.

The spatial localisation of the loss of life led me to research other legal regimes applicable in the Mediterranean Sea. This is why in Section 3.3., I elaborate on the duty to rescue people in distress at sea and in Section 3.4. on the Migrant Smuggling Protocol position regarding human rights, as well on its interaction with European law.

Section 3.1. The right to life in different human rights regimes

Further research into the right to life of the irregular migrants travelling to Europe on unseaworthy boats, makes it necessary to analyse how the right to life is framed within the legal order created for the human rights from international law and European law perspective. Although there are international and European instruments protecting the fundamental rights of the individual, it seems the right to life of the irregular migrants travelling at sea is not protected in a suitable and effective manner.

One of the first international documents mentioning the right to life is the Universal Declaration of Human Rights (UDHR) adopted by the General Assembly of the United Nations on 10 December 1948.\textsuperscript{117} The UDHR asserts that “Everyone has the right to life […]” emphasising the intention of the signatory states that the right to life should be protected at all times. The trouble is that this proclamation constitutes just a declaration and thus does not have the same binding effect as a convention.\textsuperscript{118} Therefore, for the purpose of clarifying to what extent does the right to life of an irregular migrant benefits of protection, it necessary to analyse the protections existent for all individuals, in general. In consequence, I will have to


\textsuperscript{117} UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (UDHR).

\textsuperscript{118} See E. Wicks, “The Right to life and Conflicting Interests” (2010), Oxford University Press, pp 38-40.
consider the protections conferred by the ICCPR\textsuperscript{119} and the ECHR,\textsuperscript{120} as well as the available jurisprudence which may contribute to answering the research question.

Section 3.1.1. The right to life and its limitations in the terms of the ICCPR

Article 6(1) of the ICCPR affirms that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” This legal text broadcasts the conviction of the drafters that human life is intrinsic to every individual and that the states parties should reflect into their domestic law the mechanisms necessary to enforce the right to life whenever it is required. The use of the word ‘arbitrarily’ seems to indicate the right to life is not absolute and that some limitations to the right to life are allowed in exceptional cases. Remarking on this issue, Wicks has pointed out that even though the content of the legal text leaves room for different interpretations, the legal provisions of the ICCPR represents a substantial step forward in clarifying that it is necessary that the right to life has to be enforced along with the other human rights, in the international legal order.\textsuperscript{121}

Given the wording of the legal text related to the right to life, the state parties have the obligation of guaranteeing its enjoyment through dispute settling mechanisms in their national legislation. The prohibition of the states to arbitrary interfere with the right to life of individuals is essential. The Human Rights Committee (HRC) has pointed out in General Comment no 6 that the states have an obligation to create laws aimed at discouraging and condemning “deprivation of life by criminal acts”, even those committed by its law enforcement agents.\textsuperscript{122} In the communication \textit{Suarez de Guerrero v Colombia}, the actions of the police officers were considered to have infringed on the right to life of the seven killed suspects on account that it was unnecessary and disproportionate.\textsuperscript{123}

Also, of importance is that in the General Comment no 6, the HRC has remarked that when interpreting the right to life the state parties have applied a restrictive approach and that the ‘inherent’ nature of this right requires states to take positive action to protect it. An application of the view the HRC maintains is illustrated in \textit{Dermit Barbato v Uruguay} where it found an infringement of the right to life because the state agents failed to take the necessary measures to protect it.\textsuperscript{124}

The HRC is not a judicial body, but it has examined communications from individuals, based on the ICCPR and the Optional Protocol, and has expressed its views in some cases. For instance, in cases where the authors claimed that the state party had applied the death punishment illegally. In some cases, the authors of the communications have been executed

\textsuperscript{120} Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (the ECHR).
\textsuperscript{121} Ibid. 118, pp 40-42.
\textsuperscript{122} UN Human Rights Committee (HRC), \textit{CCPR General Comment No. 6: Article 6 (Right to Life)}, 30 April 1982, para 3.
shortly after the complaint was submitted to the HRC, which sends the message that this body’s views are not regarded as obligatory.125

The practice of introducing complaints as a result of human rights violations is much more often encountered in the European legal system, and the ECtHR has dealt in its case law with issues regarding the application of the right to life.

Section 3.1.2. The right to life in the European human rights context

Article 2 of the European Convention of Human Rights (ECHR) declares, in no uncertain terms, that the right to life is to be protected.126 The protection afforded by this provision of the ECHR for the life of individuals does not allow the states to set restrictions or to suspend the application of the right to life. The contracting states are allowed to derogate from the obligation to safeguard life in certain exceptional situations strictly indicated in paragraph 2 of Article 2.

The ECtHR jurisprudence regarding the right to life highlights that the court is of the view that the state parties not only have the duty to safeguard life but must take the measures needed to ensure the right is protected effectively.127

In the Furdik v Slovakia case, the ECtHR has held that the state has the obligation of organising emergency services to protect and preserve the right to life. It considered that the state’s duty to protect the right to life includes a positive obligation of providing a legal frame for rescuing persons in distress and ensure its effectiveness.128 To rule as such the Court has remarked, in the light of the facts of the case, that the maintenance of rescue services falls under the state’s positive obligation to take the necessary measures to protect the right to life.

In the Öneryıldız case the ECtHR reaffirmed that Article 2 of the ECHR does not apply only to the deaths following from the use of force by state authorities, but it lays down the positive obligation of the state to take the necessary measures to protect the lives of those within its territory, be it in context of private or public activity.129 In addition, in the Osman v United Kingdom case, the Court stated that in order to ascertain if the authorities have failed to take the appropriate measures, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.130 And yet, in the Öneryıldız case, the Court held that if the authorities had knowledge of a threat to the right to life, the state had the obligation to take preventative measures to eliminate it.

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126 Article 2, ECHR.


128 See Furdik v Slovakia, Application 42994/05, para. 13-14 (ECtHR, 2 December 2008).

129 See Öneryıldız v Turkey, Application 48939/99 (ECtHR, 30 November 2004), para 71.

130 See Osman v The United Kingdom, Application 87/1997/871/1083, para 116.
Taking into account the ECtHR case law, we may conclude that in the Courts reasoning the state authorities have the obligation to take the appropriate measures necessary to eliminate the threat against the right to life, under condition they were informed of it and that the positive aspect of the right to life must not be understood in such a manner in which it would impose an unrealistic burden on the state.

Section 3.2. Jurisdiction issues regarding the extraterritorial application of the right to life of the irregular migrants crossing the Mediterranean

After investigating the various legal regimes applicable in the Mediterranean, it became important to find out whether the right to life of the irregular migrants crossing the Mediterranean is protected at sea, i.e. extraterritorially, under international and European human rights law. This made me question whether the EU and coastal Member States have the obligation to uphold the right to life in the Mediterranean based on the provisions of international and European human rights law. To ascertain the answer to these questions, I had to analyse the concept of ‘jurisdiction’ as it is stipulated in the most relevant human rights instruments, the case law of the corresponding human bodies, as well as the opinions existent in the doctrine regarding the obligation of protecting the human rights extraterritorially.131

Section 3.2.1 The notion of ‘jurisdiction’ and extraterritoriality in international law

Traditionally the notion of jurisdiction was conceived as being intrinsically connected to a territory.132 Having as background the intensification of cooperation between states and the emergence of various international organisations, it was remarked that at times it was necessary that states exercise their power outside their geographical boundaries and affect people that were not on their territory. This development is vividly illustrated by the landmark decision of the Permanent International Court of Justice (PICJ) in the Lotus case.133 The PICJ asserted that there is no international law rule preventing a state from initiating criminal proceedings extraterritorially (prescriptive jurisdiction). Despite that, the court emphasised that states are prohibited from applying enforcement jurisdiction on another state’s territory unless it is allowed by the international customary law or a convention. As Shaw explains prescriptive jurisdiction represents the state’s power to create and modify laws and enforcement jurisdiction relates to the state’s ability to guarantee the observance of its laws through dispute settling mechanisms, through administrative measures or courts of justice.134

The Lotus case ruling has double importance for the research purposes of this paper. This case regarded a collision occurred between two steamships, on the high seas, and it marks a slight departure from the classical notion of jurisdiction by not prohibiting extraterritorial criminal jurisdiction.

131 The most relevant human rights instruments for elucidating the research question are: ICCPR, ECHR and EUCFR.
133 Case of the S.S. Lotus, Decision of 7 September 1927, PCIJ Series A, No. 10 (1927).
The International Court of Justice (ICJ) has analysed the extraterritorial ambit of the human rights in two cases that related to occupied territories: *the Israeli Wall Advisory Opinion*\(^\text{135}\) and in the *Congo v Uganda* case\(^\text{136}\). In the first case, the court asserted that by building a wall in the Occupied Palestinian Territories, Israel has violated, among others, the international human rights instruments that it has signed.\(^\text{137}\) In the second case, Uganda had occupied the Ituri province of Congo, and the court noted that the Ugandan military force was stationed on the other country’s territory and even replaced the authority of the Congolese government.\(^\text{138}\) Additionally, as an occupying power, Uganda had the obligation of ensuring that all those located on the occupied territory observe the relevant international human rights principles.\(^\text{139}\) The court’s examination of the notion of ‘jurisdiction’ in this case law suggests that the states having the territorial control of the region had the positive obligation to take the necessary measures to guarantee the application of international human rights standards by all those present in the area.

**Section 3.2.2. Extraterritorial jurisdiction in the terms of the ICCPR**

At first glance, it appears that the jurisdiction clause put forward by the Article 2(1) of the ICCPR demands that the states parties observe and guarantee the human rights provided therein relation with all the persons on their territory and within their jurisdiction.\(^\text{140}\) Although a textual interpretation of the provision would suggest that of the ICCPR’s protection benefit only persons who are on the territory as well within the jurisdiction of the state, the Human Rights Committee (HRC) and the ICJ have consistently analysed the content of Article 2(1) as obliging the state parties to uphold human rights standards outside their borders, whenever they ‘exercise jurisdiction’, using alternatively either the territorial or jurisdictional manner of interpretation.\(^\text{141}\)

In the *Lopez v Uruguay* case, the HRC commented that the term ‘jurisdiction’ from the ICCPR and the Optional Protocol\(^\text{142}\) refers to “the relationship between the individual and the state” regarding an infringement of the rights laid out in this instrument, no matter where they appear, and not to the actual place of the violation.\(^\text{143}\) Moreover, the legal provisions regarding jurisdiction do not suggest that the state party involved cannot be held responsible for infringements of the human rights protected by the ICCPR perpetrated by its agents on the

\(^{135}\) *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, The Israeli Wall Advisory Opinion.

\(^{136}\) *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, International Court of Justice (ICJ), 19 December 2005, Congo v Uganda.

\(^{137}\) The Israeli Wall Advisory Opinion, para 137, 149.

\(^{138}\) *Congo v Uganda*, para. 173.

\(^{139}\) *Congo v Uganda*, para. 178.

\(^{140}\) Article 2(1), ICCPR.

\(^{141}\) HRC General Comment 31: UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 10; The Israeli Wall Advisory Opinion, para 111, Congo v. Uganda, paras 178-180.

\(^{142}\) UN General Assembly, Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171

\(^{143}\) Human Rights Committee, Delia Saldias de Lopez v Uruguay, Communication no 52/1979, form 26 July 1981, para 12.2 (Lopez v Uruguay).
territory of another state, regardless if it had the permission of the other state or not.\textsuperscript{144} King argued that the interpretation of the term of jurisdiction offered by the HCR does not clarify what sort of factual relationship between individual and state is required to trigger jurisdiction.\textsuperscript{145}

Further analysis into the case law of the HRC seems to confirm that this human rights body does not utilise exactly the same interpretation of the notion of jurisdiction. For example, in the \textit{Lichtensztejn v Uruguay} case the HRC affirmed that jurisdiction could be established based on the legal relationship between the individual and the state party since the realisation of the right is dependent on the measures the latter takes to secure it, irrespective of the former’s location.\textsuperscript{146}

The HRC had the chance to remove the ambiguity regarding the term of jurisdiction through General Commentary 31, but it did not succeed entirely.\textsuperscript{147} Essentially the General Comment relayed that the human rights guaranteed by the ICCPR cover all persons situated on the territory or under the jurisdiction of a state party, without differentiating based on their nationality or legal status.\textsuperscript{148} In essence, General Comments are ‘soft law’ guidelines meant to advise the state parties regarding the content and extent of their human rights obligations after the assessment of their periodic reports.\textsuperscript{149} In my view, despite their non-binding nature, General Comments, have the potential of creating new rules in alignment with an evolving society. More than that, often enough the guidelines set out by the HRC through this type of comments have been used by the ECtHR in judgements in its case law regarding the right to life.\textsuperscript{150}

**Section 3.2.3 Extraterritorial jurisdiction according to the EHCR**

Article 1 of the European Convention on Human Rights (ECHR) affirms that the state parties have an obligation to safeguard the human rights provided therein to all the persons within their jurisdiction, thus not linking the notion of ‘jurisdiction’ with the states’ territory.\textsuperscript{151}

The interpretation afforded to the notion of ‘jurisdiction’ in European human rights law continues to be an unsettled matter.\textsuperscript{152} There are scholars who claim that the concept of jurisdiction from the human rights treaties should not be understood as the one from the international law considering that they have different objectives, i.e. the international law lays

\begin{flushleft}
\textsuperscript{144} Ibid., para 12.3.
\textsuperscript{147} Ibid. 141.
\textsuperscript{148} Ibid. 141, para 10.
\textsuperscript{150} \textit{Ocalan v. Turkey}, Application no 46221/99, Council of Europe: European Court of Human Rights, 12 March 2003, para 60. In this case the ECtHR sent to the \textit{Reid v. Jamaica} (no. 250/1987) case of the HRC and General Comment no. 6: Article 6 (the Right to Life).
\textsuperscript{151} See Article 1, ECHR.
\end{flushleft}
down the rules of engagement between the states, putting a lot of weight on the sovereignty of each state, while human rights treaties highlight the obligations of the states to uphold human rights and assume responsibility in case of human rights infringements. In this sense, the state has jurisdiction whenever it has de facto and de jure control over persons outside its territory. Other scholars have pointed out that the notion of ‘jurisdiction’ should be interpreted in a territorial sense to prevent eventual disputes between states.

The ECtHR explained the notion of jurisdiction in the Banković case, where in order to elucidate whether the extraterritorial actions conducted by the states member of NATO were within the scope of the ECHR, the Court asserted that apart from several exceptional cases, in which actions of the state parties were exercised or had an effect outside their territories and can represent an act of jurisdiction, the notion of jurisdiction should be interpreted as being ‘essentially territorial’.

In the Ocalan v Turkey case, the Court maintained that the applicant entered the effective control of the Turkish authorities immediately after being taken into custody by them and thus under the jurisdiction of this state, even though Turkish agents were outside Turkey borders. After this decision, in the Al-Saadoon case, the Court pointed out that the UK government had the duty to prevent the transfer of the applicants to Iraq, taking into account that they were under the exclusive de facto and de jure control of the United Kingdom authorities, therefore within this state jurisdiction.

The judgement of the ECtHR in the Issa v Turkey case further complicated the interpretation of the concept of jurisdiction. Analysing the facts of the case, the Court stated that to hold a state responsible of breaching the human rights protected by ECHR to persons found in another state territory, evidence must be brought that the first state authorities acted and had control on the second state territory. This followed the line of reasoning adopted by other international bodies of law such as Inter-American Commission of Human Rights and the Human Rights Committee.

Also, in the Medvedyev case the ECtHR had found that the ECHR applies extraterritorially in the course of interception, under certain conditions, particularly if the persons from the intercepted vessel are embarked on another vessel, flying the flag of a state,

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155 See Banković and Other v Belgium and Others, Court (Grand Chamber) Decision of 12 December 2001, Application no 52207/99, paras 28 and 67, 75.

156 Ocalan v. Turkey, para 91.

157 Al-Saadoon and Mufdhi v. United Kingdom, Application no. 61498/08, Council of Europe: European Court of Human Rights, 30 June 2009, para 88.

158 Issa and Others v Turkey, ECTHR (Second Section), Judgement of 16 November 2004, Application no 31821/96, paras 72-82.

159 Ibid. 158, paras 72-82.

party to the ECHR.\textsuperscript{161} The Court pointed out that the French authorities had exercised *de facto* effective control over the crew and ship which provided the basis for state jurisdiction when it seemed there was no *de jure* jurisdiction nexus.\textsuperscript{162}

The jurisdiction dilemma was further analysed by the Grand Chamber in the *Al-Skeini*\textsuperscript{163} case as well. Here the Court underlined that the concept of jurisdiction under the European convention is intrinsically linked with the territory of a state and stressed that jurisdiction could be established extraterritorially only in certain exceptional situations, e.g. when an individual is under state authority and control, or the state has effective control over a territory.\textsuperscript{164}

In the *Hirsi* case, the applicants were intercepted, on the high seas, by the Italian Revenue Police and Coast Guard, transferred on Italian ships and returned to Tripoli, Libya.\textsuperscript{165} The ECtHR held that the applicants were under the control of the Italian authorities, within the meaning of Article 1 of the ECHR. From the moment the Italian authorities had embarked the applicants on their ship until they transferred to the Libyan authorities, it was considered they were under the continuous and exclusive *de facto* and *de jure* control of the Italian authorities. As a consequence, the Court found that the respondent state had gained exclusive jurisdiction on the high seas, under the relevant provisions of maritime law. The court’s pronouncements from the Hirsi case regarding the extraterritorial application of the ECHR upheld once more in the *N.D. and N.T. v Spain* case, where it contended that the state has jurisdiction where the authorities of the state exercise effective control over an individual, no matter if said individual is on the territory of the state or its land frontier.\textsuperscript{166}

Section 3.3. The legal frame of the duty to rescue persons in distress at sea

To ascertain whether there is an obligation to rescue the migrants trying to reach Europe by the Mediterranean route, I had to research what laws are applicable at sea. After analysing the various laws regulating navigation on the seas, I realised that there is an obligation to offer assistance to persons in distress at sea laid out by the United Nations Convention on the Law of the Sea (UNCLOS)\textsuperscript{167} International Convention for the Safety of Life at Sea (SOLAS)\textsuperscript{168} as well as the International Convention on Salvage (Salvage

\textsuperscript{161} Medvedyev and Others v. France, Application no. 3394/03, Council of Europe: European Court of Human Rights, 29 March 2010.
\textsuperscript{162} Ibid. para 74 and 75, .
\textsuperscript{163} Al-Skeini and Others v. United Kingdom, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011.
\textsuperscript{164} Al-Skeini and Others, para 133-140.
\textsuperscript{165} Hirsi Jamaa and Others v. Italy, para 77-82.
\textsuperscript{166} N.D. and N.T. v. Spain, 8675/15 and 8697/15, Council of Europe: European Court of Human Rights, 3 October 2017, para 54.
\textsuperscript{168} International Convention for the Safety of Life at Sea 1974, 1184 UNTS 278 (SOLAS), Chapter 5, Regulation 33.
Both the European Union and the Member States have ratified the UNCLOS.\textsuperscript{170}

Another instrument regulating activity at sea is the International Convention (SAR Convention),\textsuperscript{171} and it was conceived as a consequence of the increasing importance gained by duty to render assistance to persons in distress at sea. The SAR Convention establishes the legal regime based on which the coastal states are required to divide the oceans and seas of the world into sections of SAR, with each state party accepting responsibility for organising and managing SAR operations.\textsuperscript{172} Be that as it may, the SAR sections outlined are not clearly described since the SAR Convention authorises the coastal states with adjoining SAR sections to close agreements with the purpose of delimiting their SAR sections of the seas.\textsuperscript{173} At the moment there is no information to confirm that Italy and Malta have signed any SAR agreement regarding operations in the Mediterranean Sea, even though this should be one of the grounds on which these coastal states organise and manage SAR activities.\textsuperscript{174}

While reviewing the available literature discussing the duty to render assistance to those in distress at sea, it became evident that much of the confusion related to the spatial applicability of this obligation stems from the pending uncertainty regarding the normative content of this obligation and lack of agreement about the interpretation of the notions of ‘distress’ and what ‘rescue’ actually might actually entitle.

Section 3.3.1. What is the subject matter of the duty to rescue people in distress at sea?

Rescuing persons in distress at sea is one of the oldest and basic duties laid down by the law of the sea, acknowledged as being part of the customary law.\textsuperscript{175} As mentioned in the preamble, the (UNCLOS)\textsuperscript{176} sets out to create a new legal order regarding the seas and the oceans but matters that are not regulated by it, fall under international law.\textsuperscript{177} This seems to suggest that there is no legal vacuum at sea and issues that are not relevant to maritime law, are to be solved by applying international law.

In consonance with the provisions of the Conventions applicable at sea, the states have the duty to instruct the shipmasters flying their flag to offer assistance to persons at risk of losing their lives and to proceed as quickly as possible to the rescue of persons in distress

\begin{itemize}
\item \textsuperscript{169} International Convention on Salvage 1989, 1953 UNTS 193 (Salvage Convention), Chapter 2, Article 10.
\item \textsuperscript{171} Preamble, International Maritime Organization (IMO), International Convention on Maritime Search and Rescue, 27 April 1979, 1403 UNTS (SAR Convention).
\item \textsuperscript{172} SAR Convention.
\item \textsuperscript{173} SAR Convention, Annex, paragraph 2.1.4.
\item \textsuperscript{176} UNCLOS.
\item \textsuperscript{177} Preamble UNCLOS.
\end{itemize}
if informed it is necessary, under the condition that such action would be reasonably expected of the shipmaster and it would not to endanger their vessel and the persons on it, be they crew or passengers.\textsuperscript{178} Examining the legal provisions of the Conventions legislating activity at sea, it becomes evident that the main elements of the duty to rescue people in distress at sea are the existence of persons, in ‘distress’, at sea and the action of ‘rescue’ itself. For the purpose of my research, the right to life of the irregular migrants, I find that it is of the utmost importance of analysing the notions of ‘distress’ and ‘rescue’ in this section of the paper.

The UNCLOS describes the content of the duty to rescue people in distress at sea without defining the notion of ‘distress’ but, at the same time, assigns the contracting parties the task to organise the search and rescue services necessary to enforce this obligation. As a result, one of the most useful instruments to explain the notion of ‘distress’ becomes the SAR Convention.\textsuperscript{179}

The ‘distress phase’, in the SAR Convention is described as “a situation wherein there is a reasonable presumption that a person, a vessel (...) is threatened by grave and imminent danger and requires immediate assistance”. In scholarship, it was signalled that the definition of the notion of ‘distress’ is rather vague and should be clarified.\textsuperscript{180} Komp has identified two separate manners of interpreting the notion of ‘distress’.\textsuperscript{181} The first method of interpretation is the one advanced by Justice Bragg in the MV Toledo case.\textsuperscript{182} Based on this approach, distress is viewed as a humanitarian effort, which is not absolute and therefore the protection of life is not considered a priority over the interests of the state and its citizens. Judge Scott in the Eleanor case supports the second manner of interpretation.\textsuperscript{183} According to this view, ‘distress’ represents a situation where the risk to life has not materialised but the danger it may occur is imminent. This last point of view has found support in the case law and the scholarship as well.\textsuperscript{184} None of these approaches in defining the term of ‘distress’ seem to disperse the confusion existent around how serious the danger to life should be or how should one determine whether the risk to life is imminent.

In practice, the ambiguity surrounding the term of ‘distress’ has led to cases in which neighbouring state parties have adopted different approaches regarding the application of the duty to rescue assistance at sea and the SAR Convention.\textsuperscript{185} For example, Malta appears to make a distinction between a vessel which needs rescue and unseaworthiness, meaning that

\textsuperscript{178} Article 98, UNCLOS, Chapter V, Regulation 33, SOLAS, Chapter 2, Article 10 Salvage Convention.
\textsuperscript{179} Article 1.3.13. of the Annex, SAR Convention.
\textsuperscript{180} Ibid. 175, pp 175.
\textsuperscript{182} Justice Barr in the MV Toledo case regarding the right of vessels in distress to require permission to enter the harbour, as cited in R. Barnes, “Refugee Law at Sea”, 53 Int’l & Comp. L. Q. 47 (2004), pp. 58.
\textsuperscript{183} The Eleanor 165 English Reports 1058 1068 (English High Court of Admiralty), 22 November 1809.
\textsuperscript{184} Kate A. Hoff v The United Mexican States (Docket no 331), Opinion rendered April 2, 1929 (General Claims Commission – United States and Mexico), The American Journal of International Law 860 and V. Moreno-Lax, “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Members States’ Obligations Accruing at Sea”, 23 Int’l J. Refugee L., pp 195.
if the unwanted migrants are not in imminent danger of actually losing their lives, the Armed Forces of Malta do not consider them to be in distress.\textsuperscript{186}

Another critical issue is represented by the lack of uniformity in understanding the notion of ‘rescue’ and what it might entitle. Who has the duty to perform the rescue and when is the rescue operation considered completed? The SAR Convention defines ‘rescue’ as an “operation to retrieve persons in distress, provide for their initial medical and other needs and to deliver them to a place of safety”.\textsuperscript{187} This lack of clarity had led to incidents like the 2001 \textit{Tampa affair} when over 400 migrants were rescued from an unseaworthy ship by the Norwegian merchant vessel \textit{Tampa}, prevented access to the port by the Australian SAS forces and sent to the Pacific Island of Nauru.\textsuperscript{188}

In the wake of this crisis, under the authority of the International Maritime Organisation (IMO), in 2004, amendments were brought to the SOLAS and the SAR Conventions.\textsuperscript{189} The amendments clarified that the state in charge of the SAR section where the rescue action occurs bears the responsibility to ensure the survivors are disembarked ‘in a place of safety’.\textsuperscript{190}

Part of the problem is ascertaining where those rescued at sea be disembarked, seeing as the Conventions and the amendments do not specify that the state leading the rescue operation has the obligation to allow access to those rescued on its territory. The IMO Guidelines affirm that the obligation of the SAR centre that received the distress call to rescue people in distress at sea is considered discharged only when “the safety of those rescued at sea is no longer threatened, and their basic needs human needs […] can be met”.\textsuperscript{191} Trevisanut has pointed out that a rescue operation carried out under the SAR Convention is complete only when the survivors have been disembarked in a ‘place of safety’ and that this is the moment when the state in charge of the rescue is discharged of the obligation to rescue persons in distress at sea.\textsuperscript{192}

In the Mediterranean Sea, the duty to rescue persons in distress presents certain particularities. This is a space where the law of the sea is overlapping with international law and European law considering the coastal Member State apply the maritime conventions, their domestic laws regulating navigation on the seas, as well as the regulations developed and implemented by the European Union related to the duty to render assistance at sea. Therefore, it is necessary to assess the interpretation of the duty to rescue persons in distress at sea in the European context to understand the situation in the Mediterranean region.

\begin{footnotesize}
\textsuperscript{187} Annex, para. 1.3.2., SAR Convention.
\textsuperscript{190} Annex, para 3.1.9, SAR Convention and Chapter V, Regulation 33 (1-1), SOLAS
\textsuperscript{191} IMO, Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea, 20 May 2004, para. 6.12-6.18.
\end{footnotesize}
Section 3.3.2. The duty to rescue people in distress at sea in the European context

All the key issues identified concerning the duty to rescue persons at sea are further exacerbated in the Mediterranean Sea as a consequence of the irregular migration situation. The Mediterranean Sea is the scene where the duty to render assistance to persons in distress clashes with the interpretation of search and rescue advanced by the European Union and the Member States and with human rights law too. Maritime operations are regulated through EU Law, the most relevant being the Maritime Surveillance Regulation (MSR) and the EBCG Regulation.\(^{193}\)

Although the European coastal states, Member of the EU, are parties to the SAR Convention, search and rescue activities are subordinated to border security concerns.\(^{194}\) Added to that, Malta has rejected the 2004 IMO amendments to the SAR and SOLAS Convention and therefore has a different view on what constitutes ‘distress’ or what ‘rescue’ might entitle.\(^{195}\)

As per the provisions of the MSR, the notion of ‘distress’ is defined in a more comprehensive manner but, in reality, the Council of the EU has pointed out that search and rescue at sea are of the competence of the Member States.\(^{196}\) Joint missions at sea may be initiated at the solicitation of the Member States, but it appears that the main objective of such operations is increasing border security and only incidentally search and rescue actions.\(^{197}\) Further examination of the EBCG Regulation, in fact, highlights that the Member States are the duty bearers of the obligation to render assistance to persons in distress in the Mediterranean.\(^{198}\)

At first sight, the European legislation related to the duty to rescue of persons in distress at sea seems more detailed and normative than the maritime Conventions if we overlook the fact that it only relates to operations coordinated by the EBCG. The problem is that the EU law norms are not in complete harmony with the maritime convention provisions regarding search and rescue or with the international human rights law.

Section 3.4. The protection of the right to life under the Protocol against Migrant Smuggling

Irregular migration in the Mediterranean most often occurs through smuggling. Migrant smuggling at sea represents a challenge for the European Union and the Member States from an international law as well as European law perspective. The Mediterranean Sea becomes a space where the right to life of the migrants fails to materialise in the aftermath of the clash between international law and European law.

In researching the regimes crossing journey of the migrants, I discovered that there are cases in which those who rescue endangered migrants (humanitarian actors or fishermen), in Europe, are sometimes faced with criminal charges. Applying criminal sanctions to humanitarian actors or fishermen functions as a deterrent and has the potential of discouraging saving migrant lives. Combating migrant smuggling represents another dimension of the policies advanced by the EU and the Member States in the Mediterranean.

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\(^{193}\) EBCG Regulation.

\(^{194}\) Ibid. 59, pp 324-325.

\(^{195}\) Ibid. 186, pp 549-550.

\(^{196}\) Article 9(2)(e) MSR Regulation.

\(^{197}\) Article 15(4) EBCG Regulation.

\(^{198}\) Article 5 EBCG Regulation.
Sea, and it is relevant to the answering the research question as an example of the negative impact a restrictive interpretation of the law could have on the right to life at sea. In consequence, my investigation continued with an analysis of the provisions of the Migrant Smuggling Protocol\(^{199}\) and the Facilitation Directive\(^{200}\) after which reviewing the scholarship on this issue helped me form an opinion. Hence in Section 2.4.1., I will elaborate on the approach adopted concerning humanitarian rescue based on the provisions of the Migrant Smuggling Protocol and in Section 2.4.2. I will compare it with the one practiced by the EU and the Member States.

Section 3.4.1. Humanitarian rescue under the Migrant Smuggling Protocol

The Migrant Smuggling Protocol, adopted under the Convention on Transnational Organised Crime, is primarily intended to put a stop to migrant smuggling as a criminal activity, secondly to improve the cooperation between states and, lastly, the protection of the human rights of the migrants.\(^{201}\) Saving lives the lives of the migrants found in this situation and lastly. The provisions of Article 2 of the Protocol outline that the most significant concern of the state parties is to counter and fight migrant smuggling and the protection of the human rights of the migrants, including the right to life, represents a subsequent consideration.\(^{202}\)

The activity of migrant ‘smuggling’ is defined as providing assistance for the illegal entry into a country to a migrant, in exchange for ‘financial gains or other material benefits’.\(^{203}\) The travaux preparatoires of the Protocol suggest that the drafters intended to avoid rescue activities performed for humanitarian reasons being qualified as criminal.\(^{204}\) In other words, the Protocol’s purpose never was to criminalise or discourage humanitarian rescue carried out by non-governmental actors at sea.\(^{205}\) This also confirmed by the Legislative Guides for the implementation of the Protocol, which explains that the purpose of this instrument concerns the migrant smuggling carried out by criminal organisations and not the migrants or the illegality of migration itself, under the national law of the entry state.\(^{206}\) Although the illegal entry of the migrants is treated as a crime in some of the states’ legislation, it is not acknowledged as a criminal activity, within the meaning of the Protocol and only the ‘procurement of illegal entry’ is recognised as a transnational criminal activity and it represents the focal point of the Protocol. It follows that the humanitarian rescue performed by the

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\(^{201}\) See Preamble, Article 2 The Migrant Smuggling Protocol.


\(^{203}\) Article 3(a), The Migrant Smuggling Protocol.


\(^{205}\) Ibid. 59, pp 341-342.

different charities present at sea in situations where migrant lives are in danger of being lost does not represent a crime in agreement with the stipulations of the Protocol.

The majority of migrants choosing to take the dangerous journey at sea are forced to seek for clandestine manners to cross the borders as they are fleeing conflict or war zone, where human rights are abused on a daily basis. The Migrant Smuggling Protocol acknowledges the migrants’ vulnerability and provides that are not be prosecuted for being victims of smuggling. But at the same time, the state parties are not precluded from prosecuting the migrants for illegally crossing the border based on their domestic laws. This vividly illustrates the lack of harmony existent between international law and national law. For instance, it may happen that the smugglers are not even on the boat transporting the migrants to their destination. As it was pointed out in scholarship, this obscures the boundaries between smugglers and smuggled as it raises questions regarding the criminalisation of migrants entrusted by the smugglers to steer the boat. With no qualified crew to steer the ship, the lives of the migrants travelling to Europe is even more endangered.

Section 3.4.2. The clash between the Protocol against Migrant Smuggling and the Facilitating Directive

In Europe, the Member States endeavoured to deter migration at sea by discouraging humanitarian acts. The Facilitation Directive provides the Member States’ obligation to develop the necessary national legislation to punish as a crime the assistance of irregular migrants in illegally crossing the border, passing through their territory or establishing their residence there.

One of the issues is that the Facilitating Directive makes no distinction between humanitarian acts such as those performed by non-governmental organisations or seafarers and those for profit, such as migrant smuggling. The states are authorised to punish any person who intentionally aids third country nationals to gain entrance on the territory of a Member State, in violation of this state’s domestic law regulating migration. Indeed, Article 1(2) of the Directive provides an exception to punishing the assistance offered to enter and transit the state’s territory but it is completely facultative, and it means that the Member State may decide to sanction humanitarian assistance nonetheless. Besides that it sanctions and discourages humanitarian acts, the Facilitation Directive enters into conflict with Migrant Smuggling Protocol, which makes a somewhat approximate distinction between entering illegally on the territory of a coastal state in exchange for financial gain and facilitating entrance for humanitarian purposes. The Protocol requires the state parties to establish suitable

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207 Article 5, The Migrant Smuggling Protocol.
208 Article 6(4), The Migrant Smuggling Protocol.
211 Ibid. 210, pp 381-386.
212 The Facilitation Directive.
213 Article 1(1)(a), The Facilitation Directive.
214 Ibid. 91, pp. 430-438.
sanctions in their national legislation against the smuggling of migrants, but it underlines that humanitarian assistance is to be excluded.\textsuperscript{215}

Continuing to apply the provisions of the Facilitating Directive could lead to further unnecessary loss of life in the Mediterranean.\textsuperscript{216} In the \textit{Cap Anamur} case, in 2004, the boat of a German humanitarian organisation rescued 37 of migrants, in distress, in Southern Mediterranean and who were travelling from Libya to Italy.\textsuperscript{217} After the initial refusal of the Italian authorities' to allow the boat to dock in the Empedolce, Sicily, the ship navigated the international waters in the proximity of the Sicilian coast for twelve days. In the end, ensuing an emergency call from the captain of Cap Anamur, the Italian authorities have given permission to enter the port, but the director of the ship, the captain and the first officer were immediately arrested, and the vessel was seized under arraignment of assisting irregular migrants.\textsuperscript{218} The three crew members were released after five days of detention, but in 2006, legal proceedings were started against them for assisting irregular migrants in entering without authorisation on Italian territory. In October 2009, the Court of Agrigento acquitted the accused and ordered the release from seizure of the vessel and its restitution to the right holders.\textsuperscript{219}

The Cap Anamur case highlights the conflict existent between the provisions of the Facilitation Directive and the Protocol against Migrant Smuggling, as well as the duty to render assistance to persons found in distress at sea, from the international maritime law, which today is a rule of international customary law. The aftermath of this type of cases is that commercial ships and fishers think twice before aiding persons in distress at sea due to the fact that rescuing migrants at sea has the potential of leading to the sequester of one's boat and a costly and lengthy trial.\textsuperscript{220} This was subsequently evidenced by the left-to-die boat incident in 2011 when various vessels have passed the migrants in distress at sea without offering assistance.\textsuperscript{221}

Therefore, when discussing humanitarian rescue and establishing whether it is necessary that those offering assistance to migrants in distress at sea obtain financial and material benefits to save them, international law and European law clash. In this collision, the human rights of the migrants take a back seat. The migrants travelling to Europe have to consider that in case of distress at sea there is the possibility that other seafarers will pass them without offering assistance.

\begin{footnotesize}
\begin{enumerate}
\item Article 6, The Migrant Smuggling Protocol.
\item Ibid. 91.
\item Sentenza pronunziato in 07/10/2009, Tribunale di Agrigento, 1 Sezione Penale 1 Collegio, N. 954/09, available at \url{http://www.giureta.unipa.it/Tribunale_Agrigento.pdf} last accessed on 4 July 2018.
\end{enumerate}
\end{footnotesize}
In European and international human rights law, the right to life is recognised as inherent to the human being. Both the case law of the HRC and the ECtHR indicate that in order to safeguard the right to life the states have a positive obligation to take the necessary steps to protect it.

But when it comes to the extraterritorial application of the right to life, the jurisprudence of the human rights bodies continues to promote the classic interpretation of the notion of jurisdiction. Only in specific cases, the protection of the right to life applies extraterritorially as well, as an exception to the rule.

The duty to rescue persons in distress at sea has the potential to contribute to safeguarding life in the Mediterranean Sea. However, when it is applied to irregular migrants, it raises issues regarding the various interpretations offered to the notion of ‘distress’, as well as concerning the moment the rescue operation is viewed as completed.

Although irregular migrants are regarded as victims in smuggling context, the conflict existent between the Migrants Smuggling Protocol and the Facilitating Directive, has the side effect of discouraging humanitarian rescue, leading to even more lives lost at sea.
Chapter 4 On how to protect the right to life of the migrants in the Mediterranean region

After examining the various legal regimes overlapping in the Mediterranean region, especially the case law referring to the right to life in the case law of the HRC and the ECHR, it became necessary to explore the possibility of protecting the right to life of the migrants crossing the sea based on the positive obligation doctrine, which I will analyse in Section 4.1. In Section 4.2, I will examine in what circumstance could we engage the responsibility of the Member State and the EU for the migrant lives lost at sea and in Section 4.3. I will propose a better approach to applying the right to life extraterritorially, by analogy with the ICESCR²²² and utilising the Maastricht Principles.²²³

Section 4.1. A positive obligation to protect the right to life in the Mediterranean Sea

As I have discussed in Section 3.1.2, in order to fulfil the right to life the state parties of the ECHR, based on the case law of the ECHR, have to safeguard it by taking the necessary measures to prevent any interferences with this right, with the stipulation that the state authorities must have had knowledge that there was a threat to it and that it does not place an unreasonable and impossible burden on the state.

Taking into account the Court’s position regarding the active involvement of the state parties in effectively safeguarding the right to life it was necessary to examine ‘the positive obligation’ doctrine advanced by the ECHR, in Section 4.2.1 and how it relates to saving the lives of the migrants in the Mediterranean region, in Section 4.2.2.

This section only refers to the positive obligations to safeguard the right to life of the irregular migrants from the Member States perspective considering that the much-awaited accession of the EU to the ECHR, required by the Lisbon Treaty, has not yet occurred.²²⁴

Section 4.1.1. The positive obligation to safeguard the right to life in the case law of the ECHR

From the language of the ECHR provisions, it is evident that the state parties have committed to ‘secure’ to every person the fundamental rights specified therein.²²⁵ To ‘secure’ a fundamental right, depending on the situation, entitles positive or negative actions, thus positive or negative obligations for the state parties.²²⁶ Negative obligations have been considered as inherent in the sense that they demand states to abstain from any interference with the enjoyment of a right, while positive obligations have been seen, based on the jurisprudence of the ECHR, as requiring domestic authorities to elaborate the necessary

²²⁴ Article 6(2), TEU.
²²⁵ ECHR
measures to ensure the preservation of the right to life as well as measures that are ‘reasonable and suitable’ to enforce it.\footnote{227}

The ECtHR in its jurisprudence applies the positive obligation inferred by Article 1 of the ECHR in conjunction with the fundamental right safeguarded which means that under this doctrine the right to life is interpreted as imposing positive and negative obligations on the state parties.\footnote{228} According to the ECtHR judgement in the \textit{Ilascu} case, the positive obligation of the states’ rests on the provisions of Article 1 of the ECHR and in order to establish the scope of the obligation it has to be examined whether ‘a fair balance has been struck between the general interests of the individuals’, the domestic particularities of the state parties and whether a choice had to be made between priorities and resources.\footnote{229}

The provisions of Article 2 of the ECHR place on the state a substantive positive obligation to safeguard the right to life and a negative duty to not interfere with it, baring certain specified situations.\footnote{230} Therefore the state authorities are demanded to play an active role in safeguarding the right to life, by adopting legislation meant to discourage inferences with the right to life as well as measures to preclude the risk to the life of an individual through actions of another individual.\footnote{231} Even so, the state agents are not bound by this obligation in every case there is a danger to the right to life, and most importantly this duty must not place on the authorities an ‘impossible and disproportionate’ task.\footnote{232}

The procedural aspect of the right to life involves that in cases where lives have been lost in conditions possibly drawing the responsibility of the state, there is an obligation on the part of the state to make certain there are adequate means, legal or administrative, to address and punish infringements of the right to life.\footnote{233}

The due diligence doctrine suggests that the states are to ascertain that agents of the states or other persons in such capacity do not interfere with the right to life of the individuals. At the same time, the due diligence obligation demands that the states afford remedies for the violations imputable to it, without taking into account the intent or motive of its agent. However, even though states cannot guarantee that every violation of the right to life will be averted, it is not allowed to adopt a passive conduct when there is a danger to the lives of the individuals.\footnote{234} Thus it was appreciated that the criterion to establish whether the state has fulfilled its due diligence duty to secure and ensure a human right lies between these two points.\footnote{235}


\footnote{228} Ibid. 227, pp 7-8.

\footnote{229} \textit{Ilascu and Others v. Moldova and Russia}, Application no 48787/99, ECtHR, 8 July 2004, para 332 and 334.

\footnote{230} Art. 2, ECHR.

\footnote{231} Osman v. The United Kingdom, para. 115.

\footnote{232} Ibid. para 116.

\footnote{233} Öneryıldız v. Turkey, ECtHR, Application no. 48939/99, Judgement 30 November 2004, para. 91.

\footnote{234} Öneryıldız v. Turkey, para 144-145.

\footnote{235} Ibid. 226, pp 577-578.
Section 4.1.2. The positive obligation to safeguard the right in the Mediterranean context

Since that migrants are losing their lives in the Mediterranean region, it was essential to examine whether it can be reasoned that the states involved in maritime operations have a positive duty to save the migrants, drawing on the jurisprudence of the ECtHR at sea. Unfortunately, there is little case law related to the right to life at sea and the most suitable manner to ascertain the position of the ECtHR regarding the positive obligation of the state parties to uphold human rights during maritime activities, is by analogy with the cases in which it has ruled over the application of human rights, in general, in the marine environment.

In the Xhavara case, the Court stated that the collision between the Albanian boat and the Italian warship occurred in the international waters and thus it fell under Italy jurisdiction, taking into account of these factual circumstances. To rule as such the Court pointed out that the incident took place during operations carried out based on the 1997 agreement between Italy and Albany. This view was criticised in doctrine on the argument that the existence of an agreement should not be considered an adequate method to establish jurisdiction. Nevertheless, an analysis of the judgement suggests that the Court warned the state parties that safeguarding the right to life involves not only a negative duty to refrain from interfering with this right, but also to take the necessary measures to ensure the protection of the lives of those in their jurisdiction.

Based on the same principle, in the Medvedyev case, the Court examined the objective facts and asserted that the French authorities have exercised ‘full and extensive control’ over the vessel and its crew, in a ‘continuous and uninterrupted manner’. Thus, the persons on the board were under French jurisdiction and therefore owed protection under the ECHR. The judgements in these two cases imply that operations carried out by state parties on the high seas have to align with the provisions of the ECHR and that possible infringements enter under the purview of the ECtHR when state agents exercise effective control over the vessel and the crew.

In 2009, in the Hirsi case, a group of irregular migrants was intercepted by the Italian naval authorities and moved on an Italian ship, after which they were returned to Tripoli, under the terms of the 2008 agreement between Italy and Libya. The Court retained that between the time the migrants were boarded on the Italian boat and the time they were passed to the Libyan authorities the applicants were under ‘the continuous and exclusive de jure and de facto control’ of the Italian state and thus under its jurisdiction, within the meaning of the Article 1 of ECHR. So far the Hirsi case is the only one concerning human rights violations relating to SAR activities.

In the aftermath of the Hirsi judgement, when the coast guards take the migrants on their ship, they are bringing them under the jurisdiction of the flag state, and the ECHR provisions apply. This is in agreement with Article 92 of the UNCLOS as well regarding the

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236 Xhavara and others.
237 Ibid. 127, pp 9-11.
238 Xhavara and others.
239 Medvedyev and Others v. France.
240 Ibid. 127, pp 10-11.
241 Hirsi Jamaa and Others v. Italy.
242 Hirsi Jamaa and Others v. Italy.
243 Ibid. 127, pp 11-12.
exclusive jurisdiction of the flag state.\textsuperscript{244} The problems occur when the migrants rescued are not embarked on the intercepting vessel or when to avoid responsibility or the state managing the SAR section does not perform the required services. For instance, in the \textit{Xhavara} case the operations were carried out based on an international agreement, and therefore there is link a between the rescuing ship and the boat in distress. The duties stemming from the ECHR apply, including the one to safeguard life.\textsuperscript{245} However, it is difficult to establish a jurisdictional nexus in a situation where the state authorities do not intervene to rescue the migrants in distress at sea. If the migrants are located on the high seas (not in a SAR area), it is uncertain who has an obligation to save them from the states receiving the distress signal. When the event unfolds within the SAR section and the coastal state receiving the distress call is the one in charge of the area where those in danger are located, it has an obligation to perform search and rescue operations and save the migrants. But it continues to be debated whether the jurisdiction of the coastal state in the SAR region has human rights implications as well.\textsuperscript{246}

The right to life and the duty to rescue people in distress at sea have the same goal: protecting human life.\textsuperscript{247} The difference is that the duty to rescue people in distress at sea creates an obligation for the shipmasters of the state parties and safeguarding human life generates a negative obligation for the states to abstain from conduct that might lead to the taking of life and a positive obligation to take effective and practical measures to prevent the loss of life. It is evident that two obligations have a different ambit of application. For instance, the duty to rescue people in distress at sea applies over all the seas, and the duty to establish SAR services encompasses only the state’s SAR section. Komp is of the opinion that even though the case law of the ECtHR concerning the right to life may have significance in clarifying the duty to render assistance at sea, it does not influence its ambit of application and it does not broaden the scope of application of the right to life.\textsuperscript{248}

Indeed, the right to life falls under the human rights regime, which requires the states to ensure the enjoyment of this right, while the duty to rescue persons in distress at sea entitle that the states fulfil their obligation to instruct their shipmasters sailing under their flag to render assistance at sea, whenever it is possible. The realisation of the positive aspect of the obligation to render assistance at sea relies on the states’ ability to take action to prevent the loss of life, by setting up SAR centres equipped with the necessary resources and personnel to effectively and adequately perform SAR operations. However, in my view, in as much as they perform maritime operations in the Mediterranean Sea, the Member States have an obligation to ascertain that in areas considered problematic, they take the necessary measures to protect the right to life.

\textbf{Section 4.2. Engaging responsibility for the lives lost in the Mediterranean Sea}

The multitude of actors involved in the maritime operations of surveillance and control of borders in the Southern European space makes it difficult to determine who is responsible for the migrant lives lost in the region. The tragedies happening in the Mediterranean Sea illustrate the tension that exists between the necessity to safeguard the right to life and the

\textsuperscript{244} Article 92, UNCLOS as well as \textit{J.H.A. v. Spain}, CAT/C/41/D/323/2007, UN Committee Against Torture (CAT), 21 November 2008, para 8.2.
\textsuperscript{245} \textit{Xhavara and others}.
\textsuperscript{246} Ibid. 127, pp 11-14.
\textsuperscript{247} Ibid. 181, pp 236-238.
\textsuperscript{248} Ibid. 181, pp 236-238.
policies aimed at enforcing border security advanced by the EU and the Member States. Seeing as the EU and the Member States apply European law during the operations carried out at sea, they both could be held internationally responsible for their actions or omissions during maritime operations.\textsuperscript{249} According to the International Law Commission (ILC), a state or an international organisation can be held accountable for infringements upon international obligations, only if responsibility could be assigned to them.\textsuperscript{250} Based on the Draft Articles of the ILC, in Sections 4.3.1. and 4.3.2., I will explore the possibility of engaging the direct and indirect responsibility of the Member States and the EU for the lives lost at sea. In Section 4.3.3., I will propose engaging the responsibility of the Member States and the EU, having in mind the positive obligation to protect human rights doctrine.

Section 4.2.1. The direct responsibility of the EU and the Member States

Breaches to the right to life of the migrants could occur in the course of the sea operations coordinated by Frontex through actions and omissions.\textsuperscript{251} Therefore, the critical issue would be to ascertain which subject of international law has an obligation to save the migrants endangered at sea. Taking into account that Frontex personnel represents the Agency and that it is a body of the EU, based on the argument that it is acting on behalf of the Union and thus responsibility could be attributed under the provisions of Article 6 ARIO.\textsuperscript{252} However, Article 5 of the EBCG Regulation affirms that matters concerning the management of the border remain the ‘shared responsibility’ Frontex and the Member States, including coast guard as long as they perform maritime border surveillance and control operations.\textsuperscript{253} Added to that, the Member States continue to hold ‘primary responsibility’ for organising their sections of the external borders.

As it was remarked in scholarship, the concept of ‘shared responsibility’ has created confusion regarding attribution of accountability, especially in cases where third countries participate as well in maritime operations.\textsuperscript{254} Another controversy consists in the attribution of responsibility in the case of the EU, a problem that continues to constitute a cause for debate in international law.\textsuperscript{255} The EU has emphasised that the acts of the Member States executing


\textsuperscript{251} Ibid. 249, pp 389-399.

\textsuperscript{252} Article 6, ARIO.

\textsuperscript{253} Article 5, EBCG Regulation.

\textsuperscript{254} Ibid. 249, pp 399.

EU decisions within the exclusive scope of the Union competency, should be regarded as actions of the EU considering that there are areas where the EU has exclusive competence and thus exercises normative control over the Member States, implementing European law. In this situation, it becomes difficult to attribute responsibility, as it appears contrary to international law principles to depend on the internal legislation of an international organisation.

The ECtHR, in its jurisprudence, has maintained that the state parties to the ECHR bear sole responsibility for the actions and omissions of their own institutions, without making a distinction on whether they were applying national or international law. Thus, it would be contrary to the ECHR that the state parties avoid responsibility based on the argument that they have delegated some of their responsibilities to an international organisation. As such, for human rights purposes, the Member States retain responsibility, but in cases where they are enacting EU law, the EU might have the responsibility to offer remedies when violations of human rights occurred.

Furthermore, the ECtHR underlined in the Bosphorus case that state parties conduct based on their 'legal obligation' as members of the EU were legitimate since they were strictly fulfilling their obligations and taking into account that the Union afforded equal standards of protection to human rights as the ECHR. For this reason, a petition against the EU at the ECtHR would be inadmissible. This would only have been possible if the EU had acceded to the ECHR, as required by Article 6 of the TEU. On the other hand, if the Member States were to infringe upon the right to life in a field where they have a margin of discretion, such as on migration issues and border surveillance maritime operations, they would retain responsibility for their actions or omissions, even though they are implementing European legislation.

The ILC deems normative control as insufficient to assign responsibility to an international organisation, based on the conduct of the states. Under international law, an international organisation bears the responsibility for the actions of a state only when it has 'effective control' over the state’s conduct, which means that it would not be accountable for the manner in which the state sees fit to implement EU legislation. Nevertheless, the ILC has acknowledged that in certain situations, when states and international organisations share operational control, attribution of responsibility based on the general principle is not possible, as it is assumed the states maintain control over them. Thus, it would be contrary to EU law to presume that the operations at sea are coordinated only by Frontex, as a body of the Union.

257 Ibid. 249, pp 399-403.
259 Ibid. 249, pp 399-403.
260 Article 6, TEU, also Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties. Case Opinion 2/13.
261 Ibid. 249, pp 399-403.
262 Article 7 ARIO, Commentaries and Observations, pp 24.
and that there is no actual involvement of the Member States in the maritime activities headed by Frontex.

Section 4.2.2. The indirect responsibility of the EU and the Member States

Engaging the European coastal states’ responsibility based on their complicity in the commission of a wrongful act, under the provisions of Article 16 of ASR, presents obstacles as well. The Commentary to Article 16 of ASR requires that certain conditions be accomplished in order the engage the responsibility of a state for ‘aiding and assisting’ another state in internationally wrongful acts but the most challenging requirement is that the acts in question must be carried out with intention and have the purposed result. This sets quite a high threshold for holding the states accountable in this sort of situation and is the most debated issue when fleshing out state responsibility matters. For example, the joint maritime operations carried out by European coastal states with third-countries must be performed with the intention that the practices applied at sea will lead to a breach to the right to life, when in fact the Member States have developed policies aimed at controlling the migration flux at the Mediterranean border. The International Court of Justice (ICJ) has indicated that there has to exist a nexus between the knowledge that the perpetrator will commit a crime and the intent to contribute to the breach. Thus, establishing that the Mediterranean coastal states are training and providing technical support to third-countries with the aim of lives being lost at sea is an impossible endeavour.

Section 4.2.3. Responsibility based on the positive obligation doctrine

Allocating responsibility to the European Member States for the lives lost in the Mediterranean Sea could be possible, based on their positive obligation to respect, ensure and secure the right to life of the irregular migrants. The ECHR acknowledges the existence of a positive obligation regarding the rights protected therein and particularly concerning the right to life taking into account the legal provisions of Article 2. Without a doubt, there is a requirement that the state parties take the necessary measures to protect the right to life not only in substance but by prescribing and enacting the legislation to do so. The problem would be that to activate state responsibility concerning the breaches to the right to life that occur in the Mediterranean Sea; it is necessary to expand the application of the provisions of the ECHR extraterritorially, to cover the maritime operations performed at sea with the aim of controlling migration.

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266 Ibid. 152, pp 63-67.
267 Ibid. 227, pp 21.
268 See S. Kim, “Non-refoulement and Extraterritorial Jurisdiction: States Sovereignty and Migration Controls at Sea in the European Context” (2017), International Law and Practice, Leiden Journal of
The best approach at this moment would be engaging the responsibility of the EU based on the positive obligation to protect the right to life in the Mediterranean Sea taking into account the fact that the EBCG, as an agent of the EU, has an essential role in the development and implementation of the plan established for the maritime operations. The vast extent of the involvement of the agency in operations on the ground is highlighted by the deployment of a ‘coordinating officer’ tasked among others to oversee that human rights standards are respected during the mission. Concretely, the EBCG has the awareness that many of the migrants attempting to reach European shores clandestinely lose their lives in the region and it fails to take the necessary measures to prevent them from being claimed by the sea. In 1982, the Human Rights Committee emphasised that the protection of the right to life entitles a positive obligation from the part of the signatory states. The FRA went further and suggested that the states ‘may’ have an obligation to take the necessary measures to preserve life when the breach could have been anticipated and averted.

Section 4.3. A different approach to expand the scope of the right to life of the migrants

As a result of globalisation and having as a background the intensification of the relations between states, the emergence of various international and regional organisations, such as the EU, we are more and more faced with situations in which states take action extraterritorially. In international human rights law, it has not been yet settled whether states have an obligation to uphold human rights outside their jurisdiction. At this stage it crucial to establish whether states have the positive obligation to safeguard and fulfil human rights externally, including the right to life.

In Section 3.2., I have examined the possibility of applying human rights extraterritorially, and it was demonstrated that international law acknowledges that there are circumstances in which human rights treaties are applicable outside the territorial boundaries of states. But the standard is that human rights instruments regard the exercise of jurisdiction as primarily referring to the territory of a state. In exceptional cases, under customary and international human rights law it was admitted that states could take action abroad. Although it was acknowledged that when the state exercises effective control, it exercises jurisdiction, there are no commonly agreed on criteria to identify such cases.

A newer and better approach would be to interpret the states’ obligation to safeguard the right to life of the migrants as applying extraterritorially having in mind the universal nature of this right advanced by the UDHR, assessed in Section 4.1.1, and the possibility of extending the ambit of the right to life by analogy with the ICESCR and the Maastricht Principles on

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269 Article 22 (1), EBCG Regulation.

270 Ibid. 122, para 5.


272 Al-Skeini, para 131-132, Banković, para 59.


274 The Maastricht Principles.
Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights\textsuperscript{275}, in Section 4.1.2.

Section 4.3.1. The obligation to safeguard the right to life of the boat migrants based on the universal nature of human rights

When the concept of human rights appeared on the international scene, there were different times and the human rights of present days continue to constitute a reflection of the times they were first introduced. Nowadays, there are other challenges that could only be eliminated by establishing that the safeguards of the right to life apply extraterritorially as well.\textsuperscript{276} To conceive that the right to life applies only within the states’ territory or jurisdiction drastically limits the protection of life in the Mediterranean. Another manner of interpretation would be to base the extraterritorial application of the safeguards to the right to life on the claim that the moment the states take action beyond their borders, as an effect their human rights duties, the obligation to protect the right to life becomes wider too.

The right to life of all the individuals is recognised by Article 3 of the UDHR.\textsuperscript{277} Added to that, the UDHR was acknowledged as establishing general rules of international law and lays out an obligation of international cooperation in Article 22.\textsuperscript{278} According to these provisions, every person has the right to the fulfilment of their human rights through the creation of rules meant to enact human rights on a national level and international cooperation, depending on the capacities and the resources of the state.\textsuperscript{279} Therefore, every individual has the right to require the realisation of their human rights universally acknowledged through international cooperation.

The conditions necessary to activate state jurisdiction based on the ICCPR and the ECHR are comparable. The correspondent judicial bodies overseeing the application of these human rights instruments have maintained constantly that states have jurisdiction whenever it was established that there was effective control. As such human rights apply extraterritorially every time the state has effective control over a territory, a person or a situation.\textsuperscript{280} The HRC maintains that the ICCPR covers situations where the state takes action abroad.\textsuperscript{281} The ECtHR has constantly withheld that the ECHR applies extraterritorially only in specific cases, such as when the state exercises effective control over a territory abroad and in more recent cases has stated that there is jurisdiction where the state exercises control and authority over an


\textsuperscript{276} See I. Kanalan, “Extraterritorial State Obligations beyond the Concept of Jurisdiction”, 19 German L.J. (2018), Vol. 19, No 01, pp 51.

\textsuperscript{277} Article 3, UDHR.


\textsuperscript{279} UDHR, Article 22.


\textsuperscript{281} HRC, General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 10.
Thus, extraterritorial jurisdiction depends on the existence of a link between the authorities and control exercised and the vicinity of the object, person or territory.

The interpretation given to the ICCPR and the ECHR in literature only contributes to the vagueness existent concerning the extraterritorial application of human rights. Some scholars argue that Article 1 of the ECHR can be read as concerning the obligation to 'secure' and Article 2(1) from the ICCPR as regarding jurisdiction in a strict sense related to the obligation to ensure and not the obligation to respect. This suggests that although the positive obligation is linked to the application of jurisdiction, the negative obligation is not. However, examining human rights instruments in a strict sense is bound to lead to more confusion, and it does not account for the evolution of society and human rights as a consequence of globalisation and intensification of relations between states or stated and international organisations. In the Mediterranean region, multiple actors are interacting (states, international organisations, third countries and non-governmental organisations) during maritime operations. To further support a strictly territorial interpretation and jurisdiction-based approach to the scope of the right to life is contrary to the conviction that human rights are universal.

Section 4.3.2. The Maastricht Principles could extend the application of the right to life extraterritorially

A different approach would be to establish an extraterritorial scope for the ICCPR, based on the universality of the right to life as a human rights, by analogy with the ICESCR. Taking into account that it is considered that the obligations of the international assistance and cooperation provided by Article 2 (1), 11 (1) and 23 of the ICESCR, give rise to extraterritorial of the rights enumerated by this instrument, we could argue that the ICCPR could be as well. The Committee on Economic, Social and Cultural Rights (CESCR) seems to be of the same view regarding this issue. To support this theory an important contribution is brought by the Maastricht Principles on the Extraterritorial Obligations of States. The specialists who drafted the Principles advanced a broad strategy related to the extraterritorial obligations of the states, despite the slightly differing interpretations afforded by the case law of the human bodies.

282 Banković, para 67-71, Al-Skeini, para 133, 137.
283 Al-Skeini, para 136.
284 Ibid. 276, pp 52.
285 Ibid. 276, pp 52.
286 Ibid. 278, pp 51.
289 The Maastricht Principles.
In order to answer the question of whether human rights apply extraterritorially it is necessary to leave aside the narrow interpretation given to the scope of the human rights instruments. While the ICCPR’s provisions related to jurisdiction leaves a bit of room to stretch the applicability of human rights, the scope of the ICESCR is wider.

The Maastricht Principles imply that states have extraterritorial obligation related to human rights and they indicate the extent of these obligations. The principles detail the circumstances in which states are bound by human rights duties extraterritorially. According to the Principles, states have obligations related to human rights whenever they “exercise authority or effective control” over persons or situations beyond their borders in a manner that has the potential to affect human rights, based on the obligation to cooperate internationally.

The obligation of international cooperation was acknowledged by the UDHR as well in Article 22. In agreement with these provisions, every person has the right to the fulfilment of their human rights through the creation of rules meant to enact human rights on a national level and international cooperation, depending on the capacities and the resources of the state. Therefore, every individual has the right to require the realisation of their human rights universally acknowledged through international cooperation.

Besides human rights treaties, the obligation to uphold human rights extraterritorially finds support in general international law. The interdiction of states to permit access on their territory to cause harm on the territory of another state has become customary law, and it indicates that states have an obligation to protect human rights extraterritorially as well.

Referring to Principle 5 of the Maastricht Principles, De Schutter points out that extraterritorial obligations exist in relation to civil and political human rights and economic, social and cultural human rights approximatively alike. Although they are part of different groups of human rights; they have the same character and ambit of application. Indeed, it does not matter that the rights in question flow from civil and political or economic, social and cultural human rights, they have been created based on the same legal principles. The difference is that economic, social and cultural rights have been cultivated and evolved based on the states’ obligation to cooperate and assist internationally in the fulfilment of these human rights, while the ICCPR does not contain references to such obligations.

The obligation to respect, protect and fulfil economic, social and cultural rights extraterritorially is detailed in Principle 9 of the Maastricht Principles. That the notion of jurisdiction in human rights is different from the one used in international law, requiring the states to exercise effective control in certain cases, was ascertained by the ICJ in the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. In this case, the court pointed out that although the scope of application of the ICCPR is territorial as a rule, there are some circumstances it can be extended to comprise cases

290 Ibid. 276, pp 50.
291 Maastricht Principles, Principle 3, Sections III and IV describe the extent of the obligation;
292 Ibid. 278, pp. 1090-1096.
293 Ibid. 278, pp. 1091.
294 UDHR, Article 22.
295 Ibid. 278, pp. 1095-1096.
296 Trail Smelter Case (US v Canada), 3 R.I.A.A. 1905 (1941) and Advisory Opinion Concerning the Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion by the General Assembly of the United Nations), International Court of Justice (ICJ), 8 July 1996, the dissenting opinion of Judge Weermantry.
297 Ibid. 278, pp. 1098.
298 Principle 9, Maastricht Principles.
where states have exercised jurisdiction on foreign territory. To rule this way the ICJ has analysed the *travaux preparatoires* of the ICCPR according to which the intention of the state parties was not to restrict the obligations bind that states under the ICCPR to persons that are on the states’ territory alone. The ICJ maintained this view in the case of *Democratic Republic of the Congo v. Uganda* where it reasserted the position adopted in the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

Principle 9(a) refers to cases where the state has effective control over a territory and the persons therein or exercises state authority. The HRC has indicated that the state parties to the ICCPR are obliged to respect and ensure the human rights asserted in this instrument toward every person within ‘the power or effective control’ of a state even when not located on the territory of that state. The ECtHR has expressed the same view that the scope of a state’s jurisdiction may extend to include acts of its agents which produce effects abroad, as an exception to the rules.

Another situation of extraterritorial application of human rights obligations is when a state may affect the enjoyment of human rights through its actions or omissions abroad, although it does not have authority or effective control over a situation or a person. The ECtHR has remarked that in specific cases states’ jurisdiction may include acts of state’s agents that influence human rights beyond its borders. Thus the states’ could be held accountable based on the acts of its agents that have interfered with rights ensured by the ECHR, despite the fact that the interference has taken place externally. The HRC asserted that a state might be deemed responsible for extraterritorial infringements of the ICCPR if there is a ‘causal link’ that would suggest that it is possible for an infringement to occur in another jurisdiction, with the specification that the extraterritorial infringement must have been a ‘necessary’ and ‘foreseeable’ result. The possibility of an extraterritorial infringement must be appreciated based on the knowledge the state had over the situation at the time in question. However, this type of assessment of extraterritorial obligations regards only the location where the states’ obligations are activated, depending on the human rights instrument examined but do not define the ambit of the obligations in international law.

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299 HRC, Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, ICJ 136, para 109.
302 Principle 9(a), Maastricht Principles.
303 HRC, General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 10.
304 *Al-Skeini case*, para 138-139
305 Principle 9(b), Maastricht Principles.
306 *Al-Skeini case*, para 133.
307 *Ilascu case*, para 317.
309 Ibid. 278, pp 1108.
The last case in which a state has extraterritorial obligations related to human rights enumerated by the Maastricht Principles concerns the situation where a state, individually or in collaboration with other states, has to take the necessary steps to advance the realisation of human rights externally, based on the international cooperation principle. This concerns the active role the states are obliged to play in the fulfilment of human rights, through international assistance and cooperation.

Section 4.4. Concluding remarks

Considering the positive obligation doctrine advanced by the ECtHR, we can argue that the Member States have the duty to protect the right to life of the boat migrants, in the Mediterranean Sea, extraterritorially as well. This claim is supported on the Member States awareness of the situation in the region. So far, the policies developed and implemented have focused on reinforcing border security to prevent the migrants from entering. The positive obligation to ensure the right to life must be understood in the sense that the Member States not only have to create laws to protect the right to life but have to put in place policies meant to contribute to the fulfilment of this human right.

The duty to rescue people in distress at sea could have the potential to contribute significantly in safeguarding life at sea, but it must not be confused with the right to life as a human right protected by international and European human rights law.

The best approach at this point would be to maintain that by analogy with the ICESCR obligation to cooperate internationally towards the realisation of the right to life, state have the obligation to protect the right to life of the migrants travelling by sea, based on their awareness of the situation in the Mediterranean Sea, a region that is under their influence through the various maritime operations performed either individually or jointly with the EU and third countries.

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310 Principle 9(c), Maastricht Principles.
Chapter 5 Conclusion

The right to life of the irregular migrants crossing the Mediterranean to Europe no longer represents an international and European human rights or international maritime law issue alone, but a transnational law problem as well. At sea, these legal regimes interact and sometimes clash with each other. The EU and the Member States continue to view the maritime migration issue as a phenomenon that restrictive border policies could be prevented or combated. For example, Operation Themis appears to have search and rescue capacities, but there are no legal provisions to require the EBCG to rescue migrants endangered at sea. Also, Operation Sophia, set up to combat migrant smuggling, does not publish information regarding the measures it takes to ensure the lives of those smuggled are protected, and it continues to be unclear what checks are in place to review possible infringements of the right to life during maritime activities.

The efforts made to conclude agreements with third countries with questionable human rights background demonstrate the EU and the Member States unwillingness of addressing the loss of migrant life in the Mediterranean Sea. Preventing the migration at the origin or embarkation point does not solve the migration problem, in fact, the ‘externalisation’ of the border security policies has only forced migrants to seek clandestine and dangerous routes to cross the Mediterranean. There is evidence that the European strategy is not effective in the number of migrants that continue to drown in the area. In 2018, a number of 2,297 migrants lost their lives in the Mediterranean and, in 2019, at the moment of writing 216 migrants were registered as drowned in the region. The deaths registered by the IMO, Missing Migrants Project are just an estimation, and it is possible that many more have been lost at sea, but they were never claimed.

While the number of migrants taking the dangerous journey at sea had decreased in 2018 to 116,647 comparing to 2017 when a number of 172,324 migrants arrived in Europe by the Mediterranean route. The fact that deaths still occur in the Mediterranean Sea is a testimony of the systemic failure of the EU and the Member States, as actors involved in the maritime operations in the area, to take the appropriate steps to address this issue.

There is no information to confirm that the EU-Turkey deal has had any positive impact. The Human Rights Watch has documented life-threatening push-backs, in which Turkish coast guards have resorted to shooting the migrants to prevent them from crossing to Greece. Added to this even though at first the number of migrants travelling by boat to Europe seemed to drop, later on, it was noted that they were displaced on other routes.

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311 IMO, Missing migrants project, Tracking deaths along migratory routes, Total of Deaths Recorded in Mediterranean from 1 January to 14 February, available at https://missingmigrants.iom.int/region/mediterranean last visited on 14 February 2019.
314
The European Union and the Member States have agreed to provide Libya with training, operational and financial support to combat migration flows. As a result, Libyan coast guards and with Italian support operate more and more in the international waters notwithstanding the fact that this country’s guards have been repeatedly accused of endangering lives at sea. The most recent case endangering lives at sea was signalled by the Sea Watch, which started legal proceedings against Libyan coast guards.

The ‘Saving Lives at sea and targeting criminal networks’ agenda furthered by the EU, as part of the organisation’s migration policy has as a purpose enforcing border security, identifying migrant smugglers and lastly saving migrants at risk. There are no measures provided regarding how the goal of rescuing the migrants is to be put into practice. Therefore, the protection of the right to life in the Mediterranean Sea does not benefit of effective enforcement, even though there are maritime operations in the region that could have an important contribution to the fulfilment of this human right. To safeguard the right to life at sea all the maritime operations headed by Frontex should have search and rescue capacities, regulated through legislation adopted by the EU.

The right to life benefits of protection within the framework of the international and human rights law and the HRC and the ECHR have indicated in their case law that states have a positive duty to preserve the right to life. Despite that, the scope of application of the right to life continues to be linked to the territory of a state and in extraterritorial context, only in exceptional cases.

The duty to rescue people in distress at sea is not applied adequately taking into account that there continues to be disagreement between the state parties at the maritime conventions on how the notion of distress should be interpreted. Furthermore, the Migrant Smuggling Protocol clashes with the Facilitation Directive and has the potential of discouraging saving migrant lives at sea for fear of being prosecuted as a migrant smuggler.

As I have pointed out in Chapter 4, another argument in favour of the extraterritorial application of the right to life could be that EU and the Member States’ have a positive obligation to safeguard life based on awareness of the problems related to boat migration and the jurisprudence of the ECHR, we can argue that the Member States have the duty to protect the right to life of the boat migrants, in the Mediterranean Sea, extraterritorially as well. The positive duty to safeguard life at sea involves not only developing and implementing laws to prevent infringement but taking adequate and effective measures to preserve it effectively. In international maritime law context, the duty to rescue people in distress at sea has a positive aspect and could enhance the protection of the migrants travelling at sea.

A different approach would be claim that based on the obligation to cooperate internationally highlighted by the ICESCR the EU and the Member States have the duty to contribute to the fulfilment of the right to life in the Mediterranean based on their awareness of the situation in this region, during the sea operations carried out individually, together with the EU and third countries.

Returning to the research question on to what extent the right to life of the migrants travelling to Europe by boat applies in the Mediterranean space? After exploring the different legal regimes applicable at sea and the relevant case law, in my opinion, the right to life benefits of protection extraterritorially only in an exceptional situation, depending on whether there is a de jure and de facto jurisdiction nexus. Based on the positive obligation doctrine and

315 Ibid. 75.
316 Ibid. 75.
317 Ibid. 61.
their knowledge of the incidents continuing to occur in the region, I consider that the EU and the Member States have the duty to take the appropriate measures to prevent further migrant deaths, without placing an impossible burden on those involved in sea operations in the area. Another point in favour of safeguarding human life at sea would be that there is no reason why economic, social and cultural, would have the advantage of a wider scope of application compared with the right to life which is inherent to the human being. Therefore, the EU and the Member States should have the obligation of cooperating internationally to contribute to the realisation of the right to life in the Mediterranean Sea.
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