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**EUROPEAN UNIONS' EXTRATERRITORIAL MIGRATION
CONTROL AND RESPECT OF THE HUMAN RIGHTS IN THE
MEDITERRANEAN REGION**

Bachelor's Thesis

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I declare I have written the research paper independently.

All works and major viewpoints of the other authors, data from other sources of literature and elsewhere used for writing this paper have been referenced.

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ABBREVIATIONS

CEAS= Common European Asylum System

EBCGA= European Border and Coast Guard Agency

ECHR= European Convention on Human Rights

ECtHR= European Court of Human Rights

EU= European Union

EUROSUR= European Border Surveillance System

ICCPR= International Covenant on Civil and Political Rights

ILC= International Law Commission

MSF= Médecins Sans Frontières (Doctors Without Borders)

SAR Convention= 1979 International Convention on Maritime Search and
Rescue

SAR Zones= Search and Rescue Zones

SOLAS= 1974 Convention for the Safety of the Life at the Sea

UNHCR= United Nations High Commissioner on Refugees

UDHR= Universal Declaration of Human Rights

UNCLOS= United Nations Convention on the Law of the Sea

ABSTRACT

In recent years, European Union and its member states central practice of the migration management has been to forestall the irregular migrants' access to the Union territory and by this shirk the responsibilities and obligations stemming from the international law in respect to migration and human rights. Most evident this is in the Mediterranean area, which accounts for the majority of the irregular migration to Europe.

The research is examining European Unions', and its member states' highly securitized extraterritorial border controls in the Mediterranean area, and their relationship to the obligations of the International human rights law, the factual fulfilment of these rights and the states responsibility in such extraterritorial migration control cases. European Court of Human Rights has taken a stand that in certain limited cases there can be extraterritorial responsibilities imposed on a state from their extraterritorial operations. Still, at present the evidence and past experiences are showing attempts to avoid these responsibilities. In addition, part of this problem is the Unions' lack of commitment to address the crisis as humanitarian problem.

Regardless of this option of EU and its member states to be held responsible for the extraterritorial operations, there is still a lot of ambiguity of the extent of the state responsibility and the courts willingness to use this in rulings. However, the system clearly needs reforms and a better accountability mechanism, and the EU represented as democratic community promoting the human rights, should not be let to avoid its obligations under the International law, just because it is relocating substantial part of its migration management to extraterritorial areas.

Title: European Unions' Extraterritorial Migration Control and Respect of the Human Rights in the Mediterranean Region

Key words: European Union, Migrant Crisis, Extraterritorial Migration Control, Human Rights, Law of the Sea, Refugee Law, Mediterranean, State Responsibility

INTRODUCTION

The humanitarian crisis in the Middle East and Africa seems to continue for years ahead as there is no resolution in sight in the near future. During 2016, there were over 360 000 (Mediterranean Arri...2017) migrant¹s coming to European Union (EU) to escape war, persecution and for a hope of a better life.

The main migration route to the EU remains to be Mediterranean Sea, especially the Central Mediterranean route since 2016. The Mediterranean crossing is extremely dangerous and the year 2016 was the deadliest year to the migrants, with 5,096 casualties known so far; representing one death for every 40 crossings. According to the United Nations High Commissioner on Refugees (UNHCR), 90 percent of these migrants and people seeking international protection were coming by the Mediterranean to Italy (Refugees and Migrants F...2017). This makes the Eastern Mediterranean route a special interest on the security, border management and the humanitarian point of view.

Mediterranean Sea crossing is not by any means a safe route to be taken, but for many the only option. People who decide to come to Europe need to put their faith in human smugglers to reach European borders, as there are practically no legal ways offered. EU, as the main actor of the crisis on this side of the coast, has decided to take stricter and expanded border controls as the main policy. For the protection of the human rights of the migrants, these measures create dilemmas between protection of human rights and effective management of EU borders and incoming migration.

With increasing popularity, EU is locating major part of its migration controls and external border surveillances to areas beyond EU's external sea borders as the situation feels unmanageable at the internal borders only. Also, the states of departure and transit have been taken as important co-partners in the scheme to attempt to strain the departure of irregular

¹ Concept of migrants will be used as a general category including immigrants, asylum-seekers, refugees etc.

migrants. The Mediterranean and extraterritorial migration controls and related agreements with third countries are creating situations which leave, at least perceived, “legal black holes” for the fulfilment of human rights and fundamental rights codified in numerous international legal documents.

This thesis aims to analyse how the recent securitised framework of EU migration policies in the Mediterranean is affecting the human rights of migrants in the EU, and how these rights have been taken into account in these current policies and how the EU is taking responsibility of possible violations of these rights in extraterritorial areas. The main focus of the analysis is put on the Mediterranean operations and the cooperation schemes with coastal third states that operate in large part outside the conventional EU borders – which creates the extraterritorial dimension to the migration crisis.

The situation is evaluated with following research questions: how does the tightened, securitised, and outsourced migration control, reaching to and beyond the external sea borders affect the protection and fulfilment of the human rights for migrants and asylum seekers? What are those human rights EU needs to respect in the Mediterranean context, and do these rights and responsibilities apply also in these extraterritorial border control areas, or are these areas “outside” the protection, areas where EU cannot be held responsible?

Research task is to achieve an overall understanding of the EU migration management in extraterritorial Mediterranean areas and the fulfilment of the responsibilities based on the human rights agreements and conventions binding on EU and its member states. The analysis will map some of the most important fundamental rights set in these frameworks, and the current EU policies on migration in the frame of extraterritorial border management in the Mediterranean. Furthermore, the EU’s extraterritorial liability under the legal instruments of International law will be evaluated.

The thesis argues that, in fact there are many fundamental rights that are guaranteed for migrants even in the high seas in numerous legal treaties and these are binding upon EU and its member states even beyond the external borders. However, I would assume that they exist *de jure*, but not *de facto*, due to the complexity of the situation and lack of political commitment to address the crisis as a humanitarian crisis. Further this setting of underestimating and respecting the rights of migrants is threatening the moral foundations of the EU’s liberal democracy.

The research is conducted in qualitative manner, concentrating in evaluation of the situation with critical legal studies idea, that “law is politics and it is not neutral or value free”. This approach is taken because the migration management and their conformity with International human rights is evidently politically motivated and not purely positivistic in practice. At the same time, research will take positive stance on the existence of human rights and basic rights in the existing situation in the Mediterranean and the EU, based on the special position of the human and fundamental rights in the legal hierarchy.

Various sources related to the thesis topic were used in the course of research. A substantial part of the thesis has been created with combining case studies of ECtHR, articles from legal journals and official EU documents. In order to get better understanding of the issues, there are academic books, electronic articles and data on migration collected by the United Nations (UN), EU and NGO’s used in the research.

Research is divided into four sections. The first section has a brief theoretical overview of the securitization of migration and border controls in the EU as it exists today and their representation of the current human right promotion in the EU. The Second section gives evidence of these securitized extraterritorial migration agendas of the EU in the Mediterranean by evaluating the significance of maritime operations and the reforms of the policies in the EU migration control during the recent years that further show the recent reforms and future prospects of the unions’ migration management. The second chapter also looks substantial part of extraterritorial border controls in third country deals and Frontex joint operations with them. Third section defines the most important fundamental and human rights applicable, with concertation in the Mediterranean context, giving examples of case law and observations on EU migration controls in the sea areas and coastal third countries. The fourth section attempts to find the substance of the extraterritorial responsibility of the EU in these rights and define the extend of state responsibility in the extraterritorial migration control codified in international law, and lastly will sum up these findings in a case study. The conclusion will make concluding remarks of the main findings.

1. THEORETICAL FRAMEWORK OF BORDER MANAGEMENT IN THE EUROPEAN UNION

This chapter will describe the theoretical overview of the securitisation of migration in the EU. To fully comprehend the concept in which the EU's migration and border management framework is based on, there needs to be understanding of the securitization largely used in the EU and the practices which reflect this. This chapter will create the basis of the research, so that the next chapter describing the current policies and recent developments of the EU migration management practices can be better understood.

1.1 Securitisation

When examining the migration management of states, we can find numerous different measures of them pursuing effective policies that affect the border crossings and migration with an attempt to balance between different aspects of it, mainly the security, rule of law and the respect of the human rights. While migration is a global phenomenon, migration management remains largely as national policy question since states retain "territorial supremacy" to freely control entry, residence and expulsion of aliens (Mitsilegas 2015).

So called "securitisation of migration", which is also politicisation of migration and presentation of it as a security threat has been especially apparent in the EU asylum and migration agenda (Léonard 2010, 231). Securitization theory has been originally created by Ole Wæver and is today known as Copenhagen School.

Foundation of the idea is that security threats are constructed socially, and it is therefore impossible to evaluate realness of the existence of the these threats. According to the Copenhagen school successful securitization of an issue comes from political discourse.

An effective process of securitization starts with a “speech act” by an actor that presents the issue as an existential threat to the security of the “referent object”, for example the state, the national identity or security. Thirdly, this view is accepted by the audience, be it the governments or the citizens. Finally, the securitization of the perceived threat is justified as an issue that needs emergency response, which further justifies these exceptional actions beyond the regular political procedures (ibid, 235). To be more precise, the securitization is also highly dependent on perceived acceptability by the audience who the securitization proposal is directed to (Singler 2016).

This development is evident in the current political discourse inside EU. Migrants have been presented as unified group, without a proper distinction of the motives of these migrants. Refugees, asylum-seekers and economic migrants are perceived as unitary category and thus creating a coherent existential threat (Ibid.). Furthermore, this is not only a phenomenon in the EU, but can be seen as global nature of the contemporary migration policies in the world (Guchteneire and Pécoud 2006, 70).

EU leaders have described migration as threat to the future existence of free movement, to the identity of the European people, as threat to economy, culture and as burden to welfare (Cierco and Silva 2016). Migration is also tightly linked with terrorism threat (Singler 2016). Such rhetoric’s have been heard for example by prime minister of Hungary Victor Orban (Ibid.) and the presidential candidate of France, Marine Le Pen, who has called for banning or limiting the migration in the threat of “Islamic fundamentalism” (Wildman 2017).

Furthermore, as the legitimation of the emergency measures and practices are going beyond the standard norms, they need to be accepted by general population. Part of the proof of this happening in the EU, is the aforementioned popular support of Orbans’ policies in halting the migration to Hungary (Singler 2016) and the prospects of the Marine Le Pen to become the next president of France. In addition, securitization of migration has already been institutionalized in the EU throughout the years, and it is an integral part of EU migration and border control frameworks and many of the emergency measures on restriction on free movement inside EU and underestimation of EU treaties, such as Dublin convention and circumvention of the UN Refugee protocol have proved this (Ibid.). This has created a proper basis for the future reformations that are further contemplate to promote securitisation.

In addition, the readmission agreements of migrants are another establishment of the securitization of migration in the EU, attempting to halt and keep away the “aliens” from the

Union territory (Huysmans 2000, 756). Transit countries and keeping better control of their borders (Guchteneire and Pécoud 2006, 71), although criticised by many, the current course on plans to conclude more such deals, speaks for general acceptance.

EU's border management agency Frontex is also claimed to be central in institutionalized securitization of the border and migration management inside EU (Leonard 2010, 240), by conducting joint operations and maritime surveillance in cooperation with third countries in attempt to strain migration flows, while creating problems in the fulfilment of rights of the migrants. These creations have institutionalized migration management, which is set up for the protection of the internal security. As there exists, at least perceived danger, from the migration to the European society (Huysmans 2000, 756).

Lately there has also been another justification to legitimise the securitisation measures in addition to the traditional security threat justification. This is the justification under "protection of migrants". Resembling examples can be found in the operations to fight smuggling businesses operating in the Mediterranean area. Frontex and maritime operations are intercepting migrant boats before the arrival to the EU territory, these kinds of operations are said to fight organized crime of the smuggling businesses and save people from making the Mediterranean crossing and so decrease the number of casualties. However, these are mainly security measures to keep the migration away (Ingunn 2016).

This institutionalised securitisation of EU's migration policy is creating problems to the fulfilment of the migrants' human rights. It can be also seen dangerous to the rule of law, as these exceptional measures are legitimised through the political discourse, becoming more and more common and an integral part of EU operational activities. The connections of the restrictive asylum policies, smuggling businesses, vulnerabilities of migrants and these interconnections raising serious human right issues are not understood as they should, and are not recognized by the western receiving countries. These are understood more as an issue themselves, like in the case of human smuggling, but not understood in a broader picture of migration policies and border management. Can be said that at most: "there is a call for barely defined "humane" border policies, which regret the consequences of migration controls but accept their necessity and legitimacy" (Guchteneire and Pécoud 2006, 74).

With the exception of the moral dimension of this approach, it is fighting against itself. The attempts to strain refugee flows can work against the policies that are attempting to halt smuggling businesses. The current policies are not a threat only for the migrants, but also the

underlying human rights and democratic principles in the core of Western states. The values guiding the EU should not end at the borders of that country, but should reflect it to the outside. Ultimately, the way EU is handling its fate of foreigners reflects the fundamental values of the Union upon which it is based. These current securitization policies may eventually backfire, and destroy the principles and freedoms we are based on and should be promoting to the world and to our self as democratic union (Ibid.).

The next chapter will examine in more detail, the migration management focusing on the prevention of arrival, which are in their own part creating and reflecting this security approach of the Union and its effects on migrants trying to reach EU.

2. EU IN THE MEDITERRANEAN: PREVENTION OF ARRIVAL

Main characteristics of EU's common migration policies can be defined into four main ideas which are, extraterritorial migration control, Union taking the competence over borders, private sector and Frontex; including the increased usage of common security technologies like EUROSUR (Mitsilegas 2015). All of these are aiming to prevent the arrival of migrants to EU territory. Also, EU is increasingly concluding cooperation schemes with third countries and conducting joint operations at the sea with Frontex. The Mediterranean border problem has been clearly addressed as security issue, and the Frontex "revival" into European Border and Coast Guard agency, and extending its competences are part of these developments. All of these policies are largely affecting the fulfilment of the migrants' rights.

2.1 Common European Asylum System

Aim of the Common European Asylum System (CEAS) is to harmonize member states migration policies, including legislation, asylum procedures, and due to the recent developments, the development of better coordination of common response operations for the pressures of increased migration flows. The creation has been done to strengthen cooperation and exchange of intelligence between the member states. This is happening also in field of expulsion and reception of the asylum seekers.

In addition, CEAS has resulted in establishment of European Asylum Support Office (EASO), which is another tool for integration and resettlement practices (Staffans 2012, 28-32). Furthermore, CEAS contains rules on refugee quotas and data banks for information sharing, like EURODAC fingerprint system (Ibid. 33) that is used as a tool to identify the EU state the asylum seeker first arrived (Ibid. 28).

EURODAC is part of the Dublin system (Ibid.), which is central part of CEAS determining “automatically” the state responsible for the asylum claim. This in principal being the first state of arrival. Also, it is worth noting that under the Dublin System, asylum seekers cannot choose the EU country where their application will be examined (The Dublin...2016). Dublin system was originally meant to guarantee quick access to asylum and to prevent the abuse of asylum procedures (Staffans 2012, 29), however, it is clearly unable to keep up with the increased irregular migration and is putting undue pressure on the coastal and bordering member states, namely Italy and Greece.

In addition, CEAS is created in respect to the Charter of Fundamental Rights, meaning that daily application matters should be done with the respect of the fundamental rights defined in the charter. It has also created minimum standards for the Member States in regards of the asylum, this is codified in; common qualification directive, reception standards, temporary protection and the European Refugee Fund as part of CEAS and secondary EU legislation (ibid. 33-34).

As CEAS has not been able to respond to increased migration flows there has been a proposal by the European Commission to reform it. This would touch almost every aspect of the current system including the Dublin system, qualifications, reception and asylum procedures directives, reforms in EURODAC and replacement of the EASO (legislative Tra...2016). The proposal also encompasses encouragements towards similar deals for migration as 2016 Turkey-EU deal (The CEA...2017).

EU presents these reformations, as ways to ease the situation and as necessary. Still, although the current system is not viable and the changes are needed, the proposal has been criticised by NGO's. The claim is that the reform agenda would be worsening human rights situation of migrants and underestimating refugee's fundamental rights by concentrating on security measures rather than finding long term humanitarian solution (Ibid.).

2.2 Agreements with Third Countries

Another part of EU migration agenda is it engaging into preventive policies to inhibit arrival of the migrants and asylum seekers to the Union territory in the first place with third country deals. These measures extend beyond the borders, to the high seas and to the third

country territories. The approach is keeping the migration as “illegal migration” as there are no legal means provided (Mitsilegas 2015).

Such example is the EU-Turkey deal, which came into effect in March 2016. The cooperation on migration with Turkey is aimed to control the migrant flows from the outside and to keep flows managed from Turkey to Greece, and to create “one for one” resettlement scheme. Also, one of the core aims was and is to “break the business model of smugglers” (Managing...2016).

In the course of the deal, EU has provided Turkey’s coast guard financial and material assistance. In total EU allocates assistance under the Facility for Refugees in Turkey on humanitarian and non-humanitarian actions, as much as 2.24 billion euros (Ibid.). If we look at the migration statistics after the deal came into effect, it has decreased the number of arrivals from 57,000 in February 2016, to around 3,400 in August 2016 (Valletta 2017). Consequently, as the departure has been prevented, the casualties in the Eastern Mediterranean route between Turkey and Greece has decreased dramatically (Managing...2016). Therefore, it has been perceived as policy success by EU leaders (Kuschminder 2017).

However, the deal has raised a lot of critique from Ankara’s, NGO’s and some members of the European parliament, as violating the Human Rights and not improving the conditions of refugees. At the same time, it is still seen as a success by the EU, the plan is to “extend” the operation from the eastern Mediterranean route to the central Mediterranean, now the main partner being Libya² (Ibid.). This basically means there is revitalization of the 2008 Italian-Libyan partnership treaty on migration and increased funding and cooperation with Libya in migration management.

The problem is, especially if there has been raised issues with the Turkey deal, that Libya cannot be directly compared to be alike with Turkey. For instance, with contested notion of Turkey as “safe third country” for the refugees, in accordance with the requirements of the Office of United Nations High Commissioner of Refugees (UNHCR), the Libyan situation with its civil war is much worse as generally recognized. UNHCR has clarified that it is not enough that the country where the refugee will be relocated or returned, is respecting non-refoulement³, it has also stressed that the 1951 Refugee Convention sets additional rules including access to healthcare, employment, education and social assistance. Also, the country should ideally

² UN backed Libyan Government of National Accord

³ Meaning that refugees are safe from returns to their home countries where they could face persecutions.

follow the rules of the 1951 Refugee Convention in general (Christophersen 2016). Furthermore, the asylum seekers “should have a close connection to the country they are staying for it to be considered a safe third country. Travelling through a country to reach another is not sufficient.” Already in Turkey, these are very questionable and if we look at the current situation in Libya, there is clearly no access to these provisions for refugees, or even the Libyans themselves (Ibid.).

First problem of Libya is that there is no such thing as asylum process for the migrants in the country. Secondly, it is not a party of the 1951 Refugee Convention, which means it is hard to recognise and safeguard the refugee rights, if there is not such established right to even seek the refugee status or any similar statutory status in Libya (Kuschminder 2017). The third problem is the overall safety in the country. Libya has been in middle of civil war since 2014, and therefore even with the support of organization officials, it is unlikely that Libyan government is able to fulfil its part and implement the EU guidelines required to ensure some of the fundamental rights as it already has a chaotic situation for the residents (Toaldo 2017). Furthermore, according to the Human Rights Watch, the violations on basic human rights in Libya already itself, function as one of the main pull factors to Europe and thus cannot work as tool to improve the crisis in the EU.

Abuses include reports on executions, torture, sexual violence, forced labour and lack to provide basic needs. These are the reasons in the first place, why asylum seekers do not want to stay in Libya. Additionally, there is no official data in the migrant deaths in the country, which makes the supervision and overall evaluation of the situation hard by outside observers (Kuschminder 2017).

The Libyan situation is in all aspects much worse than Turkey's and these two cannot really be compared to be similar in grounds for such deals, but as the reform of CEAS suggests, this the direction where EU has decided to develop its migration policies. The support for third country migration deals is unfortunately partially stemming from the assumption that most of the migration from Libya is economic migration, compared to the Turkey's migration which is predominantly from Syria. However, the UNHCR statistics are showing that 45 percent of the arrivals to Italy were qualified for international protection (Toaldo 2017). EU has taken a mentality to outsource the responsibilities and keep the problems away from the borders with these deals.

2.3 Push-Backs and Interceptions

Push-backs in the Mediterranean Sea are one of the extraterritorial migration control practices of the EU countries that have raised a lot of criticism and have been declared illegal. One of the most officially recognized forced return of migrants was in 2009 by the Italian authorities, who pushed back migrants to Libya, where they were under the threat of persecution. The case is also known as *Hirsi-Jaama* case, which got its judgement in 2012 by the European Court of Human Rights (ECtHR) (den Heijer 2014, 7).

The situation has clearly improved since, but there has been a strong evidence similar practices still continue (ibid.). Reports have been of Italian, Greece and Spanish national authorities, but also of Frontex auspices (Migrants in...2015, 31). In many of these cases violence and abuses are part of the push-backs, and the motive of authorities has been clearly to deter the migrants attempts to entry the territories (Refugees and M... 2017). Most reports have been about the Greek authorities using push-backs. In the Italian case, contrary to the past tendency to push migrants towards Libya, now the reports show mainly that returns would be towards Tunisia. Spain's violations include push-backs to Morocco, Malta and Libya. In addition, concerning Frontex operations throughout the years have been reported to engage into such practices occasionally as well (Migrants in...2015, 31).

The authorities have defended push-backs as being effective at tackling irregular migration in the Mediterranean, but it does not take away the fact that they are illegal and directly lead to human rights violations. Especially as many of these countries where people have been forcefully returned have bad human rights record (ibid. 32-33).

Since the illegality of the push-backs is widely recognised, unilateral options are limited. International laws bind EU countries to rescue and transfer migrants to the European territory once intercepted at the sea. Therefore, EU shift has been to focus on "pull-back" measure, which means, focus on transferring responsibilities to prevent the departure already from transit country to the European Search and rescue (SAR) areas of the sea or territorial boundaries. The centre of interest is to find "possibility of reallocating responsibility for search and rescue to

Southern partners, thereby decoupling the rescue missions from territorial access to international protection in Europe (Collett 2017).”

2.4 Frontex Led Operations with Focus on Smuggling Businesses

EU created Frontex for managing its external borders in 2004. The main objective of the agency is to coordinate authorities of member state in operational, and to strengthen security at the external borders of the union (Léonard 2010, 5). Since the creation, it has launched various joint operations in Central and Eastern Mediterranean. Frontex has concluded arrangements on border management with 17 countries, and is currently negotiating with Egypt, Morocco, Mauritania, Tunisia, Senegal (Del Valle 2016, 37) and has already concluded an agreement with Libya (EU-Libya Rel...2017).

Other big maritime operations of Frontex in the Mediterranean most notably are; Mare Nostrum and the operation following it called operation Triton. Mare Nostrum was seen as a humanitarian success as it managed to rescue 100 000 lives between 2012-2014 (Hartmann and Papanicolopulu 2015), but was unfortunately terminated in the end of 2014 and replaced with three times less funded, ambitious and effective Triton (ibid.). Tritons’ focus was more on the border management and control than Mare Nostrum’s mandate, that emphasized mostly search and rescue of people in distress (del Valle 2016, 37).

Reasoning behind the termination of Operation Mare Nostrum and the shift of the principal aim, presents the current state of EU migration policies in the Mediterranean rescue operations; political support was lacking, it was also lacking funding and the policy makers were concerned that it was functioning as incentive for migrants to come to Europe, by this “sending the wrong message” and was increasing the viability of the smuggling business (del Valle 2016, 32). In the Italian side, Mare nostrum was seen as operation that was unfairly burdening Italy, compared to all of the other member states. Also they were seen as not taking enough responsibility in the migration pressures Italy was experiencing (Irregular Migr...2017).

The newest add to the Mediterranean maritime operations led by Frontex is the EUNAVFOR MED, also called operation Sophia. It was launched in June 2015 after tragic capsizing of a migrant boat in April 2015, which left behind 800 casualties. New operation is a

good example of how the aforementioned political ideas have shaped Sofia's mandate and what is believed to be the right approach to prevent deaths at the Mediterranean route.

Operation Sophia is a military operation focusing on Southern Mediterranean route as EU-Turkey deal has already strained the path from Eastern Mediterranean (Cogolati and Wauters 2016, 12-14). The core mandate of it, is to disrupt smugglers and trafficker's business model and in this way, to reduce number of departing asylum seekers (Statement by...2016). Three phases of Operation Sophia are; to organize intelligence in the North Africa to remove smugglers from the business, to target smugglers and destroy their vessels, and also later to extend the operation into the Libyan territory to get rid of smuggling networks on land (del Valle 2016, 38). Good for the operation Sophia is, like with other such maritime operations, that it shows EU's efforts to make progress and address the Mediterranean issue, but at the same time the message has lately been that the main purpose of these are to fight human smugglers and traffickers and to reinforce border controls (ibid.).

This approach is dangerous for attaining the Fundamental Rights and to the lives of asylum seekers, because they still don't have any other alternatives. Also, many believe the focus on destroying the smuggler boats does not remove the problem, but rather shifts the migration route which is likely to be even more dangerous than the current one (Wauters and Cogolati, 2016, 20).

2.5 European Border and Coast Guard Agency

The establishment of European Border and Coast Guard Agency (EBCGA) is very recent one. It was officially launched on 6th of October 2016 and set up in less than a year from the initial proposal. The EBCGA is reform of Frontex, but is not a replacement of it (European Bord....2016).

The motivation behind the reform is about the overall ineffectiveness of Frontex in its "protection" of Schengen areas at external borders against increased irregular migration. There have been problems with unwillingness and lack of competences of national border guards to secure the external borders. Also the Agency has lacked equipment, competences and personnel's efficiency to respond for the mass influx of migrants (Rosenfeldt 2016).

The core approach of EBCGA is the securitisation as its prior importance is emphasized on securing the borders and keeping the migration in control. The drafters of the EBCGA

regulation (Regulation (EU) 2016/1624) were especially concerned in the loss of control of the southern, and south-eastern borders of the EU (Ibid.).

The ways in which EBCGA is changing the mandate of Frontex, is by replacing existing Frontex Regulation amended in 2007 and 2011 (Cogolati and Wauters 2016, 9). The New regulation has strengthened the Agency's competences. Also, the permanent staff and funding is doubled. In addition, EBCGA has created rapid deployment pool with 1,500 border guards, who will be available for fast deployment of the staff and equipment. Also, the expulsion and readmission of migrants is meant to be made more effective with help of the reformed agency (European Bord...2016).

To address a few of the most notable changes in the competences of the agency, it now has a "right to intervene". This means that EBCGA can make emergency interventions in the Member States when they are unable to uphold the border policies required by them (Cogolati and Wauters 2016, 10). The new competence has been criticised by many EU Member States as it is limiting their sovereignty, because in practice this competence makes the Member States obliged to cooperate in situations, which need fast actions securing borders. If specific member state does not cooperate, EBCGA can deploy its forces even without the states permission for the intervention (Rosenfeldt 2016). One of the most welcome reforms is the human rights accountability and complaints mechanism as it has been requested by many European political parties and human rights organizations. This reform allows people affected by the EBCGA actions to file a complaint about Fundamental Right violations with a Fundamental right's officer. Also, additional clauses securing Fundamental Rights of people affected by the agency's actions, were added to the EBCG regulation (Cogolati and Wauters 2016, 10).

Moreover, after the reform EBCGA will be able to, with its stronger mandate, to engage in border control operations with third countries beyond the EU borders, which is again in line with other developments of the EU migration policies to outsource the migration issues (Ibid.). Although at the same time the stronger mandate and accountabilities of the EU's border agency are welcome, the concerns over the reforms has been that it is further pushing away migrants from the Schengen area, once again focusing on the securitization and avoidance of the root of problems migrants are escaping, and ignoring the options of providing legal paths for international protection (Rosenfeldt 2016).

3. HUMAN RIGHTS AND EXTRATERRITORIAL MIGRATION CONTROLS

In this chapter, few of the most important legal obligations of EU states regarding human rights and refugee rights will be discussed. These will be analysed with keeping in mind the Mediterranean context of the EU migration management. The chapter will connect the current and past EU migration policy developments with these rights.

EU treaties and the EU charter of fundamental rights, state that EU asylum policy must be done in respect to the 1951 Refugee Convention. This has been also affirmed many times with secondary EU legislations, like the Qualification directive and with case law of The Court of Justice of the European Union (Tsourdi 2016, 9). Furthermore, EU maritime operations, as all EU actions, must be done in accordance with the customary international law and the Law of the Sea (Cogolati and Wauters 2016, 15).

3.1 Right to Life

Everyone's right to life shall be protected by law:

“No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law” Article 2 (1) ECHR

Right to life is protected at the International and EU level. The United Nations Human Rights committee (UNHRC) has already in 1982 decided that this right also imposes positive obligation to states (Citroni 2017). Meaning that in addition to states obligation not to deprive one's life unlawfully or intentionally, it shall also ensure that people have possibility to enjoy

this right and state may be obliged to take action in cases there is a danger of deprivation of right to life or there is substantial possibility to believe there exists such danger.

There is no violation of the article 2 of the ECHR if it is done under circumstances where it is absolutely necessary; in defence of any person from unlawful violence, in order to effect a lawful arrest or to prevent the escape of a person lawfully detained, or in action lawfully taken for the purpose of quelling a riot or insurrection (Korff 2006, 19).

In a case brought before ECtHR: *Osman vs. UK*, the reasoning of the court was that the states obligation to act comes with the authorities' awareness of the risk for the right to life. In the *Osman* ruling the Court expressed this as following: "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 or individuals from the criminal acts of a third party and that they have failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (Osman v UK, paragraph 116)".

If we put that reasoning into context of Mediterranean migration flows and the deaths there, we can assume that the authorities of EU and its agencies do clearly know what is happening and the existing risks. Furthermore, according to various studies there is causality between stricter border controls in the external borders of the EU and the increased deaths of migrants, due to the more dangerous means migrants need to choose to be able to leave (Spijkerboer 2009, 138). Although, this kind of relation does not in fact impose directly legal liability on member states or the EU in its strictest meaning, but rather it means, regarding the border controls at the sea, that EU and the Member States shall do their border management in such way that the fatalities are minimized (Ibid.).

The minimalization of fatalities might be the objective of the EU policies, at least on paper, but the reality of practices is that the main focus is on prevention, and the focus on the rescue operations is triggered only when the migrants are already in distress. While the authorities are concentrating on the preventive policies, smugglers and especially the people trying to seek asylum are seeking ways not to get caught by the border guards. This is also why a lot of the smuggling is happening in the night time when the chances of detection are lower, which also means that the rescue is less likely at this time, if something goes wrong (Crawley, Sigona and Düvell 2016). As migrant routes are forced to be change constantly with the number of migrants remaining the same, the rescue patrols have difficulties to keep up with the changing

routes. This further makes the rescue operations more ineffective, because authorities do not know where to place the patrols and cannot find the people in need of help (Hassan 2016).

One of the International tools to address the migration issue through Mediterranean and other sea routes is done by the United Nations office on Drugs and Crime, more specifically its Protocol against the smuggling of Migrants by Land, Sea and Air (Smuggling Protocol). The unfortunate fact is that the aims and priorities of the Smuggling Protocol are again in combating smuggling by destroying the businesses, while leaving the safety of the migrants only of secondary importance. The matter is not that tackling smuggling would not be important as well, but instead that states see that their responsibility is limited to prevent the irregularised travelling of migrants from their territory, and they have no further responsibility of these people and the risks to life they are taking, only because they die outside their state territory and they have knowingly chosen to rely on non-state actors like smugglers. As these people have chosen to attempt the crossing regardless of the warnings, the perceived responsibility is only triggered after the life is already in danger once the persons are in distress, when the state needs to engage into search and rescue. In this way, irregular migrants have been denied their right to life in its positive meaning as states deny they have responsibility to save them and nobody wants to take it (Spijkerboer 2016, 3). Therefore, to sum things up “Irregularised travellers die not because they are targeted by states of destination, but because they are ignored (Ibid. 19).”

The rights of the victims of smuggling is mentioned in the Article 16 of the Smuggling Protocol. It requires the member states (including EU states), to preserve and protect the rights of the victims of smuggling, especially the right to life and prohibition of torture, inhuman and degrading treatment or punishment. Still, without legal, regular and safe pathways to seek asylum these rights are in danger. As the UN special Rapporteur of the Human rights of migrants has expressed the policies at their current state in the Mediterranean result in “large-scale violations of the right to life” (Cogolati and Wauters 2016, 21).

3.2 Non-Refoulement

The principle of non-refoulement has been universally accepted to be customary international law and it is one of the most important governing rules in the human rights and migration law (Staffans 2012, 24). Non-refoulement prohibits states from returning or

transferring persons to areas where they would face threat to their life or freedom, or there is a risk of torture, or other inhuman or degrading treatment as recognized in the 1951 Refugee Convention and other international human rights instruments (Ibid.). As we can see the right to life and non-refoulement principle are in many instances in conjunction with each other.

Article 33(1) of the 1951 Refugee Convention defines non-refoulement principle as following:

“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

Non-refoulement principle is also codified in the UN Convention Against Torture (CAT) and when implementing EU law, in the EU Charter of Fundamental rights and freedoms (CFR) article 19 (2) (Cogolati and Wauters 2016, 5).

Non-refoulement is a customary norm in the international law, and there are no derogations⁴ or limitations allowed to it. Another special feature of the principle is that it benefits also persons who do not qualify for the refugee status under the 1951 Refugee Convention. Therefore, many countries have different forms of protection for those kind of migrants (Beyond Non-Ref...2015). In EU, this form is subsidiary protection status under Directive 2011/95/EU (Ibid.)

The principle even prohibits the refoulement in cases where the person goes under the exclusion clauses of refugee protection or subsidiary protection, for example persons possessing threat to the national security. Even in such cases person cannot be sent to the country where he or she is in danger of facing danger to his right to life (ibid.). This shows that the non-refoulement is extremely restrictive and do not allow circulation in any situation.

A milestone ruling establishing and “actualising” the principle of non-refoulement binding extraterritoriality in the ECHR contracting states, has been *Hirsi-Jaama* case, which ruled that the Italian authorities pushing-back migrants to Libya in the high seas amounted to violation of non-refoulement as Italy should have been aware that the intercepted Somalian and Eritrean migrants were under a risk to be subject to violations of their human rights, such as ill-

⁴ ECHR Article 15 (Derogation in time of emergency): affords to the governments of the States parties, in exceptional circumstances, the possibility of derogating, in a temporary, limited and supervised manner, from their obligation to secure certain rights and freedoms under the Convention ---.

treatment, slavery and forced labour and discrimination under the ECHR in Libya. The case was a milestone ruling, establishing the extraterritorial application of the non-refoulement principle under ECHR as the interception happened in the high seas and fell under the article 1 of the ECHR “obligation to respect human rights” even though the assumption is that jurisdiction is territorial. ECtHR saw in the case that Italy was exercising its jurisdiction beyond its national borders in this “exceptional” case and therefore should be held responsible for the violations (ECtHR- Hirsi...2012).

It is also important to note that in order to comply with non-refoulement the asylum claims need to be examined properly. In practice this usually means that states need to allow asylum seekers to their territory for the time of the determination of the status (Vandvik 2008, 29). The interceptions at the sea even outside the state territory may trigger the responsibility in the context of refouling people in interceptions. However, these are still case by case examinations on whether the persons in question are under the effective control of the state and so can be seen to be protected by the ECHR (ibid. 30).

As the principle is binding upon all of the ECHR member states and it is ruled by the ECtHR that it also applies extraterritorially, the obligation imposes pressure on the Member States rescue operations. In practice States cannot do search and rescue, at least in general, and transfer them elsewhere or to the departure country, if there are risks included in the non-refoulement principle (Wilde 2017). However, the question remains in defining the state authorities effective control over the individuals them to be under the jurisdiction of that state, and the fact that there needs to be the rescue in the first place to be protected by this provision (Wilde 2017).

3.3. Obligation to Rescue and Duty to Provide Assistance to Persons in Distress at the Sea

The obligation to rescue and provide assistance at the sea is a deep-rooted customary humanitarian duty to assist and rescue those who are imperilled at the sea. The shipmaster of the vessel has the responsibility to render assistance to people at distress regardless of their nationality, status, or circumstances in which they are found (del Valle 2016, 25). It has been codified and developed by several treaties dealing with the law of the sea. Including UN

Convention on the Law of the Sea (UNCLOS), Convention for the Safety of the Life at Sea 1974 (SOLAS), International Convention on Maritime Search and Rescue 1979 (SAR) and briefly in the Convention on Salvage 1989. In UNCLOS this is duty under the article 98 (1), which imposes obligation on states and to the ships that carry the states' flag that they are obliged to;

*“(a) to render assistance to any person found at sea in danger of being lost;
(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; [...]”* (O’Brien 2011, 720-721)

Thus, the obligation to assist is not only an individual obligation, but also obligation of the flag carrying state. The second paragraph of the article 98 of SOLAS further obliges the coastal states to cooperate with each other on the search and rescue operations and when needed to take preparatory measures (Ibid. 725).

The duty to provide assistance should be read in conjunction with two other maritime law principles; the duty to bring to a place of safety and duty to allow disembarkation. The duty to bring to a place of safety, briefly is an obligation of the flag state to bring the rescued persons to a place of safety. The place of safety is not separately defined, but as a common practice it has been understood as “next port of call” of the ship. The place of safety can also be the rescue ship itself, but in general it can only serve as temporary place of safety. When it comes to the duty to allow disembarkation, there is no legal provision that is obliging the coastal states to accept the disembarkation or the flag state. However, combined with the non-refoulement principle, in practice the coastal state has an obligation to temporarily allow the disembarkation for the verification of the need of protection and the status of the person as someone who might need international protection (ibid. 727). Despite the deep-rooted maritime obligation to rescue and bring people to a place of safety, the maritime environment is problematic for irregular migrants regarding responsibility taking by states and individual actors.

One of such examples was a so called “left to die boat” case in 2011. The boat was carrying 72 African migrants trying to reach Europe via Mediterranean. The boat ran out of gas and consequently was left drifting in the Sea for two weeks, which led to 63 of the passengers dying (Chirsafis 2013). The case was not that nobody knew the location of the boat, but rather that nobody took the responsibility to intervene in the situation. At the time of the incident

numerous governments and fishing vessels were aware of the boats' location, but no one took the initiative to make the rescue and assistance effective (Scheinin, Burke and Galand 2012, 1).

The SAR convention is adding a regime to ensure there is at least one state that takes responsibility to coordinate rescue operations regardless of the location of the distress, it is also designed to ensure that states coordinate and cooperate their efforts to ensure prompt rescue operations and create possibilities to disembark to a safe place (ibid, 3). Continuing with the example of the "left to die boat" case, the vessel was floating in the rescue zone of Italy, Malta and Libya according to the drawn SAR zones. Them, in addition to all of the other boats aware of the distress should have aided the migrants. However, although the boat was under their search and rescue regions, these states failed to coordinate operations and effectively do the rescue like it was required by them under the law of the sea (Heller, Pezzani and Studio 2012, 63)

The SAR zones in the Central Mediterranean in the "EU side" is divided with Malta and Italy, both of their SAR zones overlapping one another. Before the Mare Nostrum, Search and rescue operations were not institutionalized, but done on ad-hoc basis. Currently Operation Triton is extending as far as 138 nautical miles ⁵ from south of Sicily and operation Sophia is extending to 200 nautical miles from south of Sicily. Sophia is also carrying out search and rescue in Libyan SAR zone, but it attempts to stay strictly out of the Libyan territorial waters, i.e. the zone between 12 and 62 nautical miles north of the Libyan coast (Irregular Migr...2017).

4.3.1 Search and Rescue and Non-Governmental Organizations

While the number of casualties stay high in the Mediterranean crossing, the EU rescue operations have not been able to be as effective as there is demand for. That is why NGO's have taken a big role in the rescue operations and as much as percent of the Mediterranean Sea rescues were done by NGO's in 2016 (Behrakis and Scherer 2017). The search and rescue operations by NGO's like Médecins Sans Frontiere (MSF), Sea-Watch and Bourbon Argos and Dignity, in total of nine NGO's at February 2017 are operating in the Mediterranean waters. These operators patrol with their own vessels mainly in the Libyan SAR zone and in the Libyan

⁵ 1 Nautical Mile = 1,852 Meters

territorial waters (Irregular Mi... 2017), which means that they are at present closer to the Libyan coast than the EU actors. For example, MSF operates 25 nautical miles from the Libyan coast, but moves closer to the coast line when have been instructed so by the Italian Coast Guard Centre for the Coordination of Rescue on Sea. The MSF has been also operating in the Libyan territorial waters⁶ when it has seen it as necessary to save lives (Mediterranean Searc...2017).

The concerns of the European Union have been that rescue operations that reach closer to the countries where human smugglers send-off refugees functions as a pull factor for migrants and is benefiting the smuggling businesses. It is also noted that there is a risk that closer and wider the operational area of the rescue and research missions are, the more benefits it brings to the smugglers as it is easier to send off the migrants with worse vessels that last less time in the water (del Valle 2016, 33), reports show evidence that there has been increased use of rubber boats in smuggling recently (Nielsen 2017). Frontex has also observed this development and in its 2017 report and has stated that the rescue operations "help criminals achieve their objectives at minimum cost and strengthen their business model by increasing the chances of success." The criticism is targeted especially towards NGO operations near Libyan territorial waters.

The viewpoint of MSF is that managing such developments is out of its control and although it may be creating benefits for smugglers, the organization itself does not create the smugglers or the demand for their services. As MSF puts it: "The alternative implied by Frontex concerns about our rescue operations is to let people drown as a strategy to deter the smugglers (Ibid.)"

More effective search and rescue may indeed benefit the smugglers, but it is not the critical factor why people decide to do the dangerous crossing. The main motivation is still the situation in the country itself and is done because there are no other viable options. Therefore, it can be assumed that the migration would continue in large numbers, regardless of the efficiency of search and rescue operations (del Valle 2016, 32).

⁶ Up to 12 nautical miles

3.4 Right to Seek and Enjoy Asylum

The basis of the right to seek and enjoy asylum is in the 1951 Refugee convention and its 1967 Protocol. These are also foundations of the EU Asylum law (Muller 2016). All of the EU member states have ratified the convention and/or its 1967 additional protocol. The same right is codified in the EU charter of fundamental rights article 18 – Right to asylum, and TFEU article 78, both done in respect to the 1951 Refugee Convention (Art 18 – Right...2017). Refugee is a person, who falls under the definition of the 1951 Refugee convention and does not fall under the exemption clause of the convention (Staffans 2012, 19). Article 1 of the Convention, as amended by the 1967 Protocol, defines a refugee as this:

"A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.."

The convention and overall right to seek and enjoy asylum guarantees the right to “seek”, however it does not include obligation to states to grant refugees the asylum as such. Still, there exists such obligation with the relation to the non-refoulement principle. As the state cannot return the person to a country where his or her life or freedom would be in danger (Gil-Bazo 2015, 13).

In the EU, when a person does not fall under the definition of a refugee, but regardless of that needs international protection, the person will be given subsidiariy protection. This is a scheme used by the EU states and many other countries, to give people other than refugees international protection (Staffans 2012, 25). Subsidiary protection status is not controlled by the international law as such. Inside EU the rule is that persons who have been granted

subsidiary protection have the same right as persons with asylum (Ibid. 25). When it comes to the sea operations, one of the viewpoints is that the interceptions, push-backs and such activities have and are undermining the right as there are no safeguards for persons who seek the international protection (Goodwin-Gill 2011, 450). Furthermore, the effective identification processes and the determination of the status of the possible status of persons confronted at the sea is important to respect this right, the sea operations that prevent the movement of the people who are seeking protection are creating problems to the fulfillment of this right, but does not just yet extend to the violation of the established human rights law (Ibid.).

3.5 Prohibition of Collective Expulsion

ECHR Article 4 of protocol No. 4 expresses the prohibition as following:

“Collective expulsion of aliens is prohibited.”

The main idea behind the simple clause is to protect people from being removed as a mass without examining their cases and claims on individual basis. Clause includes their right to defend themselves with their personal circumstances, so that the authorities can make examination on reasonable and objective grounds and thorough that determinate their rights and status (Guide on Arti...2016, 5). Expulsions in individual manner is not prohibited. These people who can be expelled “individually” are, in general, persons who do not qualify for refugee status or subsidiary protection (Gil 2016).

The are no separate references made to the territorial applicability of the article, but from the ECtHR ruling in the *Hirsi-Jaama* case the Court decided that the article also applies extraterritorially (Ramji-Nogales 2016). In practice the article 4 protocol No 4 applies also in such cases as push-backs. The EU countries, especially those in the Mediterranean frontline are in the highest pressure to examine the applications effectively under the Dublin regime and other practical problems, thus there have been concerns on the situation that it will create “return industry” as the pressure is too high for one country only (Gil 2016).

3.6 Right to an Effective Legal Remedy

Article 13 of the ECHR guarantees effective remedy for those whose rights and freedoms of the convention have been violated before a national authority. Codified in the EU law, the article 47 of the Treaty on the Functioning of the European Union (TFEU) guarantees the same right, but more extensively by guaranteeing this right before court authorities. Right to legal remedy is covered in the EU for: everyone under the jurisdiction of the Member State of the Union (Kuijer 2014, 6).

Article 13 should be examined in connection with the right to life and prohibition of torture in a sense that authorities need to guarantee certain procedural rights in the investigations of torture and right to life cases. Article 13 ECHR does not only guarantee the compensations and damages, but also effective investigations by national authorities. This also means that migrants have rights for the domestic remedies against the removal and that after a removal decision the person whom it concerns should be given enough time to be able appeal against the decision. Other rights for migrants under this clause is the guarantee for effective asylum procedures and in connection with the article 5 ECHR of deprivation of liberty, the article 13 ECHR guarantees compensation for the unlawful detentions, and remedies with connection to prohibition of unacknowledged detention under article 5 ECHR (Ibid. 7-9).

As we can see, the EU legal instruments guarantee the rights of the migrants in their asylum status determination and the overall procedural obligations of the asylum processes (UNHCR State...). The main problems in context of this article are the safeguards of the guarantees of the procedural obligations. If EU struggles to keep the system together inside its borders, what about the agreements with third countries, with which EU is trying to convince these rights would be respected as well as possible.

3.7 Right to Leave

Codified in the Universal Declaration of Human Rights (UDHR) article 13 (1):

“People have right to leave a country, including their own.”

Article 12 (2) of the International Covenant on Economic, Social and Cultural Rights (ICCPR) made the principle universally binding and acted as the model for ECHR article 2 (2) of Protocol No.4 (Markard 2016, 594).

Right to leave, also known as freedom of movement, is yet another right that is precondition for enjoyment of many other fundamental rights like right of self-determination, minority protection and possibility to escape persecution and grave human rights violations in a country (Ibid.). The right to leave is also precondition for the right to seek and enjoy asylum and to enjoy protection of non-refoulement, even more importantly because the international protection right is only “triggered” after the migrant has crossed the international border (the right to l...2013, 31).

The obligations of the persons “home state”, under the right to leave, is that the country has an obligation to issue necessary travel documents and refrain from placing obstacles in the way of leaving. Furthermore, the 1990 UN convention on the Right of the Child enshrines children’s right to be with his or her parents. In context of the smuggling and trafficking of persons and migrants, the UN convention against Transnational Crime, more specially its trafficking protocol imposes obligation for the states to establish criminal offences to those who traffic persons, to prosecute them, but also to safeguard the migrants from the prosecution under the protocol (Ibid. 15-16).

According to the right to leave states cannot prevent their people from leaving the country, except in extraordinary circumstances. The restrictions on this right can be placed, according to the ECtHR, when these restrictions are provided by law, they are absolutely necessary for protection of national security, public order, public health or public morals or the rights and freedoms of others. In addition, these restrictions need to be consistent with other

rights of the convention. The limitation also includes restrictions on right to leave of person trying to avoid certain obligations, like military service and jail time (Ibid. 13).

Under the ECHR, an emergency situation where this freedom can be derogated must be “actual or imminent, it must be affecting the whole nation in to the extent that the continuance of the organized life of the community is threatened and it must be exceptional, in that the measures normally permitted are plainly inadequate”. In very special and extreme cases mass immigration may have such destabilizing effect that derogations can be put in place, however in Europe such limit is far from being reach yet. Also, again, the prevention of emigration from another country need to be consistent with the principle of non-refoulement (Markard 2016, 595).

Furthermore, it is worth noting that the right to leave does not require another state to permit the entry, therefore in practice the right is “right to leave for such country of the person’s choice to which he or she may be admitted (Ibid.)”. However, there are limitations on this as well as the states border sovereignty is limited by the prohibitions on refoulement, risks of persecution and torture or degrading treatment in the departing state (Ibid).

With this basis of the freedom to leave one’s country, the prevention of departure by sea constitutes an interference with persons right to leave. The departure is complete according to the UNCLOS article 2: once a vessel has cleared the territorial waters. Therefore, the pull backs are interfering with the ones right to leave (Ibid. 596) Other such measures that are intervening with the right to leave are the EU’s third country agreements, which aim to keep the migrants from leaving by assisting and encouraging these countries to carry out strict border controls for prevention of departure towards Europe. This has been increasingly popular way of forestalling the travel (the right to l...2013, 9). For example, Spain has a readmission agreement with Morocco where the Moroccan authorities cooperate with the EU authorities to prevent the departure of irregular migrants from Moroccan coast (Markard 2016, 613). Also, the Morocco received between 2009 and 2013 70 million euros of EU funds to develop its borders. In addition, Spain has between the 2007-2011 donated patrol boats, helicopter and airplanes to Senegal and Mauritania for border management (Ibid. 612).

One of the main problems with readmission agreements is that, after the irregular migrant has been sent back to the “last stayed” country, there are little guarantees that the expressed country will not expel them further to their state of origin, thus breaching the non-refoulement and interfering in the migrants’ self-determination and right to leave (Ibid.).

Likewise, the joint operations of EBCGA can be put in this category. For instance, Operation Sophia is operating in the high seas, and the aim is that in the future it will also operate in the territorial and internal waters of Libyan coastline. The logic behind the naval forces presence in the Libyan coastline is to intercept the smugglers and traffickers before they depart (Bevilacqua 2017). This is a direct objective is to prevent departure, which is controversial with the right to leave. Operation Sophia and other such maritime operations create dilemma between the human rights of migrants and the security interests of the EU.

EU also has intelligence networks in place like EUROSUR, which monitor third-country ports and pre-frontier area and attempts to track ships that may carry irregular migrants or might be involved in cross-border crime and their smuggling and trafficking activities. EUSOSUR is effective at informing the neighboring countries about the departing boats from their coast, so that they can further act and prevent their departure early on. Furthermore, the Mediterranean coastal states in Africa have already themselves made it difficult for people to leave, and not only for the one's crossing through their state, but also for their citizens by refusing to issue them passports (The right to l...2013, 9).

Unfortunately, also, the EU visa policies makes it almost impossible for asylum seekers to reach Europe in legal ways, as there are generally no visas issued because the requirements are somewhat impossible to be fulfilled by these people needing protection. This and all abovementioned measure create problems with the compliance of the right to leave (Ibid.).

4. STATE RESPONSIBILITY BEYOND BORDERS

The jurisdiction of ECHR is primarily exercised territorially, and states based on that, have a responsibility to ensure that the rights of migrants and asylum seekers inside their territory have been taken care of (Cologati and Wauters, 2016, 7). On the other hand, as we have seen in the previous chapters, in limited instances the responsibilities and the jurisdiction may reach beyond the national territory and in the high seas commonly understood as “no man’s land”. In the following chapters the focus of the analysis is to determine the extent of extraterritoriality of human rights in context of state jurisdiction and the concept of secondary state responsibility. Understanding these elements, the EU’s extraterritorial migration policies and especially the agreements with third countries can be analysed, and even more importantly question is; should and can EU countries be held responsible on their migration control activities outside their national borders or is this something that should be seen as external problem where the responsibility does not exist or it has rotated to the third country.

4.1 Under the Jurisdiction of a State

The ECHR article 1 goes as following:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"

The State obligation extends as far as the jurisdiction of the state, therefore, the main question is, when is someone or something under the jurisdiction of a certain State?

It is confirmed in the caselaw that countries may have extraterritorial responsibilities in certain situations, although starting point is that the jurisdiction is inside the State territory only.

Also, the ECHR does not govern the actions of States that are not parties of the convention and it does not impose obligation to the ECHR States to impose requirements on non-contracting states to follow the ECHR standards (Ryngaert 2012, 79).

Therefore, it is unnecessary to question whether such states can be held responsible under the convention, but the actions of contracting states in non-contracting state territory. As it has already been discussed, there is extraterritorial responsibility of the states sometimes when the contracting state is exercising its jurisdiction, the main definition that is needed, is when does the state exercise its jurisdiction over another states territory or an individual if this the pre-requirement of the extraterritorial responsibility (Gammeltoft-Hansen 2012, 287).

There are two separate criteria established by the ECtHR when the State can be held responsible exercising its jurisdiction extraterritorially. The first option is that the territory is under effective control of that state. This was the criteria established in the *Bankovic* case in ECtHR. The case was about aerial bombardments in 1999 over the Former Yugoslavia by NATO allies. Applicants claims were that the Allies should be held responsible under the ECHR for the deaths they caused in the bombardment, although it happened outside their national territories (Ibid.).

The ECtHR declared that the convention is not designed to be applicable worldwide, but that it could apply extraterritorially if the individuals of a territory would be under the effective control of ECHR contracting State. (Ryngaert 2012, 57). Although the case was ruled inadmissible, the ECtHR confirmed that the states authority may in certain instances extend beyond the borders and act as extraterritorial jurisdiction. ECtHR wanted to emphasize that in such cases the threshold would be high and this can be only in certain individual situations (Gammeltoft-Hansen 2012, 287).

After the *Bankovic*, the approach has been more towards criterion of the contracting states officials exercising effective control over individuals. Although it seems like the effective control over individuals' approach, so called "state agent model" is more likely to be used by the ECtHR than the territorial control model of *Bankovic*, It has not been abandoned by the Court and therefore it may very well apply in future cases. (Ryngaert 2012, 57-58).

The state control model has been used by ECtHR in cases which also include irregular migration and migration control by a contracting state in the high seas or in territorial waters of another state. The court touched the jurisdiction issue in the *Medvedyev* ruling. The complaint was over French authorities intercepting a Cambodian vessel in the high seas of Cap Verde for

drug smuggling activities. The Cambodian crew was charged in French court. The issue was that, as Cambodia is not a party of the international trafficking convention, French authorities in principle did not have competences to arrest the vessel and its crew. Anyhow, French authorities looked that they had the jurisdiction through ad hoc permission by Cambodian state authorities to inspect and take actions against the vessel. The case was brought before ECtHR, and among other claims and the questions was whether the detention happening in the high seas was legal and French authorities actually had power to act against the Cambodian vessel (Frenzen 2010). In the ruling, the Court acknowledged the special nature of maritime environment, but saw that it could not let the ship's crew be outside the law of the convention, and so leave a gap in the law. Also, it would have meant that the convention would dangerously leave people outside the enjoyment of the convention guarantees. The ruling was such that France was seen exercising jurisdiction over the vessel and the crew from the time of its interception, until the trial in France (Gammeltoft-Hansen 2012, 287-288). As we can see although the ECtHR wants to keep the convention as territorial, if it is possible, the importance of the rule of law and the avoidance of gap in the Human rights in the high seas is addressed as well, as something that is important to be kept in mind in extraterritorial actions by states (Mitsilegas 2015, 7).

To further specify the coverage of the “effective jurisdiction over” ECtHR has ruled that although mere usage of lethal force by the state authorities in non-contracting state does not extend to the notion of being under jurisdiction of the state authorities, thus falling under ECHR, the jurisdiction can be exercised without “physical contact”. Such example was shown on *Xhavara*. *Xhavara* considered Albanian irregular migrants in the high seas, who were attempted to be stopped and intercepted by the Italian navy. The outcome of the encounter was that the two vessels collided and eventually it resulted in sinking of the migrant boat. The incident demanded 83 casualties regardless of the rescue attempts. Italians had at the time bilateral agreement with Albanian authorities to seek and stop Albanian vessels approaching the Italian coast. ECtHR saw that Italy was responsible for investigations of the deaths under the Right to life (article 2), which it itself claimed to have done already by prosecuting the captain of the Italian ship in the national court (Cologati and Wauters 2016, 8).

The case confirmed, that even without the person being physically in the state vessel and even if the other State's authorities encircle or escort the foreign vessel in the national

waters of state of the departure or it causes the incident of other boat sinks, this State can be seen to practice its jurisdiction over those vessels and its passengers (Ibid.).

Like earlier discussed the *Hirsi-Jaama* ruling was also influential in this matter. States have an obligation to respect the non-refoulement principle even when the migration control is in the high seas (Ibid.). The *Hirsi-Jaama* case dates back to 2009, when 24 Somalian and Eritrean asylum-seekers were intercepted at the high seas 35 miles from Lampedusa. They were transferred to the Italian coast guard's vessel, which directly returned them to Libyan authorities in Tripoli. The court reasoned that as Italians handed over the irregular migrants to the Libyan authorities, they exposed them for risk of torture, or inhuman and degrading treatment, as it was commonly known that Libya cannot be seen as safe third country. Also, the blames were over the collective-expulsion and effective legal remedy. The fundamental determinant which decided if there was a violation of any of these, was if the migrants were under the jurisdiction of Italy at the time of the interception and return and thus they would be protected by the ECHR (Gammeltoft-Hansen 2012, 286). The ECtHR ruled that when the ECHR state takes the migrants onboard in the high seas and while they are handing them over to the third state they are under the effective control of the state and therefore the migrants are under the jurisdiction of the state and the consequently under ECHR. Therefore, "in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities (Colgati and Wauters 2016, 8)".

The significance of the *Hirsi-Jaama* is that it further established the extraterritorial application of the Human Rights of ECHR and the responsibilities coming with that. In addition, it confirmed that even when immigration control and surveillance is done extraterritorially with bilateral or such agreement, the responsibility may still very well exist (Mitsilegas 2015, 9). It also extended the protection of the convention into collective expulsion cases in a sense that the court reasoning "allows for an interpretation that any interception activity that factually prevents migrants from effectuating entry may be construed as expulsion (Ibid.)."

Through these facts, we can see that in many instances EU countries can be held responsible in their extraterritorial migration controls in the Mediterranean context. Frontex led joint operation or bilateral agreement covering the high seas or even territorial waters of another state, allow irregular migrants to fall under the jurisdiction of a state and therefore are guaranteed the right under the ECHR at quite large extend.

4.2 Secondary State Responsibility

Although through the above analysed idea of state jurisdiction, we can see that in many cases EU authorities need to respect the human rights and their obligations while doing their border operations outside the traditional state territory. A trickier issue is when States do not themselves directly participate in the migration controls, but the controls are done by a third country with the others “assistance” the other as “assisting state”. It is difficult to impose an obligation of another state as secondary responsibility. However, this is an important question as EU is doing more and more outsourcing of its migration control and that way affecting the fulfilment of rights of these people (Gammeltoft-Hansen 2012, 291).

Throughout the years European Union countries have concluded several treaties with third countries on migration control such as, EU-Turkey deal and the Italian-Libyan friendship treaty concluded already in 2008, which is now sometimes referred as EU-Libya deal, although it is rather a restart and intensification of the 2008 treaty (Toaldo 2017). The clear approach by the EU in its current migration agenda is to increase cooperation in the field of migration with many source countries, at present especially in the African continent. The cooperation approach does seem like a good new attempt to address the migration issue, but the EU initiative fails to take into account the interests of the partners and the rights of the migrants (ibid.).

The primary aims of the partnership are to increase irregular migrant returns to the origin and transit countries, to discourage the migration and to reduce the number of Mediterranean crossings. Financial support for the third countries is working as the main incentive for the partner states. Unfortunately, EU’s newest migration action plan does not address the legal pathways for migration enough, it rather just mentions the issue that there is a need to address the question. The whole communication on these future partnerships has been highly criticised by numerous NGO’s (Lehne 2016).

Although in general, the cooperation schemes with third states are important, they are also problematic. Especially when this third country is entrusted with the authority and competence for the operations in the Mediterranean with the help of EU. There is a risk that these assisting programmes distance the EU responsibility, although it is still remaining highly

involved as outsourcing and assisting state (Giuffré 2012, 727). The main problem is defining the extend of international responsibilities of the states, and their reach when one state is assisting other in setting its migration operations, even if those measures may be contrary to the international refugee law binding to the assisting country (Gammeltoft-Hansen 2012, 292).

The basis of the State responsibility in this case can be taken from the UN International Law Commissions (ILC) 2001 articles on “Responsibility of States for internationally wrongful acts”, especially articles under “Responsibility of a State in connection with the act of another state” consisting of articles 16, 17 and 18. Articles 16 and 17 are relevant only when state coerces or compels other state for unlawful acts, by proper military or economic pressure and control or direction for the act. Although EU does assist significantly monetarily these countries it is unlikely that the extend of this support is enough to go under these articles (Ibid. 292). The relevant one for the assisting partnerships is the article 16, which states that;

“Aid or assistance in the commission of an internationally wrongful act; a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State ”

Although the articles are not binding as treaty law, they can be seen binding as customary international law, and their relevance in human right and refugee law cases has been established by the commentaries of these documents and application by human rights treaty bodies (Ibid). Also, for example in the *Bankovic* case the Court said that in its interpretations of the law, it needs to take into an account all the relevant international law rules in the jurisdiction and in finding and determining the responsible state (Bankovic v. UK, Para. 57).

The secondary responsibility of the states has so far been primary recognized in instances which include participation in armed conflict. However, in the commentaries of the article 16, there is an inclusion of “material aid to a state that uses the aid to commit human rights violations”. Therefore, EU providing assistance, equipment, monetary assistance, technical border equipment and other materials to the respective country it is in cooperation with, it may be considered to be seen responsible under this article (Ibid. 293).

Still, two core requirements for the application of secondary responsibility must be met to establish this; the requirement of knowledge and intent. The knowledge requirement demands that the assisting state knows that circumstances of the state of cooperation are such that this aid may be used contrary to the international law. The aid is given in “view to facilitate the internationally wrongful act and must actually do so”, but, it does not require that the assistance is essential for the act, but rather significantly contributing to it (Ibid. 294). In addition, to the contribution the wrongful act must be seen as wrongful norm in both of the states (Giuffré 2013, 727).

The threshold is not easily met as many countries use the aid and assistance in many forms such as development aid or trade agreements, or other general frameworks of trade and aid, which means that the knowledge and intent are hard to be proven (Gammeltoft-Hansen 2012, 294). For instance, the mere compensation for the migration controls in third country does not usually give rise to the article 16 as the aid countries do not pay or acknowledge properly the abuses deriving from their assistance (Ibid.) It is also extremely hard to prove that the assistance is done intentionally “with a view to facilitate the commission of the wrongful act (Giuffré 2013, 728).”

The ILC has been stressing that the threshold must be high or else it could be triggered too easily at any time when there is a bilateral cooperation with third country. Thus, the eventual possibility of the assistance resulting in wrongful act is not enough to prove the link between the assistance and the wrongful act. The bottom line is that it must be proven that assisting state knowingly of the facts of the serious risks, the assistance would result in the wrongful acts (Ibid.). With the above analysis, the EU responsibility may reach the threshold, at least in paper, but the willingness to recognize this may be a different story.

4.3 Case Study: EU-Libya Cooperation

As we could expect, EU will conclude more agreements like the Italian-Libyan partnership treaty. Thus, it is important to look at current agreements and take the examples from there what the new partnerships could mean, and could they go under the above-mentioned responsibilities.

To begin with the significant contribution to the internationally wrongful act, it could be said that there is enough aid and assistance by EU and its Member States, especially Italy,

that they have been, and still are significantly contributing to the migration control of Libya. Part of this contribution is from general investments in Libya (Giuffré 2013, 730). Also during the partnership Italy has assisted Libyan Coast guard with vessels, different technical support, training, providing confidential information and construction of reception centres, also it has arranged flights to return irregular migrants from Libya to the source countries (Ibid.).

The monetary funding and aid statistics show that EU is providing Libya assistance to the training activities through an immediate 1 million euros additional to existing Frontex Seahorse programme, 2.2 million euros through Regional Development and Protection programme in North Africa, establishing Maritime Rescue Coordination Centre, 20 million euros for capacity-building and training of the Libyan coast guard and other migration activities. In addition, EU's external Investment Plan for Africa and the Neighbourhood is distributing 44 billion euros in investments and up to 88 billion euros from EU Member States contribution to the African continent, from which some will be allocated to Libya. Also, EU is supporting Libya with its Common Security and Defence missions, which includes the posting of EU staff to Libya (State of the...2016).

Further analysing the intent and knowledge requirement, the intent of the assistance must be such that it has been given "with the view to facilitate the commission of the wrongful act" and that the EU providing this assistance, it has a full knowledge or it could reasonably expect at the material time, considering the facts, that the cooperation in this specific area would result in violations of human rights (Giuffré 2013, 730). First of all, the purpose of the EU-Libyan treaty covers the prevention of migration flows to Italy. It can be assumed that EU and especially Italy has a clear knowledge that its funding, material assistance and overall the cooperation in migration matters would entail the refugees access for asylum and that there is a knowledge, but also intent, that these would be used by Libya for actions that are against the human rights through the migration controls conducted by Libya (Gammeltoft-Hansen 2012, 295).

The actions of the Libyan border guards and national authorities include strong evidence on violations of principle of non-refoulement, consequently the prohibition of torture and other cruel, inhuman or degrading treatment. All these being international peremptory norms (Giuffré 2013, 730). Libyan Human Rights record is not very impressive as we generally know. The refugees lack many fundamental rights and also many of them are in a risk to be send back to their countries of origin against the non-refoulement. In addition, Libya is not a party of the

1951 refugee convention, it does not have established asylum system and it does not recognize that there are any political refugees in Africa and so does not make distinction between irregular migrants and refugees. This makes for example, Somalians and Eritreans extremely sensitive group (Ibid. 731).

The ECtHR has already once recognized that the Italian authorities in full knowledge of the situation exposed the migrants for the possibility of inhuman and degrading treatment by removing them back to Libya in the *Hirsi-Jaama* judgement. The court also acknowledged that Italian authorities were aware of the facts as there were various reports of the violations happening in Libya by NGO's and International Organizations (Ibid. 730). With this we can be further assume that it is clearly expected that EU and the member states are fully aware of the Libyan situation and there is already case law establishing that.

Eventually it should be analysed if there is a responsibility under the notion that international responsibility is limited to cases where the act would also equally be internationally wrongful act, if it was committed by the assisting state itself in accordance with the articles 34 and 35 of the Vienna Convention on the Law of the Treaties, which set that states are not bound by the obligations of another state in relation (*vis-à-vis*) to third states (Ibid.).

The requirement has raised questions whether article 16 applies in the cases where the act would be against assisting states treaty obligations, but not the others. This is the situation for example in this case, as aforementioned, Libya is not a member state of the 1951 Refugee Convention. The result is that assisting state cannot be held responsible for violations only done by the "principal state" (Gammeltoft-Hansen 2012, 296).

Still the assisting state can be held responsible for breaches of treaty obligations only owed by it, meaning that, as stated in the commentary of ILC Articles on State responsibility, "a State cannot do by another state what it cannot do by itself." Therefore, although Libya cannot necessarily be held responsibility on the 1951 Refugee convention obligations, but Italy for example can be. Moreover, this means that outsourcing migration control into third country cannot be used as an excuse to avoid responsibilities binding on it with its human rights agreements (Ibid.).

What should be kept in mind, in the secondary responsibility cases, where the other country is assisting or aiding, not coercing the third state to wrongful acts, the primary responsibility of the violations stays with the acting state. In addition, it is important to

remember that the acting states violations comprise the primary violation, which is separate from the assisting states responsibility (ibid.).

Nevertheless, the notion is important, as EU is planning to conclude other similar agreements with African States, which could create similar situations where it is outsourcing its migration control in third country territory, which clearly lack with many protection and human rights standards regarding refugees and asylum seekers. Also, the issue here is, if the existing agreement will function as illustration and relive Member States from their obligations in similar agreements and cooperation settings (Ibid. 297). If EU survive without any responsibility recognized officially in these cooperation and joint operation schemes, it justifies the violations on the fundamental and human rights of these people as well. However, they could be held responsible, at least on paper, but it is yet to be seen how the applicability will be ruled, if it will be addressed at all.

CONCLUSIONS

This thesis was examining three central themes of migrant and asylum rights of people in the European Union; the securitized framework of EU migration management in extraterritorial Mediterranean territories, the human rights of irregular migrants in these areas and the responsibilities and obligations of the EU and its member states to ensure fulfillment of these rights in the high seas and extraterritorial seas of Mediterranean.

The finding of the study has confirmed the institutionalization of securitization of the migration management in the EU and it is perceiving this mass movement as threat to the security of the union; overriding the humanitarian aspects. The latest developments as well as the migration and border control framework, especially in the Mediterranean is primary based on this idea of keeping the irregular migration away by controlling the arrival, pushing-back the migrants and ideally preventing the departure in the first place. Evermore commonly this is done extraterritorially, with agreements with third countries such as Turkey and with joint operations with coastal Mediterranean countries like Libya. Furthermore, the new creation EBCGA further imply the core value being the securitization and focus on halting the crossings, mainly with focus on securing the borders and fighting the smuggling, as it has been with the joint operations of Frontex. These are the findings of the first and second chapter of the thesis.

The findings of the third chapter confirmed the existence of numerous legally binding international standards that should be protected in the EU migration management. This also in the extraterritorial areas (sometimes decided case by case). Thus, generally we can establish that EU and its member states are obliged to guarantee these rights once the migrant crosses the external border of the EU, but also sometimes in the external territories under certain criteria more precisely examined in the last chapter.

The findings show that such rights at minimum are non-refoulement, right to life, and with connection to those, the prohibition of torture and degrading and inhuman or degrading treatment. Also, once the migrant has already fallen under the jurisdiction of the state officials,

the state is obliged to ensure effective asylum procedure of the applicant. These are codified and established in numerous international and regional human rights and international conventions and treaties, such as law of the sea, ECHR and 1951 Refugee convention.

These findings confirm the first claim of the thesis on the existence of the several binding international standards that should be respected, even outside the national territory of the member states and these are in many cases conflicting with the current policies of the EU migration control. Some of the rights have been already addressed by the ECtHR, where the EUs' Mediterranean operations have violated migrants right, and has for instance, has ruled the push-backs of the migrants inherently illegal.

Also, while the EU countries are unable or unwilling to ensure some of these right NGO's have stepped in. The obligation to rescue and duty to provide assistance to persons in distress at the sea and the inadequacy of effective rescue operations by EU, has been filled by organizations such as MSF. Ideally this would be done better by the EU itself, as its primary responsibility. The fact that year 2016 was the deadliest year for the migrants this far, clearly shows deficiency of the search and rescue commitments and capabilities.

Fourth chapter further defined and answered to the question of the reach and determinacy of the state responsibility extraterritorially. Based on the findings it can be said that the responsibility of the state reach as far as the jurisdiction of a state. The ECtHR has touched this issue in its case law, and the answer to the jurisdictional extend of the human right treaties, especially the ECHR, the two models determine case by case. First being the "territorial control model" of the case *Bankovic* and currently more used "state agent model". Therefore, the lack of EU commitments in respecting the migrants' human rights in the extraterritorial areas in its migration control, such as the high seas and the third country territorial waters can be claimed to be violated.

However, the main finding of the first sub-chapter was that the ECtHR does attempt to cover the rights for everyone under its jurisdiction and avoid the legal gaps that may be created in the extraterritorial operations of the EU in its border and migration management. This is an important establishment for the future prospects of the migrants' rights who attempt to reach EU territory and are met in the high seas. The further problematic determinacy of the state responsibility in operations on third country territories as assisting state, which is a situation that can be found in third country deals like the EU-Libya or EU-Turkey resettlement deals.

The secondary state responsibility seems to remain as a question to the future. The international legal instruments, especially the ILC articles on state responsibility provide the basis for the secondary state responsibility, but has not been addressed in migration management cases, and thus seems to exist in principle, but not in fact, at least not yet. However, as the last sub-chapter indicates, the EU-Libya Cooperation scheme could fall under the ILC articles, but can only function as speculation before addressed officially.

To conclude with the final claim of the thesis, the rights of migrants existing *de jure*, but not *de facto* due to the complexity of the situation, is also true. We can see the established framework in the ILC articles on state responsibility, as well as from the ECtHR case law that the rights of the migrants in the extraterritorial Mediterranean areas in many cases apply as well, but are yet to be implemented properly as part of the migration framework. Either EU should take these better into account, or the international community should try to enforce these rules as international standards in the extraterritorial migration controls, so that such holes in the responsibilities would not appear.

Therefore, the migrant crisis is largely a crisis to the established rights of the EU as well. EU as a democratic community is not willing or able to provide the rights of the irregular migrants, and is avoiding them with securitised measure, such as the third country agreements.

While the people who decide to attempt the sea crossing, see it as more viable option than staying in the crisis or war destruct areas, where they are under a threat of torture, persecution and inhuman treatment, regardless of the risks of the Mediterranean crossing. And while there is no solution at sight to the wars and crisis in places from where people are escaping and no solution to the underlying reasons why people from the crisis areas are coming to the EU, it can be expected that the Mediterranean continues to be a busy migrant route and migrants will continue to risk their lives at the crossing, no matter how many obstacles are put in the way. The only result is EU failing to fulfil its international human right responsibilities regarding the migrants, and is floating further away from the democratic foundations that its' been supposed to be based on.

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