The European Union's Responsibility for Protecting the Rights of Irregular Maritime Migrants in the Mediterranean under EU and International Law

by

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Abstract

The thesis explores the phenomenon of irregular maritime migration in the Mediterranean, the rights of irregular maritime migrants in the international and European context and the EU's responsibility, vis-à-vis this phenomenon, within its own legal order and in international law.

The main research questions include: (1) What are irregular maritime migrants' rights in the Mediterranean in international human rights and EU law? (2) What is the EU's responsibility, (i) in accordance with the International Law Commission Draft Articles on the Responsibility of International Organizations, and (ii) in line with EU law? And (3) What is the EU's responsibility in its external competences towards irregular maritime migrants in the Mediterranean?

The research identifies outdated legal provisions as the roots of the phenomenon and identifies a category of irregular migrants who are subject to rights of protection according to human rights but fall outside the 1951 Refugee Convention.

As evidence of the alleged shift in responsibility from the Member States to the EU, the thesis explores i) the recent developments at the international scene concerning migrants coming from vulnerable situations and ii) the changing mandates of the EU agencies acting on behalf of the EU in the area of freedom, security, and justice.

Further, the thesis examines areas of law to identify the potential responsibility of the EU agencies in international maritime law and the international framework concerning smuggling. It raises the question of what could trigger individual responsibility, taking note of international criminal law and the academic term of 'banal crimes'.

New insights into the EU's responsibility are possible in the external dimension of migration. For example, the EU's externalization of migration policies through its agreements with non-EU states, the EU's Multiannual Financial Framework, and the possibility that the principle of conditionality could be used as a shield for human rights when collaborating with non-EU countries.

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List of Abbreviations

1967 Protocol – 1967 Protocol relating to the Status of Refugees

AFSJ – Area of Freedom, Security and Justice

ARIO – Articles on the Responsibility of International Organizations

CEAS – Common European Asylum System

CoE – Council of Europe

DG Home – Directorate General for Migration and Home Affairs

Dublin Convention – Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Community

EASO – European Asylum Support Office

EBCG – European Coast and Border Guard

EUCAP – EU Capacity Buidling Mission

ECHR – European Convention on Human Rights

ECJ – European Court of Justice

ECOSOC – Economic and Social Council

ECSC – European Coal and Steel Community

ECtHR – European Court of Human Rights

EDF – European Development Fund

EUAA – European Union Agency for Asylum

EUROSUR – European Border Surveillance System

EUTF – European Union Trust Fund

FRONTEX – referring to EBCG

GAMM – Global Approach to Migration and Mobility

GCM – Global Compact on Safe, Orderly and Regular Migration

IBM – Integrated Border Management

ICC – International Criminal Court

ICCPR – International Covenant on Civil and Political Rights

ICJ – International Court of Justice

ICRC – International Committee of Red Cross

ICTR – International Criminal Court of Rwanda

ICTY – International Criminal Tribunal for former Yugoslavia

IDPs – Internally Displaced People

ILC – International Law Commission

IMO – International Maritime Organization

IOM – International Organization for Migration

IOs – International Organizations

IR – International Relations

JHA – Justice and Home Affairs

MFF – Multiannual Financial Framework

NGOs – Non-Governmental Organizations

OHCHR – Office of the High Commissioner of Human Rights

Operation Sophia - European Union Naval Force – Mediterranean (EURAVFOR MED Operation Sophia)

RPPs – Regional Protection Programs

SAR – International Convention on the Search and Rescue

SOLAS – International Convention for the Safety of Life at Sea

TEU – Treaty of the European Union

UDHR – Universal Declaration of Human Rights

UN Charter – United Nations Charter

UNGA – United Nations General Assembly

UNCLOS – United Nations Convention on the Law of the Sea

WRY – World Refugee Year

WTO – World Trade Organization

1. INTRODUCTION

This research focuses on the European Union's responsibility for protecting the rights of irregular maritime migrants in the Mediterranean[1] under EU and international law during the years of the EU migration and refugee crisis. During that time, the Mediterranean became the deadliest sea route to an unprecedented level. Member States' response towards irregular maritime crossings, the highly politicised European migration agenda and the border management policies were likely some of the causes which contributed to such results. Nevertheless, other reasons why the phenomenon of irregular maritime migration flourished during that time can be identified in this research. These concern gaps in the international framework of the 1951 Refugee Convention, the lack of a defined category of irregular maritime migrants due to their vulnerabilities, stemming from new drivers of migration, and the developed role of the EU agencies acting in the field of migration border control in somewhat blurred terms in respect to their responsibility in human rights violations.

The migration and refugee crisis is not limited to irregular migration in the Mediterranean Sea; irregular migration is a multifaceted phenomenon which takes place at sea and also on land, mainly through smuggling practices. The locus of this thesis is chosen by the author due to the high number of fatalities in the Mediterranean Sea,

[1] The term, irregular maritime migrants, is used by the author in this thesis to address the migrants travelling irregularly or unauthorized in the Mediterranean. The phenomenon of irregular journeys in the Mediterranean, has resulted in thousands of fatalities during the years of the migration and refugee crisis. There is not a universally accepted definition for an irregular migrant. The only relevant definition is in the glossary of the International Organization for Migration, which reads that irregular migration is about the "[m]ovement of persons that takes place outside the laws, regulations, or international agreements governing the entry into or exit from the State of origin, transit or destination." IOM, (2019), International Migration Law No 34 - Glossary on Migration accessed at <https://publications.iom.int/books/international-migration-law-ndeg34-glossary-migration> and IOM, Key Migration Terms, accessed at <https://www.iom.int/key-migration-terms>

during the migration and refugee crisis, which resulted in the loss of 11,370 human lives, during its peak years alone (2014 – 2017) and 4,222 in the years that followed (2018 – 2019);[2] it is, therefore, necessary to question further and examine the implementation of the international legal framework on protection, its impact on the EU legal order, and, consequently, States and the EU's human rights obligations under international and European law. At the same time, more should be explored concerning the EU's role in its external competences, known as the externalization policies of migration. Such high numbers of irregular crossings and fatalities at sea may indicate an unidentified responsibility of the actors involved, other than gaps in the international framework. This realization runs in parallel with the migration management policy, which does not have human rights policies and practices at its core. To exemplify/show the lack of human rights dimension in the migration management policy, this research examines the mandate of the European Border and Coast Agency, which shares responsibility with the Member States in its border control management in the area of freedom, security and justice (hereinafter AFSJ).

Although this is a bold claim on behalf of the author, the thousands of fatalities in the Mediterranean may indicate a disappointing operational system within migration and asylum management in the EU. Considering that the Charter of Fundamental Rights of the European Union (EU Charter) and the EU Treaties provide for the respect of fundamental rights and the legal acts of the Common European Asylum System (CEAS),[3]

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[2] International Organization for Migration, Missing Migrants Project, available at https://missingmigrants.iom.int/ and https://missingmigrants.iom.int/region/mediterranean

[3] It is hereby clarified that the reference to the European Agenda for Migration and the CEAS corresponds to the years of this research, before the drafting and proofreading of the thesis. Therefore, the years in concern are 2016 to 2020. However, in the years that followed, there were developments in the EU's legal acts and its political agenda. These resulted in significant steps towards the responsibility of Member States and the EU in the field of migration and

therefore, supplementing the European Convention on Human Rights (ECHR), indicate an extensive impact of international law on the European legal order which should, theoretically, provide for stronger operational management of migration. To this end, the international framework concerning the 1951 Refugee Convention and the Universal Declaration of Human Rights (UDHR) become relevant. Of major significance is the principle of *non-refoulement* as part of international customary law,[4] a general practice accepted as law – and the right of leave any country in accordance with Article 13 of the UDHR,[5] Articles 18 and 19 of the EU Charter,[6] Articles 67, 78 and 79 of the Treaty of Functioning,[7] the legal acts of the CEAS [8] and the European Courts' jurisprudence.[9]

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asylum which extend to the external border management of migration. These includes the New Pact on Migration and Asylum that manages and normalizes migration in the long term. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, Brussels, 23.9.2020 COM (2020) 609 final. Retrieved at: https://eur-lex.europa.eu/resource.html?uri=cellar:85ff8b4f-ff13-11ea-b44f-01aa75ed71a1.0002.02/DOC_3&format=PDF
And:https://eur-lex.europa.eu/resource.html?uri=cellar:85ff8b4f-ff13-11ea-b44f-01aa75ed71a1.0002.02/DOC_4&format=PDF

[4] *Non-refoulement* has a constant reaffirmation as international customary law. Walter Kälin, Martina Caroni, Lucas Heim, Article 33, para. 1 Prohibition of expulsion or return ('refoulement') /Défense d'expulsion et de refoulement. (2011) Extract from Penelope Mathew, Tristan Harley, *Refugees, Regionalism and Responsibility* (Edward Elgar Publishing 2016) 32
Non-refoulement definition: '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'. Par. (1), Article 33, UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.
In the Thesis, reference to non-refoulement and its development is analysed in Section 4.3.4.

[5] Article 13, Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 5.

[6] Article 18, 'Right to Asylum', and Article 19 'Protection in the event of removal, expulsion and extradition'. Paragraph (2) of Article 19, refers to what is now known as the principle of non-refoulement, and it reads that: 'No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'. European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02

[7] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01.

[8] ibid. Also see 4.3.1.2.

[9] ibid.

This thesis explores the impact of international law on the European legal order in the AFSJ, in order to identify the rights of irregular maritime migrants as a vulnerable category of persons who may fall outside the 1951 Refugee Convention's framework. The thesis argues in favour of acknowledging not only that there exists a category of irregular maritime migrants in vulnerable situations but also that there is a need to protect this category based on consideration of the individuals' vulnerabilities. By examining the impact of international law on the European legal order, we can also examine the extent of the EU's responsibility in the internal and external dimensions of asylum and migration management under its constitutional framework.

This thesis considers the international discussions leading to the Global Compact on Migration (GCM) and the New York Declaration of Refugees and Migrants in terms of the irregular maritime migrants' vulnerabilities.[10] The New York Declaration on Refugees and Migrants is of relevance to the EU as an international actor, both in its internal and external competency, mainly, in showing its commitment within this international agreement, of non-legally binding status. The commitments are of the Member States to adhere to the unanimous decision of the UNGA for a comprehensive response framework to refugees and migrants, as were later adopted by the two Global Compacts on Migrants and Refugees, respectively. The key objectives[11] of the New York Declaration, which were later incorporated within a framework of objectives for both

[10] Please See Section 3.1.6

[11] The key objectives of the New York Declaration as summarized by UNHCR are the following: To ease the pressures on host countries and communities; to enhance refugee self-reliance; to expand third-country solutions; and to support conditions in countries of origin for return in safety and dignity. UNHCR, New York Declaration for Refugees and Migrants, Comprehensive Refugee Response Framework, Retrieved at: https://www.unhcr.org/new-york-declaration-for-refugees-and-migrants.html

Compacts, concern the EU's special relationship with its Member States, *lex specialis*, in internal and external action.

The author pays particular significance to the term 'vulnerabilities', in addition to the work of Martha Fineman and the theory she developed with regards to vulnerability, as well as the work of Moritz Baumgärtel in the related field. To this respect, she uses the term 'migrants coming from vulnerable situations', which is expressed in the discussions leading to GCM. The term used underlines specific causes linked to irregular migration as drivers of migration, which are assumed to differ from the elements of persecution, which give rise to the right to asylum but adhere to the principles of universality as expressed in Fineman's theory on vulnerability and embraced by Baumgärtel in that migratory vulnerability is to be articulated as something to be defined on a case-by-case basis, on maintaining its universal nature.

The EU's role as an international actor is considered to be particularly significant when promoting the rights enshrined in the ECHR, the EU Charter and the EU Treaties, and international law to the extent that it has impacted the EU legal order. The author of this thesis presents the EU as an international organization aiming to identify its responsibility under the International Law Commissions' Draft Articles on the Responsibility of International Organizations (hereinafter the ARIO),[12] although, post the Treaty of Lisbon, in its external competence the EU is assumed to be an actor in international law. The ARIO provisions, provide that the responsibility of the EU is subject to *lex specialis*.[13] Therefore, the CJEU and the ECtHR's judgments in the AFSJ are

[12] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, l.
[13] Draft articles on the responsibility of international organizations, 2011 Yearbook of the International Law Commission 2011, Vol.II Part Two, A/66/10. Text on the draft articles on the

relevant in demarcating the EU's responsibility, while respecting the *Bosphorus'* equivalent protection principle and the EUs autonomy, following Opinion 2/13. The jurisprudence, so far, indicate limited or not at all responsibility for the EU, which mainly rests with the Member States.

Nevertheless, this thesis hypothesises that the strengthened mandates of the EU agencies, via the new EU regulation on the European Border and Coast Guard Agency (EBCG – Frontex), on some level, shift the responsibility towards the latter. Part of the originality of the thesis lies in this hypothesis, namely, that the EU agency of Frontex owes responsibility for a wrongful act or omission in the European legal context. This shift in responsibility (from the Member States to the EU agency), may apply in the case of other EU agencies, such as Europol and the European Asylum Support Office (EASO) (which transformed into the European Union Agency on Asylum (EUAA)), if their mandates are strengthened to a degree that they have gained effective control or conduct or if they have predicted that their actions would result in a breach of fundamental rights. This work will be explored in Study Three.. This thesis further considers that while this shift in responsibility is possible for the EU agency, the question then turns towards the EU and the protection of human rights in its migration management. In order to identify how the EU could be a more efficient actor in the international arena with respect to human rights, an analysis of the state of play of the EU's external competence is examined in the thesis. While the EU shares competences

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responsibility of international organizations, Article 64 on *Lex specialis* provides that these draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members'.

with its MSs in the AFSJ, it should be explored whether the EU could act more independently and autonomously in its external competence and possibly be more likely to have a more positive impact as an international actor in the field of human rights. This is considered possible through the EU's international agreements with non-EU states in the field of migration and asylum and the possibility of imposing conditionalities concerning fundamental rights. This thesis supports that together with the above international agreements the EU holds other powerful tools, such as the Multiannual Financial Framework and the Emergency Funding, which will be examined in the final part of this thesis. First, we must acknowledge that other domains of law are relevant when examining the rights irregular maritime migrants and the responsibility of the actors' involved. The author recognises that the phenomenon of irregular mgiration cannot be dealt with only within one domain of law or by implementing a single international or European legal instrument; instead, she sees it as having a strong human dimension characterised by the vulnerability of migrants while being connected to the global and European policies concerning borders, security, the laws of the sea, transnational organized crime, and international crime. In order to demarcate responsibility in these related domains, this research dives into the transnational crime of smuggling, the maritime laws – specifically of search and rescue – and the right to disembark.

International crime is relevant, as evidenced by a Communication that reached the International Criminal Court's (ICC) Prosecutor's Office concerning allegations of crimes against humanity conducted against irregular migrants at sea. This research, while analysing the interactions between international criminal law and refugee law, raises the question of whether a new form of crime, recently introduced in academia to

describe a new form of responsibility arising out of violations in the reception conditions of asylum seekers in Greece, could relate to the individual responsibility or liability of the EBCG's standing corps and border guards in the future due to their conduct or concerning an internationally wrongful act resulting from an EU policy. [14] This research argues that the definition of 'banal crimes'could also be applied to the case of irregular maritime migrants, while they are at sea, for EU policies implemented by Frontex - EBCG, or for their conduct.[15] The argument here is that responsibility can be convened in the form of liability on behalf of the standing corps and border guards relevant to which is the work of Fink concerning the action for damages as a fundamental rights remedy. Although it is assumed that responsibility would be shifted towards border guards and standing corps of Frontex (if banal crimes are acknowledged as a statutory form), such a scenario excludes the EU since elements, like effective control and conduct, play a significant role in each individualised case. In any given scenario, it is important to acknowledge the responsibility and the form it assumes as it also presupposes a well-structured response from the actor involved, as to preclude the possibility of liability for fundamental rights breaches. This research argues that the EU, as an international actor, bears responsibility, particularly in its external competences.

1.1 The main research question

The central concern of this thesis is to examine the European Union's responsibility to protect the rights of irregular migrants in the Mediterranean Sea under EU and international law.

[14] Ioannis Kalpouzos, Itamar Mann, 'Banal crimes against humanity: the case of asylum seekers in Greece' 2015 Melbourne Journal of International Law, 16 (1).
[15] ibid.

In this light, this research answers the following three research sub-questions:

(1) What are irregular maritime migrants' rights in the Mediterranean Sea in international human rights and EU law?

(2) What is the EU's responsibility (i) under the International Law Commission's Draft Articles on the Responsibility of International Organizations, and (ii) under EU law?

(3) What is the EU's responsibility in its external competences towards irregular maritime migrants in the Mediterranean Sea?

1.2 Structure

This thesis is divided into three studies, namely, (1) The international framework on protection, its main principles and the rights it protects; (2) The EU's responsibility as an actor at the international and EU legal order and (3) The EU's responsibility in view of its external policy on migration.

Each study is divided into parts and corresponds to one of the research sub-questions.

1.2.1 The rights of irregular maritime migrants in the Mediterranean within international human rights and EU law – Study One'

The author explores the meaning of protection in international law and its impact on the rights of irregular maritime migrants in the Mediterranean to provide some definitional clarifications. Study One begins with a historical methodological approach to identify any gaps concerning the 1951 Refugee Convention, which do not respond to recent global migration challenges triggered by the new drivers of irregular migration, such as the societal impact of climate change, poverty, or other serious human rights abuses in

the countries of origin.[16] These gaps, perhaps further to the exclusion of drivers of migration from the existing international legal framework on protection, may have contributed to the irregular maritime phenomenon of migration. Specific focus is given to the 'out of the country'[17] criterion stated and the term 'persecution' of the 1951 Refugee Convention.

The theoretical analysis of this study is based on natural law, more specifically, the values of humanity (human dignity), and Fineman's theory on vulnerability utilised in the work of Baumgärtel.

Study One concerns the content of persecution and the *non-refoulement* principle while it provides a clearer understanding of vulnerabilities, as addressed in recent discussions. Reference is made to the 'New York Declaration for Refugees and Migrants' and the 'Global Compact on Migration' in order to identify a new category of migrants in vulnerable situations who need a new form of protection even though they fall outside the framework of the 1951 Refugee Convention. This is developed within the presupposition that the contemporary drivers of migration are a sufficient cause to activate the right to leave any country, even on irregular terms, when the situation is

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[16] In accordance with the UN, drivers of migration are the factors that lead people to migrate, voluntarily or involuntarily, permanently, or temporarily, and that perpetuate movement once it has begun. United Nations, (2017) 'Addressing drivers of migration, including adverse effects of climate change, natural disasters and human-made crises, through protection and assistance, sustainable development, poverty eradication, conflict prevention and resolution'.
Retrieved at: https://www.iom.int/events/addressing-drivers-migration-including-adverse-effects-climate-change-natural-disasters-and-human-made-crisis-through-protection-and-assistance-sustainable-development-poverty-eradication-conflict-prevention-and-resolution
Also relevant is the following report which includes testimonies of irregular migrants: Heaven Crawley, Franck Duvell, Katharine Jones, Dimitris Skleparis, Understanding the dynamics of migration to Greece and the EU: drivers, decisions, and destinations. (2016) MEDMIG Research Brief, 2.

[17] The 'out of the country' criterion is one identified, as a prerequisite of the 1951 Refugee convention definition. Article 1 (A) (2) – Definition of the term refugee, Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) Article 33.

such that it entails taking risks, including unseaworthy irregular journeys. The chronological research in this first study, includes the Member States' response in the years of concern, 2015-2020.

1.2.2 The EU's responsibility in line with the ARIO and under EU law – Study Two

Identifying the existence of responsibility of the EU as an international organization may be considered straightforward based on consideration of the two conditions of Article 2 (a) of the ARIO, i.e., the international legal personality and an entity established by a Treaty. For the EU both requirements are met within the meaning of article 47 TEU. However, to define the EU's responsibility is not a straightforward task because the ARIO identify that such responsibility is based on *lex specialis*. The provisions of the ARIO are examined in order to understand the responsibility of international organizations (IOs).

Next, the author jumps into the deep end of the EU's relationship with its Member States in a shared competence area. Although this relationship in the AFSJ's context is provided as shared in the EU treaties, the responsibility stemming from the implementation of the CEAS is likely to primarily burden the Member States. To clarify if this is the case, the judgments of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) are indicative. To this end, the author explores the doctrine of equivalent protection,[18] also known as the *Bosphoru*s doctrine emanating from an ECtHR's decision,[19] to determine whether the EU's responsibility is possible under certain conditions. However, Opinion 2/13,[20] which upholds the EU's autonomy, complicates the claim that the EU's responsibility is restricted. However, is this entirely correct? The author turns to the shifting of competences from the Member

[18] M. & Co. v. the Federal Republic of Germany, App. No. 13258/87 (ECtHR 09 January 1990).
[19] Bosphorus Hava Yollari Turizm v. Ireland, App. No. 45036/98 (ECtHR 30 June 2005).
[20] Opinion 2/13 pursuant to Article 218(11) TFEU, ECLI:EU:C:2014:2454.

States to the EU through the strengthened mandates of the EU agencies in these fields and questions the corresponding shift in responsibility for these agencies. The role the EBCG in the AFSJ is explored with this objective in mind.[21] The thesis further examines the principle of non-refoulement with reference to Mungianu and the rulings of the ECtHR and the CJEU, particularly in the context of the ECHR and the EU Charter, respectively.

1.2.3 The EU's responsibility in its external competences – Study Three

As mentioned earlier, the thesis presupposes that the rights of irregular maritime migrants cannot be delineated solely based on the 1951 Refugee Convention or the CEAS. The Laws of the Sea should, therefore, be considered since the phenomenon is at sea, and allows us to understand better which responsibilities correspond to the Member States and the EU, considering that this is a shared area of competence with regards to the extraterritorial application of *non-refoulement*. As in transnational crime, smuggling has created obligations to states within the international framework (referring to the Protocol), according to which the EU has also taken steps to limit the phenomenon (i.e., through the first Action Plan of 2020, which was later renewed). [22]

Questions such as the following are raised: *Who is responsible for rescue and protection at sea? What can the EU do to tackle smuggling whilst respecting the principle of non-*

[21] Reference to EU agencies is limited to EASO (now EUAA) and Frontex (now EBCG), as are relevant to the procedures followed at sea and on land. Other Agencies also, play a role, such as Europol, the data base of which could indicate danger regarding security, and thus may be prevail the entry of a person on the ground of a Member State, or provide some details which would then be examined from the authorities of a Member State, e.g., if a person applies for international protection, to decide if that person pose a risk to public order and security.

[22] The first Action plan on Migrant smuggling concerned the years 2015-2020 (27.5.2005) which was later renewed, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A renewed EU action plan against migrant smuggling (2021-2025), Brussels, 29.9.2021 COM (2021) 591 final.

refoulement? Is there a new form of individual responsibility born out of this phenomenon? These questions may indicate the limits of the responsibility of the actors involved; however, the author sees that the EU's responsibility with respect to transnational crime, international criminal law and international maritime law is limited to non-existent. The author questions whether there is another form of responsibility that could be assigned to the actors involved since the number of fatalities at sea for irregular migrants has been considerably high during the years 2015-2020. She then dives into the domain of international criminal law to find parallels with the laws on refugee protection. Although attempting to draw the said parallels entailed difficulties in terms of producing results, particularly considering the complex definition of crimes against humanity, the author came across an academic term, as a new form of crime, describing the reception conditions of asylum seekers in Greece, namely banal crimes. This definition allows her to draw parallels with irregular migration at sea and the actions of the EBCG.[23] 'Banal crimes' remains a theoretical term used exclusively in academia and does not constitute a statutorily defined crime.

The author suggests that the EU's responsibility can be identified within the externalization of migration policies. Consequently, the author explores the adoption of international agreements, the EU's funding, and the links of migration management to trade and development. If the Union's responsibility is established – at this point, the author refers to moral obligation – it is argued that the EU has gained a role as an international actor responsible for the promotion and protection of human rights through its competence to sign international agreements with non-EU states in the field of migration and asylum and by imposing certain conditionalities of human rights. In

[23] Kalpouzos, Mann, 2025 (n 14).

placing human rights in its migration management, the EU may contribute towards accomplishing the objectives of the GCM with reference to its own order. This is likely to limit to a great degree the fatalities in the Mediterranean and elsewhere. The contributions of Kalpouzos & Mann, and Fink, are particularly relevant to the research on a new form of responsibility.

1.3 Thesis originality

This thesis approaches the phenomenon of irregular maritime migration as human-centred, primarily through the lens of human rights, based on the premise that the migrants involved come from vulnerable situations. The thesis links the migrants' right to leave any country to the new drivers of migration and identifies that the 1951 Refugee Convention does not fully correspond to the global migration challenges caused by the drivers of irregular migration as identified in the New York Declaration for Refugees and Migrants and the discussions leading to the adoption of the Global Compact on Migration. It identifies outdated terms of the 1951 Refugee Convention contributing to the existing phenomenon responsible for the unprecedented number of fatalities. The vulnerabilities of the irregular maritime migrants are encompassed within the term 'persecution' and the *non-refoulement* principle. The thesis' approach is original as it is based on research of the *travaux preparatoires* of the 1951 Refugee Convention and its predecessor, the 1933 Refugee Convention, in combination with theories on vulnerability drawn from academia, particularly the contributions of Fineman and Baumgärtel. Their views on vulnerability are important in the identification of the rights of irregular maritime migrants, some of which fall outside the 1951 Refugee Convention, irregular migration involving individuals in vulnerable situations is not currently considered in the framework of human rights as it is not recognised as a legal right. The

basis of the analysis remains natural law based on the writings of Hugo Grotius and the liberalism theory, which essentially endorses the natural law values.

The second point of originality concerns the spillover effect of competence, in terms of responsibility, within the AFSJ, deriving from the integration theory of functionalism, which, subsequently, triggers the responsibility of the EU when a wrongful act or omission is committed under the ARIO or a violation of fundamental rights enshrined in the EU Charter and EU Treaties committed by Frontex as an EU agency. Since the EU is not itself accountable, due to *lex specialis*, and further considering that it is not an ECHR signatory while it retains its autonomy in accordance with Opinion 2/13, the EU agency Frontex – EBCG is bound in its actions by the EU Charter through its actual conduct. Therefore, even though Frontex's mandate (and, to a lesser degree European Union Agency for Asylum) is strengthened as to its powers, there is no accountability mechanism, and no Court or other body would find the EU agencies responsible for any violations of human rights against irregular maritime migrants. Therefore, this research introduces a hypothetical ground based on a new form of responsibility that could arise when the gravity caused by the policies developed and measures adopted, which emanate precisely from the fact that these policies and measures fail to understand the perspective of those suffering the results of such implementation. This definition of banal crimes, as addressed in academia by Kalpouzos and Mann, concerning violations with regards to reception conditions in Greece, could also find application in the future in terms of individual liability of the border guards and standing corps of the EBCG when the preconditions of conduct and effective control are satisfied. To support this claim, the research extends to domains of law such as maritime laws and international crime, leaving open the possibility of further parallels in the future.

The third original aspect of the thesis lies with the EU's role in its external competence as an international actor. This role could prove beneficial in addressing the drivers of irregular migration and have an impact on reducing the fatalities in the Mediterranean and generally in the context of maritime migration. This role lies in the EU's policies regarding its external funding and planning within a more comprehensive management of migration and border controls policy, primarily through the imposition of human rights conditionalities and the migration-development nexus. The EU's external competence in adopting international agreements with non-EU states strengthens its role and provides a unique opportunity. Thus, the migration-development nexus could positively impact on non-EU states' international obligations upon an effective monitoring mechanism of the EU funding (multiannual financial program and emergency funding), in addition to other conditionalities in respecting fundamental rights. The EU's responsibility for the irregular migrants in the Mediterranean is, thus, shifting to the extent that international law continues to impact the EU order and the EU as an international actor. To this regard, the English School theory, from a solidarist approach, helps us understand how the EU's role as a global actor in the world order.

2. METHODOLOGY

2.1 Background of research

The thesis is primarily based on a qualitative research analysis using primary sources of law, international conventions, EU treaties and primary and secondary legislation. The analysis involves the study of the International Law Commission's (ILC) Draft Articles on the Responsibility of International Organizations (ARIO), the UN Charter, and EU law. In addition, the research analysis relies on historical archives and academic literature and identifies derived rights of migrants while exploring the extent of the responsibility of the actors involved with a focus on the EU's responsibility as an international law actor.

The research involved regular visits to the United Nations Library at *Palais de Nations* in Geneva, the study of the *travaux preparatoires* of the 1933 and 1951 Refugee Conventions, other historical archives on migration and asylum, international law, and recent academic literature.

During the period of my PhD studies, I have participated in several International and European Conferences, including the United Nations Intergovernmental Conference to adopt the Global Compact for Safe, Orderly and Regular Migration in 2018; the Cyprus Consideration for the Convention Against Torture (CAT) at the United Nations in 2019; the 32nd Session of the Universal Periodic Review at the United Nations in 2019; the United Nations' Global Forum on Migration and Development in 2018 and 2017 respectively; the United Nations' First Meeting of the Forum in 2019; the 109th and 108th Session Council, International Organization for Migration in 2018 and 2017 respectively; the 7th meeting of the Global Forum on Migration and Development, including the Dialogue on the Global Compact on Migration, United Nations in 2018. My participation in the above, has contributed to a broader understanding of the complex issues, including the legal,

financial, political and social aspects involved in the international spectrum of law and global politics around the issue of irregular maritime migration internationally and regionally. Moreover, visits to several museums abroad, including the International Red Cross and Red Crescent Museum in Geneva, have enhanced my understanding of human rights, humanitarian law and international criminal law.
The qualitative research provides the opportunity to explore the irregular maritime phenomenon of migration in the Mediterranean during its peak years 2015-2016 but also the years that followed up to 2019, known as the 'EU refugee and migration crisis'. Although migration is a term that describes a broader concept encompassing variations of migration, it is the specific phenomenon of irregular maritime migration that forms the focus of this thesis.

The qualitative research explores the hypothesis of shifting responsibilities from the Member States to the EU as a *supranational* entity that has developed into an organization with a legal personality. The development of the EU, the evolution of its treaties, and the subsequent impact on the polity's responsibility is explored within the EU and international legal frameworks. Two theories are utilized to guide the analysis and reach our conclusions; the first involves the English school theory, and the second, the theory of neo-functionalism, developed within the fields of international relations and EU law, respectively.

In identifying the rights of irregular maritime migrants, protection is primarily examined in the context of asylum as provided by the 1951 Refugee Convention. However, the present thesis embraces a wider understanding of protection based on the UN values and principles, which draws back to the writings in natural law and calls within the most

recent international discussions regarding global migration, including irregular migration.

To this end, the author argues in favour of expanding the category of persons in need of protection from refugees to irregular maritime migrants in vulnerable situations. It identifies gaps in the international law framework and expands the analysis to several other domains of law from which it purports to identify both the rights of irregular maritime migrants and the responsibility of the actors involved.

This thesis does not follow a black letter law, but rather it expands on a descriptive analysis of the phenomenon and its legal, human, and humanitarian perplexities. The question concerning the EU's responsibility is explored accordingly, within the domains identified to produce rights for irregular maritime migrants in the Mediterranean. On the other hand, these legal domains may imply a responsibility for the actors involved. The thesis explores the International Refugee Law, the Protocol on Smuggling, the International maritime law (the right to rescue, disembark and *non-refoulement* at sea) and International Criminal Law, (the possibility of individual criminal responsibility for border guards and standing corps), as well as the extent of individual responsibility stemming from a new type of crime, namely 'banal crimes' — a term used in literature but not statutorily acknowledged.

EU law and the external dimension of EU actions as an international actor in the field of migration become the subject matter of this research at Study Three. This external dimension opens a possibility on the topic of responsibility since it mainly reduces the competence and obligations of Member States and shifts it to the EU, via the conduct and operations of its Agencies, in addition to the international agreements between the EU and non-EU (third) States.

2.2 Theories

2.2.1 Natural Law

Study One has a historical evolutionary character and explores the development of the international framework on protection regarding asylum, its main principles and the rights it protects. The aim is to understand the concept of protection in order to explore the extent to which it is applied in the context of irregular maritime migrants' rights in the Mediterranean region. This analysis links to natural law and specifically to the inherent values of humanity, particularly human dignity,[24] which, as argued in this thesis, are not fully respected. This argument is based on two hypotheses: (i) there are gaps in the international framework on protection, and (ii) there is currently no legal or definitional acknowledgement of a new category of persons in need of protection under the existing international and European legal frameworks.

The right to international protection, asylum, is legally formed and developed based on an international obligation to justice. There have been two international attempts to codify the right to asylum prior to the adoption of the widely accepted international instrument following the Second World War. The right to asylum is a historically rooted concept with no strict limitations regarding movement while it involved rights without additional border or security restrictions. The central principle to the right of asylum is the principle of *non-refoulement* connected to other rights now codified in European and international instruments. These have been the subject matter of discussions during the initial attempts of states to develop a refugee framework.

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[24] Readings on natural law include Hugo Grotius writings. For example, Hugo Grotius, Hugo Grotius on the law of war and peace (Cambridge University Press 2012); Hugo Grotius, Mare liberum. (New York: Oxford University Press 1916).

The historical paradigm of the irregular maritime journey of Jews, following the Second World War, in parallel to the recent phenomenon of irregular maritime migrants in the Mediterranean, indicates that the international framework of rights is jeopardized but not at the EU level. Moreover, significant gaps are identified from the examination of the two maritime phenomena concerning the application of the international protection framework.

The first study outlines that the inherent values of humanity, central to natural law, as reflected in the writings of *Hugo Grotius*, constitute the basis of international human rights and have been the forerunners of European fundamental rights.[25] Dignity, as a prevalent value in natural law and as a general principle of law addressed by the International Court of Justice, is a guiding principle stated in the preambles of international instruments and in recent global discussions for migration.

Liberalism, an international relations theory which will be discussed below, endorses universal rights and is based on natural law principles. This is important in assessing the responsibility of the EU and the Member States regarding the obligations that arise in the context of migrants at sea. Natural law, with a focus on Hugo Grotius, provides a useful approach to questions concerning protection while the parallel analysis of irregular migration at sea reveals the political complexities involved in these phenomena.

[25] For the purposes of this Research, reference to natural law, is about the theory developed by Hugo Grotius, although there are other natural law theorists, the preference of this research remains H. Grotius.

With reference to Hugo Grotius, his writings and contribution to intellectual thought in general, the social contract theory,[26] is further explored, which refers to the sovereign's power and the efforts to balance the moral origins of the principles that would make that sovereign power just and legitimate.[27] It includes the principles of freedom and equality which are expressed through two principal elements: (i) the state of nature as a pre-political situation where all individuals are equal and, (ii) the original position which is driven by self-interest, whereas the welfare of citizens depends on the conditions of the social contract with respect for the principles of others.[28] Therefore, the social contract theory builds on the principles of justice and legitimacy, whereby States replace citizens as the parties to their social contract.[29] It has been argued that Grotius theorized a multifaceted system of rights by setting forth the basic traits of human nature based on the concepts of justice and freedom and at the same time has established that human affairs are to be developed universally on the grounds of morality.[30]

Natural law describes a type of rights between the Divine Law and the Law of Nations. Grotius (1583–1645), considered self-interest or selfishness as an obstacle to the law of human nature, distinguishing it from the law of physics or the law of the universe.[31] Grotius considered self-interest or selfishness as an obstacle to the law of human nature, which was inherently connected to the Divine Law of God's will. The natural law theorist, had been greatly influenced by Europe's chaos at the time, leading him to distinguish

[26] Romain Girard, Hugo Grotius – Natural Law and Social Contract Theory (1631). History Research Dissertation 2014, 5, 20-21.
[27] Jason Neidleman, The social contract theory in a global context, E-International Relations Publishing 2012.
[28] ibid.
[29] ibid.
[30] Girard, 2014 (n 26).
[31] ibid 25-26.

between just and unjust wars, the latter of which was based on the laws of nature. The natural law concept is rooted to the idea that individuals hold rights and duties under an international right, which gives rise to the laws of nations. More specifically, moral and legal obligations apply to all states and function as the basis of international society. This is what the Grotian tradition holds, namely that international politics take place within the international society.[32]

Grotius supported that while States hold rights and duties at the international society level, individuals hold rights and duties under an international right. Such a position from the father of natural law can be applied to two of the main arguments of this thesis. Firstly, to the argument of individual responsibility as a new form of responsibility that may arise for Frontex border guards and standing corps. Secondly, it can be applied to the relationship of refugee law with international criminal law, while it can further be applied to the natural rights of a new category of persons in need of protection by States, namely irregular maritime migrants in vulnerable situations. Individuals have an obligation before the law, however, in the phenomenon of irregular migration, it would be unjust or not in accordance with the law of nature to leave humans adrift without the protection of the international order. The Grotian theory can thus help us explain and analyse the applicability of human rights in terms of protection for irregular maritime migrants and the responsibility of the EU stemming from its obligations to respect and promote human rights based on its internal and external competences.

The first study focuses on international law, which, on a theoretical level, is understood as 'a mode of the self-constituting of society, namely the international society of the

[32] Hedley Bull, *The Anarchical Society: A study of Order in World Politics*. (Red Globe Press, 4th ed., 2012) 23.

whole human race, the society of all societies'.[33] National legal systems are part of the international legal system and international law has developed as customary law through the experience of self-ordering and legislative form through treaties.[34] Further, the international legal system has a direct relationship to international customary law.[35]

The historical description of the concept of protection and the assumptions explored through the new category of vulnerable migrants are based on natural law. Before exploring the extent to which a complex system of protection has effectively developed (or not) by states and by international organizations, like the EU, rights need to be defined.

Accordingly, traditional natural law refers to a body of immutable rules superior to positive law and it is considered as the ideal law because it consists of the highest principles of morality towards humanity.[36] It is also an absolute law while not the result of any convention and has provided the basis of international law[37] and the subject of study for several natural law theorists who have explored its development.[38]

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[33] Philip Allott, 'The concept of international law' (1999) *European Journal of International Law* 10(1), 31-50.
[34] ibid Also, according to Allot, 'law is a universalizing system, re-conceiving the infinite particularity of human willing and acting, in the light of the common interest of society', 32.
[35] ibid 44.
[36] A.G. Chloros, 'What is Natural Law?' (1958) The Modern Law Review, 21(6), 609-622, 609
[37] ibid Natural law was also known to ancient Greek philosophers, elaborated by Plato and Aristotle, while in its rationalistic sense, it provided the basis for jus gentium.
It is also reported that, natural law became universally accepted in the 17th and 18th centuries., ibid 610.
Another source, reports that the ancient precursors to natural law appealed to nature (physis) as to positive law (nomos). Plato argued that natural justice exists in the properly ordered souls and city-state; Aristotle distinguished legally just from naturally just actions. Cicero in De Re Publica argued that natural law provides universal moral principles obliging not only Roman citizens but all human beings, etc. Stephen Pope, 'Reason and natural law' in Gilbert Meilaender & William Werpehowski (eds) The Oxford Handbook of Theological Ethics (OUP 2005) 149-150
[38] Classical natural law theory of Thomas Aquinas focuses on natural law moral and legal theories. Neo-naturalism is the development of classical natural law explored in the work of

Human rights derive from natural law and its values. Universality and inalienability of rights have emerged from a normative tradition leading to the development of human rights as defined in the Universal Declaration of Human Rights (UDHR). The normative aspect of human rights can be used as the starting point in the construction of a new set of rights in relation to irregular migration at sea.

2.2.2 Liberalism

While the first study is contextualized primarily within the natural law theory, the second study adopts an international relations theories' perspective. It particularly explores the European Union's potential responsibility within its own legal order, followed by an examination on responsibilities that arise from the international legal order as outlined in the Articles on the Responsibility of International Organizations drafted by the ILC.

International Relations theories (IR) are constantly evolving and adjusting to new challenges.[39] Accordingly, these are divided into three categories: traditional, middle ground, and critical.[40] IR theories play an important role in explaining the interaction between entities such as states, international, and non-governmental organizations, during different timeframes and contexts.[41]

John Finnis. Lon L. Fuller explores on the procedural naturalism theory and Ronald Dworkin develops another theory on legal positivism. John Finnis, *Natural law and natural rights*. (OUP 2011); Ronald Dworkin, 'Natural law revisited'. (1981) Florida Law Review, 34, 165; L.L. Fuller, 'Human Purpose and Natural Law' (1958) Natural Law Forum, 3, 68.

[39] Stephen McGlinchey, Rosie Walters, Christian Scheinpflug, International Relations Theory. (E-International Relations, 2017) 15-76,13.

[40] ibid 3.

[41] ibid 4.

Traditionally, one of IR's central theories has been liberalism, identified as a utopian theory, with a view on peace for all nations.[42] The theory is also known as the democratic peace theory,[43] developed by Immanuel Kant, and is based on the idea that as more states share liberal values, there will be no wars.[44] Although liberalism has been characterized as a utopian theory based on universal peace, its normative dimensions are useful when examining the legal, moral, and normative obligations of international actors.

In a modern democracy, liberalism is exemplified by the term 'liberal democracy' and it refers to states with free and fair elections, the rule of law and the protection of civil liberties.[45] Based on moral arguments for the right to life and liberty, liberalism emphasizes the wellbeing of the individual 'as the fundamental building block of a just political system'.[46] Accordingly, the main concern of liberalism is to construct institutions in order to protect the freedom of the individual by limiting or restricting, in a way, the political power over them.

The thesis utilizes the international relations theories of liberalism and the English school, the latter of which reflects the norms of the liberal European civilization from a solidarism approach, which will be explored subsequently.[47]

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[42] ibid 5. The other one is realism. The theory was developed following the Second World War, represented by Thomas Hobbes, who described human beings as living in an orderless state of nature that he perceived as a war of all against all.

[43] Democratic peace theory is reported to be perhaps the strongest contribution liberalism makes to IR theory because it asserts that democratic states are highly unlikely to go to war with one other. ibid 23.

[44] ibid 4.

[45] ibid 22.

[46] ibid 22.

[47] A solidarist approach refers to natural law and to the unchanging moral principles. On the contrary within the same theory, a pluralism approach refers to a low degree of shared norms and rules. Y. Stivachtis, 'Introducing the English School in International Relations Theory' in

International relations theories contribute to areas such as the global economy, the environment, human rights, and international trade. Nevertheless, international relations' research on protection, and especially on asylum and forced migration, has been limited.[48] All these areas involve questions on the EU's responsibility as an international organization, especially in its external competence.

The second study, relies heavily on the theory of liberalism, reiterating the approach taken in the first study, namely human rights. However, it explores the theory in the context of international organizations' operation.With the characteristics of the EU in mind, the theory of liberalism helps to shed light on any derogations justified by the relationship of the EU with its Member States and, most importantly, by the EU's legal personality as an international organization. This theory purports to explain the institutions' support for the rule of law and the protection of civil liberties.[49]

Generally, liberalism supports the idea that human nature is subject to qualitative change (for the better), so are the States that engage in cooperation based on common moral values. They then create a transnational structure which evolves into a *supranational* system, to which other States, in the process of democratization (harmonization to the common values) may enter. Liberalism is built on the same foundations and norms that purport to restrict the power of states, for example, the war of aggression.[50] In this regard, states collectively or individually, as part of an

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Stephen McGlinchey, Rosie Walters, Christian Scheinpflug. (eds) International Relations Theory (E-International Relations Publishing 2018)

[48] Alexander Betts, Gil Loescher, (Eds.) *Refugees in international relations* (Oxford University Press 2011).

[49] Jeffrey W. Meiser, 'Introducing Liberalism in International Relations Theory', in McGlinchey (n 66).

[50] ibid 24.

international organization, i.e., the United Nations, attempt to restrict the power of an offending State.

There are three interconnected factors for the liberal world order. The first relates to international law and agreements by international organizations like the United Nations. The second relates to free trade and capitalism and the work of the World Trade Organization (WTO), the International Monetary Fund (IMF) and the World Bank. The third factor involves the international norms which favour international cooperation for human rights, democracy and the rule of law.[51]

Accordingly, the liberalism ideals, inspired by the ideas of John Locke,[52] are embraced in this thesis as they are based on a moral argument for the respect of the rule of law and the protection of liberties such as the right to life and liberty for individuals.[53] At the international level, those ideals are achieved when the power of States (governments) is limited and transferred to international-level institutions and organizations, which impose sanctions on States who violate international agreements.[54] More specifically, liberal scholarship focuses on how international organizations assist states in overcoming any desire to escape from international obligations and this is achieved when states cooperate and trust one another while safeguarding human rights, democracy, and the rule of law.[55]

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[51] ibid

[52] John Locke, (1967). *Locke: Two treatises of government*. Book II, Chapter Two, 'On the State of Nature', Abstract (Lonang Institute) retrieved at: https://lonang.com/library/reference/locke-two-treatises-government/loc-202/

[53] D. Gold & S. McGlinchey (2017). International Relations Theory. International Relations, 46-56.

[54] Meiser, 'Introducing Liberalism in International Relations Theory', (n 49)

[55] Alexander Dugin, 'A review of the basic theories of International Relations. Part 2', Geopolitica.ru 2019, Retrieved at: https://www.geopolitica.ru/en/1296-a-review-of-the-basic-theories-of-international-relations-part-2.html

Neoliberalism[56] is relevant in this research in terms of accepting international values that are normative in nature. According to Meiser on the theory of neoliberalism, the European Union, the ECtHR, and the Court of Justice are a 'prototype of the future world order where certain emergent entities will have authority beyond the national level (and the) functions of the states will gradually decrease until they finally be abolished'.[57] Meiser has stated that at the international level, institutions and organizations limit the power of states by fostering cooperation to reduce excessive power that violates international agreements.[58] Although liberalism provides a decent framework to understand questions concerning human rights and the responsibilities held by the various actors involved, it remains quite theoretical. Consequently, although the theory coincides with arguments in favour of the responsibility for involved actors, especially when there is a breach of an international obligation, it does not provide clear methodological guidelines to clearly understand the complexities regarding protection at sea. Consequently, liberalism is complemented by (i) functionalism — a European integration theory —, and (ii) the English School theory (analysed below 2.2.4). Consequently, even though liberalism supports responsibility on behalf of international actors, especially in situations where a breach of international obligation is observed, it must be supplemented by other IR theories. This is necessary to understand the shift in responsibility from Member States to the EU and further to the EU agencies.

[56] Neoliberals, whose work is studied for this research, include M. Doyle and his work on the World of Politics: Michael W. Doyle, 'Liberalism and world politics' (1986) American political science review, 80(4), 1151-1169. Also, J. Rosenau and his work on how international relation theorists use liberal principles to explain world politics: James Rosenau, *Thinking Theory Thoroughly: Coherent Approaches to an Incoherent World* (Routledge 1999). Also, Joseph S. Nye, 'Neorealism and neoliberalism' 1988 World Politics, 40(2), 235-251. Nye explains the balance of power behaviour by States is predicted by the structure of the international system.

[57] Meiser (n 49).

[58] ibid 27.

2.2.3 Functionalism And Neofunctionalism

Following the analysis concerning the EU's responsibility in accordance with its own legal order and as derived from ARIO, the provision on *lex specialis* concerning the special relationship of the EU with its Member States prompts an examination of the impact of international law on the EU legal order. To this effect, examining the integration theories, such as functionalism, and English school theory are deemed necessary. As we will see further, functionalism supports the argument that the EU's responsibility arises through its agencies. Neofunctionalism, as the continuance of functionalism in the evolution of European integration theory, helps address new or build on future insights in areas of currently shared competences between the EU and its Member States.

Functionalism can be used to explain the relationship between the EU and its Member States and how power and politics are spread. From this analysis, it becomes evident that the shared competence area to which asylum and migration belong, consists of legal acts and principles that need to be analysed to identify a potential responsibility of the EU or the Member States.

Neo-functionalism was born out of the *supranational* character of governments responding to European integration.[59] Haas, who has developed this theory referred to the functional 'spillover' from the economical to the political fields to achieve community integration.[60] This theory reflects a dynamic process of development from

[59] Organization for European Economic Cooperation, 1948-1960, later renamed Organization for Economic Cooperation and Development (OECD). Ernst Haas, *The uniting of Europe: political, social and economic forces 1950-1957*, (University of Notre Dame Press 1958) Chapter: New Forms of intergovernmental Co-operation, 521–527.

[60] Haas, (1958) ibid; Ernst Haas, 'International integration: The European and the universal process' (1961) International Organization, 15(3), 366-392. Also, Ernst Haas, 'Regionalism, functionalism, and universal international organization'. (1956) World Politics, 8(2), 238-263.

an inter-governmental to a *supranational* level.[61] Functionalism is considered a theory that explains the relationship between the organization and its member states, the attributing and implied powers, and their normative dimension.[62]

The spillover effect is relevant in the context of EU and responsibilities that extend from the state to an entity with a *supranational* character, thus contributing to social expectations and behaviour changes that affect policymaking at the *supranational* level.

The present thesis relies on neo-functionalism to argue that integration in the fields of migration and asylum, as provided by the EU Treaties, has a spillover effect thus extending the Member States' responsibilities towards the EU. This is attributed to the development of the EU's legal personality,[63] arguably extending to its agencies' operation within the AFSJ. The extent to which the EU has a responsibility to protect the rights of irregular migrants in the Mediterranean, within its own legal order, is explored with reference to the Union's particular competences, as amended by the Treaties, the general principles of law, and the rights of persons seeking international protection as established in the EU treaties and the Charter of Fundamental Rights.

Neofunctionalism mainly supports an entity's ability to spillover competences from Member States. This theory helps identify possible shifts primarily to competences and then in terms of responsibility. The extent of the EU's responsibility is assumed from the competences of the EU in accordance with the EU Treaties and its relationship with its Member States, as well as the effect of international law on European law.

[61] Alec Stone Sweet, Wayne Sandholtz, 'European integration and *supranational* governance' (1997) Journal of European Public Policy, 4(3), 297-317, 300-301.
[62] Klabbers, J. *An introduction to international organizations law*. (Cambridge University Press, 3rd edition, 2015) 33. It is also argued that functionalism has an explanatory power, however, it suffers from serious problems, as it is biased in favour of international organizations.
[63] Article 47 TEU

It has been suggested that when an international organization fails to meet its legal obligations, there is no certainty as to what consequences may follow in terms of its responsibility since there is no certainty as to its implied powers.[64] Nonetheless, it is pointed out that the dynamic relationship between the organization and its Member States is what gave rise to functionalism. Accordingly, the international organization exists to delegate functions to its Member States, and the law has largely been developed within a functionalist framework.[65] In this research, the development of the EU as an international organization with external competences can create the same spillover of these competences, thus extending responsibilities beyond the Member States. The spillover of Member States' competences to the *supranational* entity, which has evolved into an international organization and which in turn shares those competences according to its own treaties, which by the functioning of the EU agencies, is transfered over the international organization (*supranational* entity). Through the spillover of the competences regarding the EU agencies, what has been achieved is spillover in responsibilities when explored through the EU's external dimension capacities. In order to explore the EU's externalization of migration and what this means in terms of competences and responsibilities and to provide new insights on irregular migration, the thesis examines the chronological developments from Tampere onwards.

The research proceeds to examine the rule of law and conditionality principles in the EU's external action and policies. Further, it explores the possible impact of migration – development nexus on the human rights of migrants. It further examines the conditionality and the EU global strategy in its external foreign and security policy.

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[64] Klabbers, (2015) (n 62).
[65] Klabbers, (2015) ibid 3.

Consequently, the thesis, examines the external migration policy, the legal mandate and action of the EU's agencies and what these mean in terms of responsibility. It explores any shift of responsibility towards the EU agencies and, subsequently, to the EU, and the extent to which this could be possible.

We begin by exploring the complexity of irregular maritime migration which involves several legal domains, such as the international and European law on migration, the legal framework on security and border controls, international maritime law, transnational criminal law (smuggling), international criminal law (for potential individual responsibility in the form of 'banal crimes' instead of any international crimes). In parallel, the international obligations of nations are explored in relation to migration and protection, regarding the development of the EU's external policy.

The thesis also explores whether any new legal pathways could be a solution to the phenomenon of irregular maritime migration in the Mediterranean. For the external policy of the EU, the English School theory provides further guidance on the more practical research questions regarding the extent of the EU's responsibility in international law. It builds on the EU's external competences, the power over the EU agencies and the assumed responsibility that the EU should have to comply with the international framework by acting within its regional (equivalent, or not) framework. The English School theory, as we will see, provides a global approach towards the rights of irregular maritime migrants and regulating the responsibility for all actors involved, especially through its external policy and conduct.

2.2.4 The English School Theory

The ideas of liberalism are supplemented by the international relations theory, namely the English School theory, which provides a completed theory on how those liberal ideas work on an international and regional level. [66]

The English School theory adopts a solidarism approach[67] in order to explain the EU's position in the international legal order, through states' political relations. In brief, the English School in IR explains how the international system shares the same values with international society but not with the world society. These are the three concepts upon which the theory is built: international system, international society and world society.[68]

Specifically, the international system refers to States that have a contract between them and influence each other's decisions to act in uniformity and eventually achieve peaceful relations.[69] In terms of the EU, international system is an important concept in terms of integration. International society refers to like-minded States which share the same values, rules and institutions. It is about the institutionalization of States with mutual

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[66] Yannis A. Stivachtis, 'The English School and the concept of "empire": theoretical and practical/political implications' 2013 *Global Discourse*, *3*(1), 129-135; Yannis Stivachtis, 'The English School', in Stephen McGlinchey, Rosie Walters and Christian Scheinpflug (edts) *International Relations Theory* (International RelationsPublishing 2017) 28-35; Tim Dunne, 'The English School' in Christian Reus-Smit & Duncan Snidal (edts) *The Oxford Handbook of Political Science* (Oxford University Press 2010). Also, Dunne, Inventing International Society, A History of the English School (McMillan Press 1998).

[67] Stivachtis (2017) *ibid*

[68] Barry Buzan, B. (2014). *An introduction to the English school of international relations: The societal approach* (John Wiley & Sons 2014); Also see Martin Griffiths (ed) *International relations theory for the twenty-first century: An introduction* (Routledge 2007) 75-87

[69] Stivachtis (n 66); It is also reported that the international system is about power politics among states, represented by the rationalist approach of Hobbes and Machiavelli. Buzan (2014) ibid. Also, according to Bull (2012) (n 32) the international system is formed where there is interaction of States and by contrast, 'a society of States (or international society) exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common situations'. Griffiths (2007) (n 68) 80

interest and identity which share the same norms, rules and institutions.[70] World society refers to the greater society of all humankind, which place human beings, rather than States, at its centre.[71] It has been suggested that the world society is the degree of interaction which links all parts of the human community to one another and that the basic value that links the world society is human rights.[72] It has also been argued that the world society should be understood as encompassing the transnational interactions across state borders and in such a way it is co-dependent on international society since those interactions are regulated by States.[73]

Nevertheless, it has been argued that the position of world society, although based on a normative political theory that neither rests on States nor individuals, parallels with transnationalism.[74] It has been explained that the main idea is that States exist in an international society which shapes and is shaped by their own social contract.[75] The distinction between the first two concepts, international system and international society, are necessary to understand the pattern of relations between States and a group of States.[76]

In this sense, and while exploring the EU's development as an international actor, the English school theory seeks to focus on the practice. Further analysis concerns the relationship of the EU with its Member States and the development of a shared practice

[70] Buzan (2014) (n 68).
[71] ibid; Also, refers to Kant's, revolutionism as one form of universalist cosmopolitanism.
[72] Referring to Hedley Bull's definition of world society (n 32). Griffiths, (2007) (n 68) 81.
[73] ibid 83.
[74] Buzan (2014) (n 68)
[75] ibid.
[76] Stivachtis, (2017) (n 66).

of competences towards a shift to the EU in terms of responsibility that derives from the conduct of the EU agencies.

According to the English school theory, the EU Member States reflect an international society. The EU's relations with non-EU countries reflect a broader international system. In relation to international societies, solidarism refers to types of international societies which share common norms, rules and institutions, like the EU, with the goal to reduce the tension between the imperatives of States and humankind. The theory, therefore, adheres to natural law. Accordingly, solidarism represents the development of coexistence and cooperation to shared projects within sustainable justice.[77] The United Nations, World Bank and World Trade Organization, as institutions are represented by solidarism.[78]

The English school theory had not attracted the idea of regional international societies until recently. In the author's understanding, this was because the regional organizations had not developed into international organizations, like the EU post-Lisbon. However, with the development of the EU, the English School's theory is more comprehensible if one argues that the powers and responsibilities of the EU spillover from the States to the *supranational* entity. Consequently, as an international organization, the EU acts in its external capacity as an international actor. Thus, the world order which is the third component of the English School theory is materialized if one considers that the EU needs to develop and implement policies through its Agencies that promote respect and sustain international obligations of States. The latter helps us identify the EU's responsibility. Therefore, for the current purposes, the EU is considered

[77] Buzan (2014) (n 68) 16.
[78] ibid.

a solidarist regional international organization with legal personality, according to its own legal order, and a subject in international law from which responsibility arises.

Moreover, this theory supports that, given time, the integration process which resulted in *supranational* institutions with legal powers creates a world society that underpins the EU international society. In terms of human rights (obligation to justice), this means that the EU needs to adjust to the new realities of the world society. This theory also helps us understand the external dimension of the EU as an actor in the areas of migration and asylum.

While liberalism supports that unaccountable violent power by states exerted on individuals must be restrained through institutions and norms, the English School theory explains how international order functions. As part of liberalism, the English School theory, which can be situated within the middle ground theories, is built, as mentioned earlier, on three concepts; the international system, the international society, and the world society.[79]

As already explained, Bull defined the international system as a contract between one or more like-minded states that function as a whole and are bound by common rules that guide their relationship and the workings of their common institutions.[80] This is defined as the international society, which is about the creation of shared norms, rules, and institutions. The final concept is that of world society, referring to individual human beings as the ultimate unit of the international society.[81] It has been argued that Bull's,

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[79] Robert W. Murray, (ed.) *System, society and the world: Exploring the English School of international relations*. (E-International Relations Publishing 2015).
[80] McGlinchey, Walters, Scheinpflug (2017) (n 66).
[81] ibid.

emphasis on international society favors the Grotian tradition.[82] Similarly, it has also been argued that an international system may involve more than one international society whereby states recognize that they are bound by common rules, for example international law, and maintain the workings of common institutions.[83] However, the argument continues that international society is more than these institutions and involves shared interests, values, and identity.[84] Finally, it is argued that world society puts the global population (individuals) at the centre of any analysis of states' relations.

Historically, the new international society was created following the First World War by establishing the League of Nations and developed into the United Nations in 1945.[85] Solidarism, as one of the forms of the English school,[86] refers to types of the international society that share common norms, rules, and institutions. Solidarists debate on questions favouring natural law, which concerns the rights and inherent and universal values understood through human reason.[87] As the entire theory was inspired by Grotius, Bull suggested that Grotians are solidarists and that 'the main assumption is the existence or potential for solidarity among states comprising of an international society with respect to the enforcement of the law'.[88] Arguably, the Grotian approach describes international politics as a society of states or as an international society.[89]

Meanwhile, the end of the Second World War also marked the beginning of forming a regional international system, namely the European Communities, initially between six

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[82] Balkan Devlen, Patrick James, Özgür Özdamar, 'The English School, international relations, and progress' (2005) International Studies Review, 7(2), 171-197, 182.
[83] ibid 183.
[84] ibid.
[85] ibid 30.
[86] The other one is pluralism which refers to societies with relatively low degree of shared norms.
[87] ibid 31.
[88] Devlen, James, Özdamar (2005) (n 82).
[89] McGlinchey, Walters, Scheinpflug (2017) (n 66) 175.

states. It is argued that as time progressed, the integration process gained momentum and resulted in *supranational* institutions, laws, and policies, which led to an EU world society.[90] The process of EU enlargement reflects the English School theory and the solidarist approach in the sense that the membership criteria, both economic and political, create a thick regional international society.

Other elements within the European order further indicate the thick international society. The external dimension of the EU and its competences seem to fall within this notion. It is argued that some elements apply beyond the EU boundaries in three ways: (i) states located at the EU borders are encouraged to adapt to norms and practices compatible with those of the Member States; (ii) through the development of financial assistance by meeting certain criteria and conditions; and (iii) through trade and partnerships that must fulfil certain norms, rules, and practices which are part of the Union's trade policy.[91]

It has also been argued that the English School theory can deal with both the analytical and normative aspects of globalization, through the regional developments of the EU.[92] Accordingly, it has been stated that '[…]English school theory can handle the idea of a shift from [the] balance of power and war to market multilateralism as the dominant institutions of international society, and it provides an ideal framework for examining questions of intervention, whether on human rights or other grounds'.[93] Therefore, it

[90] ibid 32.
[91] ibid 34.
[92] Devlen, James, Özdamar, (2005) (n 82) 172.
[93] ibid 172; Abstract from Barry Buzan, 'From international to world society? English school theory and the social structure of globalisation' (2004) Cambridge Studies in International Relations 1 (95).

provides a roadmap for the EU to meet its international obligations through its external powers.

3. STUDY ONE: INTERNATIONAL FRAMEWORK ON PROTECTION, ITS MAIN PRINCIPLES AND THE RIGHTS IT PROTECTS

Part 1 – THE THEORETICAL ANALYSIS ON INTERNATIONAL PROTECTION: ASSESSING THE PAST

3.1.1 Introduction

Irregular migration in the Mediterranean is a phenomenon that entails a high-risk life journey undertaken by migrants who consent to smuggling in order to undertake journeys without the permission of states but with the assistance of organized networks of smugglers. Such transports have both hidden and obvious dangers associated with the consequences of smuggling[94] and the high fatal risk undertaken, considering, for example, the adverse weather conditions or the unseaworthy vessels used for transportation. [95] Unfortunately, the irregular journeys have resulted in thousands of fatalities and continue to do so. There are also risks of exploitation and abuse, including sexual abuse, especially of women and children as well as violence and trafficking in persons. Irregular maritime migrants embark on life-threatening journeys hoping to successfully request international protection from other states, often forcing them to undertake dangerous journeys to escape persecution and human rights abuses.

Although the legal framework may seem to be providing a basic form of protection to those seeking international protection, at the same time its practical implementation has proved to be inadequate as states have not yet managed to implement an effective common approach to asylum and to truly respect the principle of solidarity. The failure

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[94] The term ‘irregular maritime migrants’ is adopted as the general term used throughout the thesis as it best represents its objectives and aims. Please see section 1. Intoduction.

[95] Please see section 5.1.3

of the current asylum system is evident by the fact that no legal routes are available to persons seeking international protection thus forcing them to travel irregularly.

The first study of this thesis is concerned with the legal framework of international protection, i.e., asylum, its roots, values, and development (if any) since the adoption of the 1951 Refugee Convention and its 1967 related Protocol.[96] The first study will proceed with a historical analysis concerning protection with emphasis on the principle of *non-refoulement*.[97] The aim is to identify whether all migratory movements are included in the migration-protection sphere and, if not, to examine the reasons for the exclusion of some categories of irregular migrants. Questions such as *What are the rights of irregular maritime migrants in terms of protection?* and, importantly, *what is the content of protection in terms of asylum?* will be explored below. It is assumed that the scope of protection has a broader meaning and application than what is implemented by states when implementing their international and EU law obligations.

This research focuses on the development of protection and its evolution with reference to its statutory elements. Importantly, we will review the exclusion of migrants in vulnerable situations[98] from the framework of the 1951 Refugee Convention. The argument put forward here is that this category of migrants, namely irregular maritime migrants in vulnerable situations, are entitled to protection. This argument is based on

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[96] UN High Commissioner for Refugees (UNHCR), 'The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol', September 2011.

[97] Reference to the principle of *non-refoulement* follows in the historical description of protection.

[98] The term 'migrants in vulnerable situations' was used in the discussions at the United Nations prior to the adoption of the Global Compact on Safe, Orderly and Regular Migration, to which I had attended as a national delegate. UN Migration Agency, International Dialogue on Migration, 'Understanding migrant vulnerabilities: A solution-based approach towards a global compact that reduces vulnerabilities and empowers migrants, Background Paper', 18-19 July 2017, Palais de Nations Geneva.

the norms and principles of the UN, primarily used to address the statutory content of asylum.[99] The recent global efforts to address safe, orderly, and regular migration[100] provide new hope for the management of irregular migration, particularly regarding the rights of people who would otherwise be left outside the scope of international protection.

3.1.2 International Committee of the Red Cross 1921 as the initiator of protection based on an international obligation to justice

Migratory movements in the 20th century did not encounter border controls or restrictions for people's settlement in other countries.[101] Primary efforts to collectively categorize migrants as refugees and decide upon their rights arose because of the wars within the European continent. In 1921, the human necessity of escaping wars and preserving life urged the International Committee of the Red Cross (ICRC) to become the initiator of the international protection system. An initiative of the ICRC, based on an obligation to justice, prompted the whole system of international protection to be formed.[102] In 1921, an initiative by the Joint Committee of the ICRC and the League of

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[99] The main research on the content of protection was carried out at the United Nations Geneva Library. Focus is placed on the value of dignity.

[100] UN Global Compact on Safe, Orderly and Regular Migration, UNGA Res 73/195 (11 January 2019) UN Doc A/RES/73/195.

[101] It is reported that until the First World War, it was possible to travel to many countries without even possessing a passport. In the aftermath of the war, instruments were developed in order to deal with the number of people forcibly displaced. William Alley, *What is a Refugee?* (Oxford University Press 2016) 17

[102] The President of the International Committee of the Red Cross, Mr. Gustave Ador, in a telegraph sent to the Council of the League of Nations on 20th February 1921, wrote: 'In begging you to be good enough to discuss at your present meeting the possible appointment of a League of Nations Commissioner for the Russian refugees, the International Committee is well aware that it is not so much a humanitarian duty which calls for the generous activities. Of the League of Nations as an obligation of international justice. The eight hundred thousand Russian refugees scattered throughout Europe without legal protection or representation. All the organizations already at work would be glad to put forth fresh efforts under the general supervision of a Commissioner appointed by the League of Nations, the only supernational political authority capable of solving a problem beyond the power of exclusively humanitarian organizations'.

Red Cross Societies, calling for a conference involving the principal organizations concerned led to the appointment of Dr. Fridtjof Nansen as a High Commissioner on September 1st of that year.[103] Nansen's task involved developing repatriation plans and defining the legal status of refugees, organizing their dispersal from congested parts to places where employment was possible.[104] On behalf of the Russian refugees, an appeal to the Council of the League of Nations in 1921 was positively accepted on the basis of an international obligation of justice. The High Commissioner for Refugees Office was established in order to work on matters of legal status, repatriation and co-ordination of externally financed relief operations.[105]

Following the First World War, nearly two million refugees were reportedly moved throughout Europe and Asia, most of whom lacked legal status and nationality.[106] It was under those circumstances that the League of Nations first addressed the problem of protection. The initial attempt to define refugees unfolded between 1922–1926 and concerned the issuance of identity certificates of Russian and Armenian refugees. In

League of Nations, Official Journal, March-April 1921, 227. https://heinonline.org/HOL/Page?handle=hein.journals/leagon2&id=1&size=2&collection=journals&index=journals/leagon Also see, James Hathaway, 'The Evolution of Refugee Status in International Law: 1920—1950' (1984) International & Comparative Law Quarterly, 33(2), 348-380, 351

[103] Gilbert Jaeger, 'On the history of the international protection of refugees' (2001) Revue Internationale de la Croix-Rouge/International Review of the Red Cross, 83(843), 727-738, 728 Also, see Hathaway, 'The Evolution of Refugee Status in International Law', ibid.

[104] United Nations, Refugees, Background Paper No.78, ST/DPI/SER.A/78, 29 December 1953, 2.

[105] During the period of the League of Nations (1921-1946) the High Commissioner for Refugees was assisted in its tasks to provide international protection by the offices of the Nansen International Office for Refugees, the Office of the High Commissioner for Refugees from Germany, the Office of the High Commissioner of the League of Nations for Refugees and the Intergovernmental Committee on Refugees. Jaeger (2001), (n 103) 729.

[106] United Nations, Refugees, Background Paper No.78, ST/DPI/SER.A/78, 29 December 1953, 2

1928, the Arrangement Relating to the Legal Status of Russian and Armenian Refugees was adopted.[107]

In relation to the Russian refugees following the Russian Revolution, it is estimated that one and a half million people fled Russia due to famine, destruction, suffering, and political convictions.[108] In accordance with the Agreement, Russian refugees who wished to migrate to a country other than the country of first reception were issued an international travel document, commonly known as the Nansen Passport. The Nansen passports represent the first identity certificates of refugees.[109]

The same protection applied to the Armenian people, further to mass deportations, indiscriminate killings, and a mass exodus to other countries during 1921-1922, upon issuing emergency certificates by the Office of the High Commissioner. The Office of the High Commissioner, at the time, estimated that there were 320,000 Armenians in need of identity certificates.[110] The first definitions of a 'refugee' were drafted by the High Commissioner for purposes of issuing certificates, upon a collective right to protection, initially for Russian and Armenian Refugees, followed by Assyrian, Assyro-Chaldean origin, and Turkish refugees in 1928.[111]

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[107] League of Nations, 'Arrangement Relating to the Legal Status of Russian and Armenian Refugees', 30 June 1928, League of Nations Treaty Series, Vol. LXXXIX, No. 2005.

[108] Hathaway (1984) (n 102) 350-351

[109] United Nations, Refugees, Background Paper No.78, ST/DPI/SER.A/78, 29 December 1953, 2 para 1.

[110] Hathaway (1984) (n 102) 352.

[111] Russian refugee: 'Any person of Russian origin who does not enjoy the protection of the Government of the Union of Soviet Socialist Republics and who has not acquired any other nationality'.

Armenian refugee: 'Any person of Armenian origin, formerly a subject of the Ottoman Empire, who does not enjoy the protection of the Government of the Turkish Republic and who has not acquired any other nationality'.

Assyrian, Assyro-Chaldaean and assimilated refugee: 'Any person of Assyrian or Assyro-Chaldaean origin, and by assimilation any other person of Syrian or Kurdish origin, who does not

The vulnerability of persons triggered by wars, involves the initial obligation to justice. This means that persecution itself, which is one of the main elements of the current international framework on protection (discussed later) was not a prerequisite to the initial decisions to offer protection to refugees. Protection was offered collectively, not individually, but for nations suffering from due aggression, wars, and internal conflicts. It will be seen later that some of the reasons identified within these early definitions are nowadays conceived as drivers of irregular migration, although they do not qualify persons to receive international protection. For example, irregular migrants travelling due to, among others, famine, exhaustion, and human rights abuses, may no longer fall within the meaning of protection. The high number of persons in need remains significant, which in the early days of the establishment of the High Commissioners Office concerned thousands of people. Protection referred to passports and emergency travel documents with states' assistance to offer good employment opportunities to vulnerable refugees.

3.1.3 Review of the International and European Perceptions on Migration and Asylum

Before exploring the historical analysis on protection, some general considerations on migration indicate some characteristics concerning the perception of migration and its limits especially in relation to the aspect of irregularity.[112] Migration is a global phenomenon of the past and the future which is greatly implicated with human rights particularly considering that Article 14 UDHR that 'Everyone has the right to seek and to

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enjoy the protection of the State to which he previously belonged and who has not acquired or does not possess another nationality'.

Turkish refugee: 'Any person of Turkish origin, previously a subject of the Ottoman Empire, who under the terms of the Protocol of Lausanne of July 24, 1923, does not enjoy the protection of the Turkish Republic and who has not acquired another nationality'.

[111] Hathaway (1984) (n 102) 353, 356-357.

[112] The general considerations that follow would benefit the reader later.

enjoy in other countries asylum from persecution'. However, national migration systems impose several limits on the exercise of this right, leading to unauthorized journeys that are considered irregular or, often referred to at the national level as 'illegal'. [113] From the UN's perspective, in today's international system, migration is understood as a megatrend of an unprecedented level of human mobility.[114] Generally, the phenomenon of migration is the cross-border movement of people with different protection profiles,[115] including, but not limited to, refugees.[116] Apart from the right to request asylum and leave or re-enter one's country of origin, migration further involves the freedom of movement and the right to reside.[117] From this point of view, there is a definite nexus between migration and human rights.[118] However, as a general observation, the irregular maritime migrants' protection rights are neither automatically recognized nor immediately identified by States.[119]

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[113] Although migration is not identified as a human right, this thesis approaches migration as a human right and defends that because of the articles 13 and 14 of the Universal Declaration of Human Rights, (UDHR). It was the case recently, that Hungary did not accept migration to be a human right or that it derives from the UDHR. That position, amongst other concerns, led Hungary to be one of the EU Member States that did not sign the Global Compact on Migration. Discussions on the matter were withheld during International the Organization for Migration's 108th Session of the Council, to which I have attended as a national expert and delegate on 27–30 November 2018, Geneva.

[114] UN Migration Agency, International Dialogue on Migration, 'Understanding migrant vulnerabilities: A solution-based approach towards a global compact that reduces vulnerabilities and empowers migrants, Background Paper', 18-19 July 2017, Palais de Nations Geneva.

[115] UN Office of the High Commissioner for Human Rights (OHCHR), 'Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations', February 2017, available at: <http://www.refworld.org/docid/5a2f9d2d4.html>

[116] Asylum is a human right. Article 14(1) of the Universal Declaration of Human Rights provides that 'Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations' Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

[117] Article 13 UDHR provides accordingly that '(1) Everyone has the right to freedom of movement and residence within the borders of each state. (2) Everyone has the right to leave any country, including his own, and to return to his country'.

[118] The nexus in question will be discussed in 4.1.5.

[119] To be explained later in section 3.2.5, on the response of Member States to the phenomenon, including the EU-Turkey Statement.

The irregular migratory phenomenon in the Mediterranean can be defined as the unauthorized sea movement which is not in compliance with the Laws of the Sea[120] and violates states' migratory rules.[121] Generally, irregular journeys are often perilous while linked to multiple and intertwined drivers of migration.[122] These may range from wars, conflicts and persecution, poverty, discrimination, lack of access to rights — including education, health, and decent work — violence, gender inequality, and the consequences of climate change and environmental degradation.[123]

The involved actors' responsibility is crucial as migration has caused hundreds of fatalities in the last few years alone. Generally, responsibility is associated with states as the main actors involved; nevertheless, the states as members of the EU with its capacity as an international organization (according to the ARIO, please see section 4.1.4 and 4.3.2) with a legal personality and its representative Agencies suggest that

[120] Extensive examination of the Laws of the Sea, and their meaning in relation to the irregular maritime phenomenon in the Mediterranean is discussed in Chapter IV of this thesis. The focus is maintained on the responsibility of States, or other organizations, in relation to rescue, disembarkation, and the flag principle, among others.

[121] Extensive discussion on the Mediterranean Sea routes takes place in Study IV of this thesis.

[122] In accordance with the UN, the drivers of migration are the 'factors that lead people to migrate, voluntarily or involuntarily, permanently or temporarily, and that perpetuate movement once it has begun'. ECOSOC, 'Thematic Session Two: Addressing drivers of migration, including adverse effects of climate change, natural disasters and human-made crises, through protection and assistance, sustainable development, poverty eradication, conflict prevention and resolution' (New York, 22-23 May 2017).
Also relevant is the following report which includes testimonies of irregular migrants: Crawley, Duvell, Jones, Skleparis, Understanding the dynamics of migration to Greece and the EU (n 4)

[123] UNGA 'Report of the Office of the United Nations High Commissioner for Human Rights - Situation of Migrants in Transit' (27 January 2016) 31st session (A/HRC/31/35).
Also, recently the UNHCR noted that the relationship between climate change and human rights is one which cannot narrowly focus on the climate change event or disaster as solely natural hazards, but on a broader approach regarding the significant adverse effects on State and societal structures, along with individual wellbeing and the enjoyment of rights. UN High Commissioner for Refugees (UNHCR), Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters, 1 October 2020; Further, in the recent case of Teitiota, the UN Human Rights Committee, emphasised the relationship between climate change and human rights is increasingly recognized in law. Ioane Teitiota v. New Zealand (advance unedited version), CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020.

responsibilities may extend beyond the states. The analysis of the EU's legal framework entails a complex system of laws, obligations and responsibilities, stemming from a relationship between the states and the organization qua the EU, the evolution of the organization itself from an intergovernmental organization with only some *supranational* powers to an international organization and, thus, from a regional actor to a global one. Therefore, the actors involved in the phenomenon of irregular migration at sea pertain not only to Member States, but the EU and its Agencies, namely EASO and Frontex – EBCG.[124]

The following historical analysis examines the development of international protection before and after the 1951 Refugee Convention. The 1951 Refugee Convention is an international milestone instrument currently in force upon which the EU's own legal framework is based.[125] This chronological approach aims to identify the challenges of migration in the Mediterranean before and after the adoption of the international framework on protection.

3.1.4 The First Refugee Convention (1933)

In 1933, the migratory phenomenon leading to a large number of refugees persisted contrary to the initial perception of states that the refugees' return to their countries was possible, or even inevitable, upon the resolution of conflicts or following their

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[124] For the purposes of this thesis, reference to Frontex covers the period of its establishment until its new Regulation. From 16/9/2016 reference will be to EBCG. Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC OJ L 251, 16.9.2016, 1–76.

[125] Reference to the legal acts of the EU concerning the Common European Asylum System and whether it is equivalent to that of international standards, is explored in Study Two – mainly sections 4.1.2, 4.1.3.

naturalisation in countries where they were residing.[126] States became reluctant to the issue identity certificates and renewal of refugee passports.[127] The international community held an Intergovernmental Conference in 1933 to secure grounds of protection for the refugee populations of the First World War. The Convention of October 28th, 1933,[128] relating to the International Status of Refugees, was the first international instrument adopted for refugees. It was based on the Preamble of the Covenant of the League of Nations to promote international cooperation for the maintenance of world justice.[129] From a human rights perspective, the 1933 Convention provided the solution of a legal pathway by permitting entry to another state and safeguarding populations from any risk of further exploitation. Refugee populations had no restrictions to travel to any other state and, for this purpose, the Nansen Office was permanently established. Accordingly, the Convention applied to Russian, Armenian, and assimilated refugees, as defined in the 1928 Arrangements who had Nansen

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[126] Peter Fitzmaurice, 'Anniversary of the forgotten Convention: The 1933 Refugee Convention and the search for protection between the world wars'. Legal Aid Board Retrieved at <http://www.legalaidboard.ie/en/About-The-Board/Press-Publications/Newsletters/Anniversary-of-the-forgotten-Convention-The-1933-Refugee-Convention-and-the-search-for-protection-between-the-world-wars.html>

[127] Hathaway, (1984) (n 102) 359

[128] League of Nations, 'Convention Relating to the International Status of Refugees', 28 October 1933, League of Nations, Treaty Series Vol. CLIX No. 3663.

[129] The Preamble takes into consideration previous measures of the Intergovernmental Arrangements of 1928. The opinions expressed by the Inter-Governmental Advisory Commissioner for Refugees and the decision of the Assembly of the League of Nations dated 4th September 1930, were also considered. The decision involved setting on a temporary capacity, the Nansen International Office for Refugees, under the auspices of the League of Nations. Inter-Governmental arrangements of July 5th, 1922, May 31st, 1924, May 12th, 1926, and June 30th, 1928. Preamble of the Convention of 28 October 1933 relating to the International Status of Refugees.

Also see League of Nations, Arrangement with respect to the issue of certificates of identity to Russian Refugees, 5 July 1922, League of Nations, Treaty Series Vol. XIII No. 355; League of Nations, Arrangement Relating to the Issue of Identify Certificates to Russian and Armenian Refugees, 12 May 1926, League of Nations, Treaty Series Vol. LXXXIX, No. 2004; League of Nations, Arrangement Concerning the Extension to Other Categories of Certain Measures Taken in Favour of Russian and Armenian Refugees, 30 June 1928, League of Nations, Treaty Series, 1929; 89 LoNTS 63; League of Nations, Arrangement Relating to the Legal Status of Russian and Armenian Refugees, 30 June 1928, League of Nations Treaty Series, Vol. LXXXIX, No. 2005.

certificates for not less than a year, subject to six months' renewal and those who regularly resided in their territory, subject to no further restrictions in travelling.[130] The 1933 Refugee Convention protected refugees on the basis of *refoulement* which prohibited states from removing or keeping from their territory by application of police measures, refugees who had been authorized to reside there regularly, except for reasons of national security and public order.[131] To safeguard this principle, the Convention additionally provided that states undertook not to refuse entry to their borders. This prohibition is a milestone to international protection and sometimes a contrast compared to today's practices and political considerations that place, first and foremost, the sovereign right of states to refuse entry to irregular migrants or not to receive more refugees into their territories.

The 1933 Refugee Convention identifies the element of vulnerability in the refugee status to justify the basis of their rights. Provisions of the 1933 Refugee Convention incorporated in today's international legal framework include the juridical condition,[132] free access of refugees to the Courts of law, the rights to welfare and relief,[133] and the right to have access to education. The Convention also provides rights regarding the

[130]League of Nations, 'Convention Relating to the International Status of Refugees', 28 October 1933 ibid Articles 1 and 2 Passports were to be issued on the lowest tariff as applied to visas on foreign passports to indigent persons.
[131] ibid Article 3, 1933 Refugee Convention.
[132] Ibid Chapter III of the 1933 Convention Relating to the Status of Refugees, Articles 4-6.
[133] ibid Chapter VI, Articles 9-11; Also see Appendix 1 – International Responsibilities in respect of Protection, paragraphs 3-10, Economic and Social Council, Communication from the International Refugee Organization, 30 July 1949, E/1392/Corr.1. A copy of the true original document was retrieved from UN Geneva Library at Palais de Nations.
Also see Article 1-Definition of the term refugee paragraph 1, (travaux préparatoires) UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Texts of the Draft Convention and the Draft Protocol to Be Considered by the Conference: Note by the Secretary-General, 12 March 1951, A/CONF.2/1; Also see, Article 1, UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Texts of the Draft Convention and the Draft Protocol to Be Considered by the Conference: Note by the Secretary-General, 12 March 1951, A/CONF.2/1. A copy was retrieved from UN Geneva Library at Palais de Nations.

fiscal regime and exemption from reciprocity. Unfortunately, the vulnerability element was not reiterated (in writing) in the 1951 Refugee Convention, and arguably this has caused a perception of a narrower definition of a refugee.

The international obligation to justice is the dominant principle of the first drafted instruments regarding the refugees, however, overshadowed by the political concerns regarding sovereign rights by the colonial states. The 1933 Convention's provisions are drafted on broader legal terms than the International and European Framework applicable today and have more of a collective declaratory character. This observation is reflected mainly in Article 9, which, on its basis, acknowledges, additional to persecution, some of the main drivers of migration as integral parts to the refugee status.[134]

However, the 1933 Convention did not draw the interest of many states mainly because it was drafted during a period of wars and an unstable political environment. It was ratified, with serious reservations,[135] only by eight states.[136] It came into force in 1935 and applied only to *Nansen refugees*, (i.e., Russians, Armenian, Assyrian, Assyro-

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[134] Article 9 states: 'Refugees residing in the territory of one of the Contracting Parties: unemployed, persons suffering from physical or mental disease, aged persons or infirm persons incapable of earning a livelihood, children for whose upkeep non adequate provision is made either by their families or by third parties, pregnant women, women in childbed or nursing mothers, shall receive therein the most favourable treatment accorded to nationals of a foreign country, in respect of such relief and assistance as they may require, including medical attendance and hospital treatment'.

[135] Ibid Belgium's signature was subject to reservations of Art. 2 para. 3, Art. 9, Art.14 and exception to the colony of Congo or the mandated territories of Ruanda-Urundi. Bulgaria's signature was subject to reservations in Art. 1, Art. 2., Art. 6., Art. 7, Art. 8, Art. 10, Art. 13 and Art. 15. Egypt signed but didn't ratify Egypt's signature was signed with reservations for Art. 1-4 and Art. 13-15. France's signature was subject to reservations for Art. 7, Art. 15 relating to any obligations arising from the governance of colonies, protectorates, overseas territories, territories placed under its suzerainty or territories in respect of which a mandate had been confined to. Norway's signature was subject to reservations for Art. 2 and Art. 14 (b).

[136] Ibid Belgium (4.8.1937), Bulgaria (19.12.1934), Czechoslovakia (21.12.1935), France (3.11.1936), Ireland (28.10.1936), Italy (16.1.1936) and Norway (26.6.1935), Appendix.

Chaldean, Turkish and Saar refugees).[137] The international solution to the human phenomenon of migratory movements, including the inter-wars in Europe, was to extend protection to any nationality. States of the European continent were not immediately enthusiastic about this solution. For example, it was not until 1938, after the drafting of the 1938 Convention concerning the Status of Refugees coming from Germany,[138] that Britain signed, with reservations, the 1933 Convention.[139] The reservations raised by the signatories of the 1933 Convention centered on political and sovereign concerns stemming from the colonies' governance.

The cornerstone of protection for all migrants forced to leave their country of residence is *non-refoulement*, i.e., the principle prohibiting the return of persons to a place where their life may be threatened or at risk. The very first characteristics of the protection framework differ from contemporary international protection. The differences are the following:

(i) protection was provided through issuing passports collectively;

(ii) protection was provided to vulnerable populations of migrants on the move;

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[137] United Nations, Refugees, Background Paper No.78, ST/DPI/SER.A/78, 29 December 1953, 2.
[138] Hathaway, (1984), (n 102) 363.
Article 1 of the 1938 Convention defines 'refugees coming from Germany' as:
'(a) Persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or in fact, the protection of the German Government. (b) Stateless persons not covered by previous Conventions or Agreements who have left Germany territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the Germany Government.
2. Persons who leave Germany for reasons of purely personal convenience are not included in this definition'. League of Nations, Convention concerning the Status of Refugees Coming from Germany, 10 February 1938, League of Nations Treaty Series, Vol. CXII, No. 4461, page 59
[139] Britain's signature was subject to reservations on Art. 1,3,7,12 and 14. R. Beck, 'Britain and the 1933 Refugee Convention: National or State Sovereignty?' (1999) International Journal of Refugee Law 11 (4) 597–624, 620.

(iii) protection was provided by countries in which the vulnerable migrants were already residing;

(iv) there were no restrictions to travel;

(v) refugees were entitled to socio-economic rights;

(vi) a need for an enlarged concept of protection was raised by an international humanitarian organization.

Earlier lack of interest in the ratification of the 1933 Refugee Convention focused on eliminating any pressures that extended to the legal protection offered for *Nansen refugees* to Germans and to other nationalities whenever there was such a necessity.[140] The lack of passports and juridical status of the persons in concern led to the drafting of the 1938 Convention on the Status of Refugees coming from Germany.[141] In 1948, the ICRC requested an enlarged concept of protection,[142] for refugees stressing its humanitarian character, through the Draft Convention for the Protection of Civilians.[143]

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[140] For purposes of chronological cohesion, it is mentioned that the rise of National Socialism in Germany had accompanied the need for protection of the Saar refugees following reoccupation by Germany. During the period in reference, thousands of persons were leaving Germany for the United States, Palestine and other countries of Western Europe. Hathaway (1984), (n 109) 363.

[141] ibid.

[142] In 1948, the International Committee of the Red Cross submitted a Draft Convention for the Protection of Civilians, which contained a provision on Return to Domicile – Emigration, which did not use the word 'refugee' but addressed the refugee problem. The words used for refugees where '[…] persons who, as a result of war or occupation, are unable to live under normal conditions in the place where they may happen to be'. That agreement was desired by the International Committee of the Red Cross to be carried in the text of the 1951 Diplomatic Conference and to be incorporated, as: 'Every person forced by grave events to seek refuge outside his country or ordinary residence is entitled to be received'. UN General Assembly, Aide-Memoire on the Refugee Question, 4 July 1951, A/CONF.2/NGO.2. A copy was retrieved from UN Geneva Library at Palais de Nations.

[143] Article 44 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 provided the following: 'In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively based on their nationality 'de jure' of an enemy State, refugees who do not, in fact, enjoy the protection of any government'. Retrieved at: <https://ihl-databases.icrc.org/ihl/INTRO/380>

The historical/chronological analysis on protection from the early 1920s–1938 demonstrates that *non-refoulement* is a concept that incorporates the element of vulnerability collectively. Although vulnerability as a concept has been neglected during earlier definitions of refugees, it has now become a reference point in today's global discussions concerning refugees.[144] The current system of protection does not incorporate migrants coming from vulnerable situations, thus making a distinction between them and asylum seekers, another protected category.

3.1.5 Human Rights and Protection Through the Inherent Values of Humanity

The thesis identifies the inherent values of humanity as the root of human rights development, thus focusing on a human rights approach to migration, including the protection of persons who may fall outside the current definition of 'refugee'. As such, this research acknowledges the relationship between international protection grounded in the principle of the international obligation to justice and the maintenance of world justice identified as the primary principles that gave birth to protection, alongside the value of dignity, later incorporated in the UDHR. The principle of *non-refoulement* has historically been considered the cornerstone of international protection because of the principles related to justice and the element of vulnerability. Further to that, the values of humanity have historically aimed to demonstrate their importance in the contemporary international system. Respecting the element of vulnerability in addition

[144] The reference regards the Global Compact of Safe, Orderly and Legal Migration and the International Dialogue of Migration 2017, to which understanding migrant vulnerabilities became a subject under discussion. The UN Migration Agency, 'Understanding migrant vulnerabilities: A solution-based approach towards a global compact that reduces vulnerabilities and empowers migrants', 18-19 July 2017, Palais de Nations, Geneva.

to providing protection is an intrinsic (moral) obligation of states and international organizations.

From the above, it becomes clear that granting rights to populations for protection from wars and conflicts has been developed throughout history by civilizations with the norms and values of humanity at the centre. History records important milestones in the commitment to respect the values and fundamental freedoms of humanity in law and policy, which chronologically dates back to 1750 BC,[145] developed against oppression and intolerance[146] in several ancient Kingdoms.[147] Human dignity, for example, conceptualized as 'the principle of primacy' over the interests of States in the Covenant of the League of Nations after the First World War.[148] The value of dignity was immanent in the League of Nations' and the protection of basic rights, starting with the rights of minorities.[149] In the aftermath of the Second World War (25th April–26th June 1945), the drafting of the UN Charter guaranteed fundamental freedoms, thus values that became human rights.[150]

Therefore, this intrinsic awareness for the respect for human dignity, peace, and justice turned into human rights for all.[151] The preamble of the 1945 UN Charter, refers to faith

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[145] The King of Babylon expresses his will that the strong should not oppress the weak, 1750 BC Mesopotamia.

[146] Cyrus declares freedom of Religion throughout the Persian Empire, 539 BC.

[147] Other recordings refer to the Treaty of Peace in 1279 BC in Egypt, 1215 Magna Carta, England which established the principle that everyone is subject to the law, even the King, and guarantees the rights of individuals, the right to justice and to a fair trial, 1280 The Code of War prohibits the extermination of women, children and aliens, 1789 The Declaration of the Rights of Man and of the citizen in France, 1864 Geneva Convention for Humanity on the battlefield.

[148] United Nations, Department of Public Information. (1995). Boutros Boutros-Ghali, 'The United Nations and Human Rights, 1945-1995' Department of Public Information p.5. Retrieved from United Nations Library, DPI/1676 at Palais de Nations, Geneva.

[149] ibid 5 para 16.

[150] Clark M. Eichelberger, *The United Nations: The First 20 Years* (Macfadden-Bartell 1965)

[151] 'The United Nations and Human Rights 1945-1995, with an introduction by Boutros-Ghali, Secretary-General of the United Nations', (n 148) para 20.

in fundamental human rights, the dignity and worth of the human persons, the equal rights of men and women and nations large and small.[152] It declares that the conditions under which justice and respect for the obligations arising from the treaties and other sources of international law must be maintained in order to promote social progress and better standards of life.

The UN Charter aims to achieve international cooperation and solve international problems including those of humanitarian character by promoting and encouraging respect for human rights and fundamental freedoms for all without discrimination as to race, sex, language, or religion.[153] It provides for its application to individual countries, members or non-members of the United Nations including any regional arrangements.[154] Importantly, all members pledge themselves to take joint and separate action in cooperation with the UN for the achievement of the purposes of[155] international, economic and social cooperation.[156] For the purpose of promoting and respecting human rights, Article 55 (c) makes it an obligation for the UN to take appropriate action.[157] The Charter marks the beginning of the human rights

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[152] United Nations, 'Charter of the United Nations', 24 October 1945, 1 UNTS XVI
[153] ibid Article 1 (3).
[154] ibid Article 2 (6) and Article 52.
[155] ibid Article 56.
[156] ibid Article 55.
[157] Article 55 of the UN Charter states: 'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'

development and promotion under the UN system as the first international treaty, the aims of which are based on a universal respect for human rights.[158]

Following the adoption of the UN Charter and two years deliberations of the Human Rights Commission, the UDHR was adopted on 10th December 1948. The wording of the UDHR is astounding from a human rights perspective. It declares that 'all human beings are born free and equal in dignity and rights'[159] and that everyone is entitled to all the rights and freedoms without any distinction of any kind.[160] These values reiterated in the General Assembly's Resolution 217A[161] (by vote of 48 countries) marking the cornerstone of international law from which state obligations, and potentially responsibility in the context of protection, arise.

Protection is inextricably connected to the rights to life, liberty, and security of person,[162] and the prohibition of torture or cruel, inhuman or degrading treatment or punishment.[163] This protection nexus cannot be separated from the UDHR's provisions for everyone's 'right to leave any country, including his own, and to return to his country' (Article 13), 'to seek and enjoy in other countries asylum from persecution' (Article 14),[164] or the right to recognition as a person before the law.[165] Notably, the

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[158] United Nations, Department of Public Information. (1995). Boutros Boutros-Ghali, 'The United Nations and Human Rights, 1945-1995' Department of Public Information p.5. Retrieved from United Nations Library, DPI/1676 at Palais de Nations, Geneva.
[159] Article 1 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 5
[160] ibid Article 2.
[161] ibid 183rd Plenary meeting, 10 December 1948.
[162] ibid Article 3.
[163] ibid Article 5.
[164] Article 13 and 14, UDHR, ibid. The right to leave any country is reported to have its origins within the Peace of Westphalia incorporated in the notion of *jus emigrandi*. For more details, please refer to Betts and Loescher, (2011) (n 48) 6-7. More analysis on the right to leave will follow in this section.
[165] ibid Article 6.

inalienability of human rights and *non-refoulement* as a principle recognized in international customary law,[166] provide a normative orientation of human rights that enhances their legality. Normativity mainly relates to this thesis' human rights approach, while legality relates to the responsibility of the actors involved in protecting irregular migrants in the Mediterranean.

The Declaration represents an important promise rooted in respect for everyone's dignity and life. Over time, the UDHR has acquired a legal character through international customary law or treaty law.[167] The nature of human rights reflects a moral account of human possibility, which represents a social choice of a particular moral vision regarding human potentiality, which rests on a substantive account of the minimum requirements of a life of dignity.[168] Such analysis is based on the international normative universality of an attractive underlying moral vision.[169] It has been identified that human rights are regularly held to be inalienable, not in the sense that one cannot be denied the enjoyment of these rights, for every repressive regime daily alienates its people from their human rights, but in the sense that losing these rights is morally unacceptable; violation of these basic human rights directly impacts the human dignity of victims and denies them the decency in living their lives.[170] For example, Donnelly

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[166] *Non-refoulement* has a constant reaffirmation as international customary law. Walter Kälin, Martina Caroni, Lukas Heim, (2011) Article 33, para. 1 Prohibition of expulsion or return ('refoulement')/Défense d'expulsion et de refoulement. Extract from Mathew, Harley, (2016) (n 4) 32.
[167] Hurst Hannum, 'The UDHR in national and international law' (1998) *Health and Human rights*, 144-158.
[168] ibid 17.
[169] ibid 24. Also, the author argues that 'there is both a constructive interaction between moral vision and political reality and a constructive interaction between the individual and society (especially the state), which shape another through the practice of human rights. The limits and requirements of state action are set by human nature and the rights it grounds, but the state and society, guided by human rights, play a major role in creating (or realizing) that nature', 19.
[170] ibid 19.

explains that,[171] human dignity is the foundational principle of international human rights law, the ultimate value that gives coherence to human rights.[172] Notably, several years following the adoption of the UDHR and despite its inspiring and determinative wording, it is often received with criticism which is mainly attributed to an inadequate implementation by States.[173] Doubts have been expressed regarding its binding effect on States, whereas others have argued that theoretically, a declaration may, by custom, become recognized as being binding upon States.[174] The Declaration served as a model for many new institutions and rights' instruments adopted in the active period of constitution-making following the Second World War.[175] Subsequently, the Declaration became binding through international customary law. The controversy relating to the character of human rights was later affirmed in the Vienna Declaration and Programme

[171] Jack Donnelly, *Universal human rights in theory and practice* (Cornell University Press 2013) The author is quoting from Hasson (2003), 83.

[172] Ibid 28.

[173] Mary Ann Glendon, 'The rule of law in the Universal Declaration of Human Rights' (2004) Northwestern Journal of International Human Rights 2(1) 'It is a common place that long lists of rights are empty words in the absence of a legal and political order in which rights can be realized', 2; Emilie M. Hafner-Burton, Kiyoteru Tsutsui, 'Human rights in a globalizing world: The paradox of empty promises' (2005) *American journal of sociology*, 110(5), 1373-1411. 'The authors examine the impact of the international human rights regime on governments' human rights practices. They propose an explanation that highlights a "paradox of empty promises", (Abstract, 1373).

[174] Glendon, ibid.

[175] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976 993 UNTS 3; Convention on the Elimination of All Forms of Racial Discrimination adopted 7 March 1966, entered into force 4 January 1969 660 UNTS 195), Convention on the Elimination of All Forms of Racial Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981 A/RES/34/180), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987 1465 UNTS 85; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990 1577 UNTS 3); Convention on the Rights of Persons with Disabilities (adopted 24 January 2007 A/RES/61/106).
Also, see Glendon (n 173) 12, para 26.

Action in 1993, whereby it was emphasized that human rights are universal, indivisible, interdependent and interrelated.[176]

The Declaration incorporates the right to asylum and the right to protection from any acts contrary to the purposes and principles of the UN. *Non-refoulement,* which is integrally connected to UDHR's right to be protected from torture or degrading treatment or punishment, is a rule of international customary law. The same stands for the UN Charter, which incorporates the value of dignity in its core. In support of this, reference is made to the International Court of Justice's rulings (ICJ); it is argued that a right in international customary law is based on the respect of the inherent dignity and worth of a human person.[177] To this end, the ICJ recognized human dignity as the normative basis for the progressive realization of human rights law.[178] Therefore, the normative basis of *non-refoulement* is the value of dignity.

Non-refoulement, which is at the core of protection, is part of international customary law rules. The nexus between human rights and international protection is based on the international obligation to promote justice and the value of dignity as a normative right,

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[176] '5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms'. UN General Assembly, 'Vienna Declaration and Programme of Action', 12 July 1993, A/CONF.157/23.

[177] International Court of Justice, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Separate Opinion of Judge Robinson, 294, para 5.

[178] The ICJ in the case of Chagos Archipelago, recognized the respect of human dignity as a general principle of law. The case concerned the right to self-determination.
Also see, Niloufar Omidi, Opinio Juris, 'The analysis of the ICJ order in the case concerning "Alleged Violations of the Treaty of Amity" (Iran vs US), Who is the Real Winner?' 24.10.2018. The ICJ activated the autonomous legal regime of provisional measures of protection. Retrieved at: <http://opiniojuris.org/2018/10/24/the-analysis-of-the-icj-order-in-the-case-concerning-alleged-violations-of-the-treaty-of-amity-iran-v-us-who-is-the-real-winner/>

as identified by the ICJ. *Non-refoulement* is the nexus between international human rights and protection. Arguably, the normative nature of this principle, which includes, as previously demonstrated, both refugees and populations or persons coming from vulnerable situations, creates further responsibilities regarding their protection. This outcome leads to an examination of the actors who may have a responsibility to protect irregular migrants in the Mediterranean as foreseen by Article 13 (2) UDHR.[179] This can be identified as the nexus between *non-refoulement* and any entry restrictions in the country of origin or habitual residence. Moreover, the right to leave is a self-standing human right and does not depend on any other entry-exit rights.[180] The UDHR does not distinguish between the citizens of a state over others. The UDHR being 'universal' and applicable to all humankind, it safeguards everyone's right to leave their country without states' prior consent. Therefore, the right to asylum is significant in that regard but the UDHR does not reduce the right to leave to the right to request asylum; it goes a step further by envisaging the protection of all from any acts contrary to the UN's purposes and principles.[181]

This reasoning is significant in the context of this thesis; it suggests that irregular migrants in the Mediterranean are a category of persons coming from vulnerable situations caused by acts or circumstances that are, arguably, contrary to the UN's

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[179] Article 13 para 2, UDHR

[180] Elspeth Guild, Conference Workshop C – The human right to leave a country, at the Conference 'Conflict and Compromise between Law and Politics in EU migration and Asylum Politics', Odysseus Network, 1st February 2018, Brussels. Retrieved at <http://odysseus-network.eu/conference-2018/>; Ulrike Brandl, Odysseus Conference, ibid; Evelien Brouwer, 'Extraterritorial migration control and human rights: Preserving the responsibility of the EU and its Member States' 195-224, in Bernard Ryan, Valsamis Mitsilegas (edts) *Extraterritorial Immigration Control: Legal Challenges* (Brill Nijhoff, 2010) 224

[181] Article 14 (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations, Universal Declaration of Human Rights.

principles and purposes. The following argument suggests that a category of irregular migrants in vulnerable situations does not necessarily need to prove persecution under one of the Refugee Convention's grounds. Rather, they may be eligible for international protection based on their right to leave any country and claim protection in another state if their country of residence violates the UN's principles and purposes.

Despite the significance of the right to leave, this is not an absolute right and there are certain restrictions including that there must be necessity, proportionality and desirability in order to protect the national security, public order or the morals or freedoms of others.[182] These are the only limitations in international law and although not stated in the UDHR, they are included in the International Covenant on Civil and Political Rights (ICCPR), which was ratified by 169 countries, and includes the right to leave any country.[183] The UN Human Rights Committee has stated that the freedom to leave a state's territory may not be dependent on any specific purpose and time or even to stay outside the country.[184]

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[182] Article 12 (1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. (2). Everyone shall be free to leave any country, including his own. (3). The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Covenant. (4). No one shall be arbitrarily deprived of the right to enter his own country. ICCPR

[183] The International Covenant on Civil and Political Rights is accompanied by an Optional Protocol signed by all countries that signed the Covenant (except Greece, Switzerland and the UK). The Protocol contains a mechanism of a dispute resolution. Accordingly, the Human Rights Committee produces an Opinion which is quasi-judicial.

[184] Paragraph 8, 'Freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. Thus, travelling abroad is covered, as well as departure for permanent emigration. Likewise, the right of the individual to determine the State of destination is part of the legal guarantee. As the scope of article 12, paragraph 2, is not restricted to persons lawfully within the territory of a State, an alien being legally expelled from the country is likewise entitled to elect the State of destination, subject to the agreement of that State'. UN Human Rights Committee (HRC), CCPR

The question arises as to what extent the EU acquis has respected the right to leave a country as expressed in international law and how the UDHR has influenced or became a source of law within EU law. These questions and arguments will gradually unfold, following a historical analysis of the right to asylum and the UN responsibility to protect, since the rights of irregular migrants in the Mediterranean are still addressed within a restrictive asylum framework.

3.1.6 What about vulnerabilities?

In the introduction, the author suggests that the irregular maritime migrants, as a category, may not be accepted as beneficiaries of international protection by the Member States, as they may fall outside of the 1951 Refugee Convention framework.[185] What gave rise to a further discussion in this thesis, is the reference on vulnerabilities in the New York Declaration and the term used at the preparatory work before the adoption of the Global Compact on Migration, about migrants coming from vulnerable situations.[186]

The author, identifies the following vulnerabilities in relation to irregular maritime migrants:

(i) out of their status as irregular migrants, asylum seekers, or other,

(ii) the drivers of their irregular journey,

General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9.

[185] See 1. Introduction

[186] IOM, International Dialogue on Migration, 'Understanding migrant vulnerabilities: A solution-based approach towards a global compact that reduces vulnerabilities and empowers migrants, Background Paper', 18-19 July 2017, Palais de Nations Geneva.

(iii) the state dependency to be rescued and protected and also, to be allowed access to the territory of Member States,

(iv) the negative response of Member States and, potentially, the EU agencies while they are at sea,

(v) smuggling,

(vi) no clear understanding of the EU's responsibility in maritime laws and the extent of competence in the EU agencies' external role.

Moreover, the author has identified that the concept of vulnerabilities is not a new one, and that the framework on protection has actually endorsed it (i) within the principle of non-refoulement and (ii) the term persecution,[187] in the First Refugee Convention of 1933.

The vulnerabilities of irregular maritime migrants are either developed prior to (drivers of migration) or during their journey (the negative response of Member States and smuggling). The number of fatalities and of people who were smuggled into the Mediterranean in order to reach the EU Member States' shores in the years under examination indicate that risking an irregular journey at sea increases the migrants' vulnerabilities.

The thesis argues that vulnerability should be considered an important element towards protection and it should be measured during the actions of EU agencies. The reason for this is that vulnerability as a concept can be understood as a universal and constant

[187] See Section 3.1.4

inherent of the human condition.[188] As such, it should move way from current discrimination models towards equality, consistent with Fineman's vulnerability theory. It is worth mentioning that although Fineman uses the equality principle, based on what she observes in the American society, arguing that a responsive state is most conducive to producing subjects who are resilient in the face of neoliberal pressures.[189] However, the elements of vulnerability, as she explains, are associated with victimhood, deprivation, dependency or pathology.[190] The vulnerability's potential in describing a universal, inevitable and enduring aspect of human condition must be at the heart of the concept of social and state responsibility.[191] She identified that, 'vulnerability should be understood as arising from our embodiment, which carries with it the ever-present possibility of harm, injury, and misfortune from mildly adverse catastrophically devastating events, whether accidental, intentional or otherwise', and she also identifies 'natural' disasters beyond our individual control to prevent'. She concludes that, 'equality must be a universal resource, a radical guarantee that is a benefit for all', while 'the state's commitment to equality [must be thought of] as one which is rooted in an

[188] Martha A. Fineman, 'The vulnerable subject: Anchoring equality in the human condition', 177-191 in Martha A. Fineman (ed), *Transcending the boundaries of law: Generations of Feminism and Legal Theory* (Routledge-Cavendish 2010).

[189] Primarily she developed the theory after observing the content and influence of American law, when she explained that equality is weak to address the disparities in the economic and social well being amongst various groups in society; and that inequalities are produced and reproduced by society and its institutions. ibid 3- 5.

[190] Martha Fineman, *The Autonomy Myth: A Theory of Dependency*, (The New Press 2004) 33-35.

[191] Fineman developed the theory based on observations of the inequalities in the American system and, therefore, defended that there is an obligation for the state to ensure a richer and more robust guarantee of equality afforded under the equal protection model. Fineman, M. A. (2010). The vulnerable subject (n 188) 9. Other authors refer to the meaning of vulnerability which mainly relates to 'vulnus', meaning 'wound', that somehow the concept comes with a harm and suffering feature. Lourdes Peroni, Alexandra Timmer, (2013). 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' *International journal of constitutional law*, *11*(4), 1056-1085, 1058, referring also, to Neal, M. (2012). "Not gods but animals": human dignity and vulnerable subjecthood. *Liverpool Law Review*, *33*, 177-200.

understanding of vulnerability and dependency, recognizing that the autonomy is not a naturally occurring characteristic of the human condition, but a product of social policy'.[192] Fineman's theory of vulnerability supports what the international dialogue on migration, attempted to introcude to states during the discussions for the adoption of the GCM, the term of 'migrants coming from vulnerable situations'.

There is a nexus between human rights and vulnerability; for example, when a person's human right is violated, some degree of vulnerability develops accordingly. However, literature on the subject suggests that it is not that straightforward.[193] The ECtHR's response on the concept of group vulnerability is used frequently, but it is limited with regard to cases of irregular migration.[194] In *M.S.S. v Belgium and Greece*, the Court found the applicant particularly vulnerable because of all he had been through during his migration journey and the traumatic experiences he had to endure.[195] Moreover, the Court identified that the applicant's distress was accentuated by the vulnerability

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[192] ibid *Fineman,* The vulnerable subject (n 188) *9*

[193] Peroni & Timmer (2013) Vulnerable groups (n 191); Neal, (2012) (n 191). Also, Bryan S. Turner, *Vulnerability and Human Rights* (Penn State University Press 2006). Anna Grear, points on the one hand, that the UDHR is a system founded on a concern of embodied vulnerability and on the other that many groups (women, people of color, asylum seekers) fall outside the scope of universal protection of human rights. Anna Grear, 'Challenging corporate 'humanity': Legal disembodiment, embodiment and human rights' (2007) *Human Rights Law Review*, *7*(3), 511-543.

[194] Peroni & Timmer (2013) (n 191) 1062, 1063. D.H. and others v. the Czech Republic (GC), App. No. 57325/00, 47 Eur. H.R. Rep. 3, 182 (2007) (Roma); Alajos Kiss v. Hungary, App. No. 38832/06, 20 May 2010, (disability); and M.S.S. v. Belgium and Greece, App. No. 30696/09, 53 Eur. H.R. Rep. 2, 251 (2011) (asylum). and Kiyutin v. Russia, App. No. 2700/10, 53 Eur. H.R. Rep. 26, 74 (2011). Moreover, Moritz Baumgärtel, introduces 'the concept of migrant vulnerability in an effort to remedy that shortcoming by making an already existing legal principle fit for the daunting task posed by migration cases'. Moritz Baumgärtel, 'Facing the challenge of migratory vulnerability in the European Court of Human Rights' (2020) *Netherlands Quarterly of Human Rights*, *38*(1), 12-29. Also, Sylvie Da Lomba, 'Vulnerability and the right to respect for private life as an autonomous source of protection against expulsion under Article 8 ECHR' (2017) *Laws*, *6*(4), 32.

[195] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, para. 232.

inherent in his situation as an asylum seeker.[196] Particularly, in para 251 of the judgment, it is stated that the 'Court attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection (see, mutatis mutandis, Oršuš and Others v. Croatia [GC], no. 15766/03, § 147, ECHR 2010-...)'.[197] It then, notes 'the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union Reception Directive'.[198]

From the above, we understand that the ECtHR could expand protection to irregular maritime migrants coming from vulnerable situations, as belonging to this group, which is shaped by specific vulnerabilities due to their experiences. These experiences (i.e., drivers of migration, vulnerabilities due to smuggling, and the Member States' negative response), could amount to serious harm if the persons within this category are to be returned without some form of protection. Similarly, in the case of *M.S.S. v Belgium and Greece,* those experiences related to the shortcomings of the asylum seekers system in Greece. The author argues that once the ECtHR identifies the category of irregular maritime migrants as per their situational circumstances taking into account their vulnerabilities it could then proceed to decide the limits of such vulnerabilities as has already done in the case of *M.S.S. v Belgium and Greece,* and the Dublin II Regulation,

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[196] ibid para 233.
[197] ibid para 251. In the case of Oršuš and Others v. Croatia, Judge Sajo points to the open-endedness of the vulnerable group concept, as limited to a narrowly defined set of actors by relying on a series of other indicators. Also, see Peroni & Timmer, (2013) (n 191) 1069. Also, See ECtHR case of *Tarakhel v. Switzerland*, Application no. 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014.
[198] ibid para 251.

while the asylum seekers already entered Member States. Subsequently, substantive equality focuses on the group which has suffereda disadvantage.[199] Baumgärtel, argues that migratory vulnerability describes 'a cluster of objective, socially induced, and temporary characteristics that affect persons to varying extents and forms' which must be examined on a case-by-case basis and in reference to identifiable social processes.[200] He then identifies that 'migratory vulnerability may give rise to distinct legal effects such as enlarged scopes of protection' and 'shifts the burden of proof procedural and positive obligations and a narrower margin of appreciation, possibly even 'triggering' proceedingsunder Article14ECHR'.

When searching within the database of the CJEU's case law it yields 106916 results using the keyword: vulnerability As for the CJEU, the word vulnerability appears in some of the judgments in the AFSJ and refers to asylum seekers (while they are in the Membe States).[201] In the case of *Jawo*, the CJEU made reference to a particular vulnerability (extreme poverty and individual circumstances) and to typical vulnerability (being uprooted).[202] The CJEU mentioned the ECtHR's M.S.S. case (as it involved transfers under the Dublin Regulation) but also, found that the indifference of the authorities was incompatible with human dignity which could trigger Article 4 of the EU Charter.[203]

Based on the above considerations, I argue that irregular maritime migrants' vulnerabilities, even if their situation is temporary (i.e., irregular journey at sea), should

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[199] Sandra Fredman FBA, *Discrimination law*. (Oxford University Press, 2011) 26.
[200] Baumgärtel, M. (2020). Facing the challenge of migratory vulnerability in the European Court of Human Rights. (n 194) 12.
[201] Results from keyword search in the Court of Justice of the European Union case database <https://bit.ly/3HCTbQH>
[202] Case C-163/17 Abubacarr Jawo v Bundesrepublik Deutschland Judgment of the Court (Grand Chamber) of 19 March 2019. para 46, 95.
[203] Ibid para 92.

be acknowledged as part of the drivers of irregular migration and the vulnerabilities inherently related to the victims of crimes of human smuggling and violations of the right to life, the right to leave any country and the right to asylum. As we have seen, this argument can be supported by Fineman's theory and the ECtHR's decision on *M.S.S. v Belgium and Greece*, during which the vulnerabilities of asylum seekers were identified both as a category and individually in relation to the applicant. I agree with Baumgärtel's view that asylum seekers – and I add, irregular maritime migrants – should not be considered as an unprivileged population because they do enjoy rights under international and EU law; however, it is through the lens of vulnerability concerning their category that the need for protection arises.

The process of identifying the vulnerability of the category of irregular maritime migrants does not begin by identifying their particular characteristics under the 1951 Refugee Convention; rather, it starts by having in mind the fact that they become vulnerable during their journey. Specifically, this category of migrants relies on the right right to leave their country of origin but who cannot do so through the normal legal avenues. Therefore, I agree with Baumgärtel, who embraces Fineman's theory, in articulating migratory vulnerability as something to be defined on a case-by-case basis, while maintaining the universal nature of vulnerability.[204]

While the procedures of the CEAS do not apply to irregular migrants at sea, this category of migrants faces a situational risk which adds to their vulnerability. Vulnerabilities are, as we saw, inherent in the right to asylum and may be related to the causes of seeking

[204] Aysel Küçüksu, 'Fineman in Luxembourg: Empirical lessons in asylum seeker vulnerability from the CJEU' (2022) *Netherlands Quarterly of Human Rights*, *40*(3), 290-310, 295

asylum protection, an international obligation to justice, the legal definitions of what constitutes a refugee, and the principle of non-refoulement.

Persecution can be considered the result of specific vulnerabilities, and so can the drivers of irregular migration (i.e., poverty, environmental disasters etc.), exacerbated during the journey. The circumstances leading to the need for rescue and protection inevitably increase the vulnerability of irregular maritime migrants, who should be recognized as a category within the EU and international law to enjoy the legal right to rescue and protection. The parameters of this category should be decided by the EU bodies and envisioned in the policies and legal framework of migration management within the AFSJ.

Part 2 – THE INTERNATIONAL FRAMEWORK ON PROTECTION AND THE RECENT RESPONSE ON IRREGULAR MIGRATION

3.2.1 The UN's Responsibility to Refugee Protection

The United Nations' General Assembly (UNGA), explicitly recognized the responsibility of the UN for the international protection of refugees.[205] Through a Resolution, the UNGA decided to establish, as of 1st January 1951, the High Commissioner's Office for Refugees (later renamed the United Nations High Commissioner for Refugees, UNHCR) and called upon the UN's Economic and Social Council (ECOSOC) to submit a draft for its functioning.[206] The UNGA understood that the issue of refugees and stateless persons had to be international in scope and nature. It purported that its solution was the voluntary repatriation of refugees or their assimilation within new national communities.[207] The term 'international protection of refugees' was introduced in 1949 by ECOSOC on the establishment of the UNHCR prior to the adoption of the 1951 Refugee Convention. In the Preamble to the 1951 Refugee Convention, it was stated that refugees are assured the widest possible exercise of fundamental rights and

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[205] UNGA Res 319 (IV), (3 December 1949) Refugees and Stateless persons, Part A, 265th Plenary meeting.
Also see, Statute of the High Commissioner Office for the Status of Refugees, Chapter I, General Principles, reads, '(1) It shall be the duty of the High Commissioner for Refugees to provide international protection for the refugees falling under his competence and to seek permanent solutions for the problems of these refugees, by assisting Governments, and, subject to the approval of the Governments concerned, voluntary agencies, to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities'. UN Economic and Social Council (ECOSOC), Resolution 319 (XI): Refugees and stateless persons, 16 August 1950, E/RES/319 (XI); UNGA 'Statute of the Office of the United Nations High Commissioner for Refugees', A/RES/428(V) (14 December 1950) '[In Resolution] 319(IV) of 3 December 1949, the United Nations General Assembly decided to establish a High Commissioner's Office for Refugees as of 1 January 1951', Introductory Note.
[206] ibid para 4 (a).
[207] ibid UNGA Res. 319(IV), 03.04.1949.

freedoms that all human beings enjoy without discrimination.[208] Thus, the question of responsibility in upholding human rights is connected to the UNHCR's mandate.

It has been established thus far that international protection is premised on human rights principles. A possible interpretation of international protection in relation to migrants would be that they all enjoy the same human rights, which are inalienable and cannot be denied to anyone. In general, citizens' human rights are protected by states' constitutional traditions, however, in the case of refugees and stateless persons, their states of origin or residence cannot uphold these rights, thus leading them to request international protection. Therefore, other states are called upon to offer effective protection to compensate for other states' failure to provide it.

The 1951 Refugee Convention states that the phenomenon of refugees is of social and humanitarian nature and that international cooperation is needed.[209] It then acknowledges that the granting of asylum could place an unduly heavy burden on specific countries. However, it provides that this should not become a cause of tension between states and that they should be assisted by the UNHCR which is responsible for coordinating effective measures.[210] Consequently, the 1951 Refugee Convention provides for a shared responsibility between the UNHCR and states. The question arises as to what extent UNHCR allows the decision on protection to be taken by states and other regional organizations. This question is important for the purposes of this thesis

[208] Preamble of the 1951 Convention relating to the Status of Refugees, states that the High Contracting Parties, 'CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination'.
[209] ibid 'expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States'.
[210] ibid.

because it affects the level of responsibility shared by the EU in the context of international protection which may apply even extraterritorially.

It is reported[211] that a UNGA resolution[212] in 1949 explicitly recognized the United Nations' responsibility for the international protection of refugees.[213] It is clear that the mandate of the UNHCR is to provide international protection to refugees, under the auspices of the United Nations, and assist governments, subject to their approval, to facilitate private organizations with the voluntary repatriation of refugees or their integration within new national communities.[214] It is observed that the wording of Article 1 UNGA resolution grants legal authority to the UNCHR to decide who is entitled to international protection while it excludes the political character of the envisaged international protection and clarifies, in a mandatory manner, its humanitarian character.[215] All states have responsibility under the 1951 Refugee Convention and are expected to cooperate with the UNHCR to guarantee and safeguard refugees' fundamental rights within their territories.

The responsibility of the UNHCR is provided within the role of the High Commissioner, who, in accordance with Article 8 of its Statute 'shall promote the conclusion and

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[211] UNGA A/AC.96/830 (7 September 1994) 'Note on International Protection', para 11.

[212] UNGA Refugees and stateless persons A/RES/319 (adopted 3 December 1949).

[213] It is thereby clarified that the term 'international protection of refugees' was introduced for the first time in the Economic and Social Council (ECOSOC) and the General Assembly resolutions on the establishment of UNCHR. UNGA Statute of the Office of the United Nations High Commissioner for Refugees, (adopted 14 December 1950) A/RES/428(V), para. 11.

[214] UNHCR Statute, UNGA, A/RES/428(V) (14 December 1950), Statute of the Office of the United Nations High Commissioner for Refugees, Annex, General Provisions Art. 1.
Also, in November 1957, the General Assembly established the Executive Committee as UNHCR's governing body. The 'ExCom' meets annually and adopts its Conclusions which are not formally binding but are widely regarded as a form of soft law. W. Maley, What is a Refugee? (OUP 2016) 18.

[215] UNHCR Statute, Annex, General Provisions, Art. 2 provides that 'The work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule of law, to groups and categories of refugees'.

ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto'.[216] The UNHCR's supervisory responsibility is defined as 'the legal process that empowers authorized institutions to apply certain procedures to assure the proper functioning of the legal order by inducing subjects to observe obligations incumbent on them'.[217] Norms of customary international law relating to the protection of refugees, for example, the principle of *non-refoulement*, could fall within the supervisory role of the UNHCR. In contrast, the term 'convention' refers only to one source of international law, i.e., international treaties.[218]

Turk, analyzing the UNHCR's supervisory responsibility, concludes that there is no proper procedure implementing this kind of responsibility, nor has an international enforcement mechanism been established in this regard.[219] Nevertheless, the UNHCR's supervisory responsibility extends to all refugees falling under its competence deriving from the relevant UNGA's Resolutions.[220] In 1994, a UNGA Resolution framed the declaration of the right of international protection to be in collaboration with Governments and non-governmental organizations.[221] What is the extent of States' responsibility according to the 1951 Refugee Convention and the UNHCR's mandate? The sovereign states have primary responsibility to respect and ensure everyone's fundamental rights within their territory, including persons seeking admission at their

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[216] ibid Article 8 (a) 'Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;'.
[217] Volker Turk, 'UNCHR's Supervisory Responsibility' (2001) Rev. Quebecoise de droit int'l, 14, 135.
[218] ibid 145.
[219] ibid 141.
[220] ibid 142.
[221] UNGA Note on International Protection (adopted 7 September 1974 A/AC.96/830) para 12.

borders who may be refugees. States also have an obligation to international solidarity within the international community.

The UNHCR's cooperation with governments is further clarified in the 1951 Refugee Convention.[222] Article 35 of the Convention obliges the Contracting States to cooperate with the UNHCR, or any other agencies that may succeed it, in its duty to supervise the said Convention. The Contracting States undertake the obligation to implement the Convention and the laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.[223] Any disputes of interpretation or application of the Refugee Convention are to be settled by the International Court of Justice.[224] The UNHCR has the supervisory role in implementing the Refugee Convention, whilst states have the primary responsibility for its implementation. A closer examination on the refugee definition aims to identify any gaps in the international protection framework, especially when applied to the contemporary phenomenon of irregular maritime migration. When applied, two definitional elements may deprive migrants of their human rights or limit them to a certain degree; these involve the term 'persecution' and the criterion that migrants entitled to asylum must be 'outside' of their country of origin or habitual residence.

3.2.2 The 1951 Refugee Definition

The 1951 refugee definition emerged at the end of the Second World War, and it has generally changed the picture with the prevalence of strong economic and political

[222] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954 189 UNTS 137) (Refugee Convention).
[223] ibid Article 2.
[224] Article 38 on Settlement of Disputes, 1951 Refugee Convention ibid.

nationalistic policies.[225] However, the definition placed the right to asylum within geographical and chronological limits as prevailed and dictated at the time. The time limits, as stated in the Refugee Convention, concerned events occurring before 1st January 1951. The well-founded fear of persecution is a core element linked to the grounds of race, religion, nationality, membership of a particular social group, or political opinion. These elements are subject to the unwillingness of persons to avail themselves to the protection of the state of their nationality. The 1951 Convention does not define persecution, but it has a collective character referring to all persons after 1st January 1951.

Reflecting on the differences between the 1951 and 1933 Refugee Conventions, it appears that the first, introduced a new criterion reflecting the realities of the time, namely the 'outside of the country of origin' requirement. On the one hand, this criterion reflected the reality at the time considering that Jews were stateless and persecuted in Europe. On the other hand, the country of persecution is the country of origin, not the country of residence. An important evolution, in terms of protection, was the adoption of the 1967 Protocol Relating to the Status of Refugees. Under this Protocol, refugees and stateless persons were to be legally protected within the same Convention without any chronological or geographical restrictions.[226] The 1967 Protocol removed those barriers and provided the 1951 Refugee Convention with universal coverage.[227] The geographical scope of the refugee regime was initially confined to post-

[225] United Nations, Refugees, Background Paper No.78, ST/DPI/SER.A/78, 29 December 1953. United Nations Department of Public Information Research Section. Retrieved from UN Library, Palais de Nations, Geneva.

[226] Preamble and Articles I of the Protocol Relating to the Status of Refugees, UNGA Protocol Relating to the Status of Refugees, (adopted 31 January 1967, entered into force 4 October 1967 606 UNTS 267).

[227] Ibid Introductory Note of the Office of the High Commissioner for Refugees.
Also see 'The Universalization of the Refugee Convention' in Mathew, Harley (2016) (n 4) 30-35

colonial Europe and expanded to the international community, as was the work of the UNHCR which then expanded into a global refugee regime.[228] Initially, the UNHCR's protection concerned legal assistance or services,[229] but with the abolition of the geographical and time limits within the 1951 Convention by its 1967 Protocol it functioned as an extension of the UNHCR's mandate transforming it from a limited and strict refugee regime to a humanitarian agency.[230]

In theory and practice, the most important in terms of responsibility is the content of Article 33 on *non-refoulement*. It prohibits the expulsion or return of persons to territories where their life would be threatened on account of their race, religion, nationality, membership of a particular social group, or political opinion.[231] Exceptions to the status of refugees relate to specific reasons stated in Article 1F of the Refugee Convention.[232] This principle is the cornerstone of asylum protection extended to other

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[228] Betts and Loescher, (2011). 'Refugees in international relations' (n 48) 8.
[229] Sophia Benz, Andreas Hasenclever, (2011). 'Global Governanceof Forced Migration' 185–212 in Betts and Loescher, *Refugees in international relations*, (n 48) Ed. 2013, 188. Also, it is reported by a non-governmental observer that during the negotiations for the 1951 Convention, there was an impression that protection was directed towards the helpless sovereign states against the wicked refugee. This information is recorded in James C. Hathaway, 'The Global Cop-Out on Refugees' (2019) *International Journal of Refugee Law*, 30(4), 591-604
[230] ibid 185, Betts& Loescher (2011) , Ed. 2013, (n 48) 189. The authors state accordingly that the General Assembly extended UNHCR's mandate to protect the migrants falling outside the 1951 Refugee Convention and for the first time assisted IDP's in Sudan in the year 1971.
[231] Article 33 – Prohibition of expulsion or return ('Refoulement') '1. 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. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'. 1951 Refugee Convention.
[232] Article 1F. 'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations', 1951 Refugee Convention.

vulnerable migrants. The *non-refoulement* principle is also significant in terms of the responsibility of the EU, the Member States, and the EU agencies. It is a principle that underlines protection in all other instruments, such as the Transnational Organized Crime and the Laws of the Sea, (See Study Three - Sections 5.1.3 and 5.1.5).

The 1951 Refugee Convention had a wider impact in restricting protection (asylum) upon states' decisions. Although, a person's status as a refugee may be decided based on the UNHCR's refugee mandate in its statutory basis and the UNGA resolutions, it is also the states' decision as part of the Refugee Determination Procedure. Ideally, states should cooperate with the UNHCR or, when deciding individually, the governments should be guided by the UNHCR criteria for the refugee status' eligibility.[233] Even though this initial idea of providing protection to refugees still holds, it has progressed since the evolution of the EU agencies. Later, this will be discussed in relation to the establishment of the European Asylum Support Office (EASO), mandated to assist the EU Member States in implementing EU legal acts within the Common European Asylum System (CEAS).

Hathaway and Foster refer to refugee law as a powerful international human rights mechanism.[234] This mechanism is declaratory in nature. This means that needing protection occurs prior to the formal determination of the refugee. In other words, individuals do not become refugees because of their recognition as such but are instead recognized because they are refugees.[235] Hathaway and Foster argue that once the

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[233] UN High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3

[234] James C. Hathaway, Michelle Foster, *The law of refugee status* (Cambridge University Press 2014) 1

[235] UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951.

criterion of alienage (i.e., being outside of the country of origin) is satisfied, then the rights under international law apply regardless of any status recognition.[236] The UNCHR's statement, together with the argument of Hathaway and Foster, is a powerful tool in the hands of the international community; however, it does not adhere to states' practices. The declaratory nature of a person as a refugee is in alignment with the normative values of protection but as will be explored further, it was not developed in that way within the EU, nor have the Member States' practices aligned with this concept as they primarily act within their own sovereign powers.

The 1951 Refugee Convention is also applicable in situations of mass influx whereby collective protection may be granted to refugees. It is observed that nothing precludes group determination, either territorially or extraterritorially. It is also evident that in situations where the lives of persons are threatened based on any of the Convention's criteria, an individual examination is not required. However, although collective protection is permitted or even desirable under the 1951 Refugee Convention, the latter being a successor of the 1933 Convention does not provide a uniform and universal practice.

In the early years of the 1951 Refugee Convention (which came into force in 1954), [237] several factors seemed to shift the focus from the humanitarian nature of international protection towards more political, government-centred policies influenced by national economic interests.[238] Following a call from the United Nations to declare 1959-1960 as

[236] Hathaway and Foster (2014) (n 234) 25.
[237] The 1951 Refugee Convention came into force on the 22 April 1954. UN High Commissioner for Refugees (UNHCR), The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis, 1990.
[238] The humanitarian nature of protection is explained in an Article on the Politics of Refugee Convention by Guy S. Goodwin-Gill, according to which in 1921 when Fridtjof Nansen was

the World Refugee Year, an early humanitarian response managed to almost solve the European refugees' problem during those years. States had committed to and signed the 1951 Refugee Convention, an extraordinary catalogue of refugees' rights towards their economic empowerment.[239]

The UNGA proposal urged all states to cooperate in addressing the refugee issue and to encourage additional financial contributions from governments, voluntary agencies and the general public to encourage additional opportunities for permanent refugee solutions through voluntary repatriation, resettlement or integration on a purely humanitarian basis and in accordance with the freely expressed wishes of the refugees themselves.[240] The UN's ambitious attempts[241] and the governments and Non-Governmental Organizations' (NGOs) efforts to increase public awareness and to find solutions, such as resettlement and integration, improved the refugees' lives around the world and enhanced solidarity between states.[242] However, international solidarity

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appointed first League of Nations High Commissioner for Refugees in 1921, the humanitarian nature of the refugee protection seemed possible. To this end at that time, more than 800.000 Russians refugees needed protection and Hansen has helped Soviets from famine relief, returned prisoners of war and established a status for Russian refugees by improving their legal status. Guy S. Goodwin-Gill, 'The politics of refugee protection' (2008) Refugee Survey Quarterly, 27(1), 8-23, 11

[239] Hathaway (2019) (n 229)

[240] General Assembly Resolution 1285(XIII) World Refugee Day, 05 December 1958. Retrieved at: http://www.unhcr.org/excom/bgares/3ae69ef3a/world-refugee-year.html. The same calling is also present in the General Assembly Resolution 1390 (XIV) World Refugee Year, 20 November 1959. It can be retrieved at: http://www.unhcr.org/afr/excom/bgares/3ae69ee610/world-refugee-year.html. In the following year the General Assembly urged States to increase their cooperation with the programmes of the United Nations High Commissioner for Refugees and the United Nations Relief and Works Agency for Palestine Refugees in the Near East. General Assembly Resolution 1502 (XV) World Refugee Year, 5 December 1960. Retrieved at: https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/152/76/IMG/NR015276.pdf?OpenElement

[241] P. Gatrell, S. Peeling, & N. B. D. J. Carson, 'When the War was over: European refugees after 1945'. (2012) Briefing Paper 7. World Refugee Year, 1959-60.

[242] It is reported that Robert Menzies, Prime Minister of Australia, during the opening of the World Refugee Year, in September 1959, stated accordingly that '(i)t has not been easy for organised world opinion in the United Nations or elsewhere to act directly in respect of some of

during the WRY was gradually reduced when in the 1990s, western states took measures to prevent the globalization of asylum.[243] Those measures concerned the prevention of asylum seekers' arrival at their borders, including interdiction at sea, visa restrictions, carrier sanctions, safe third country relocations, and smuggling policing. In relation to the EU, these measures have taken a legislative form.[244]

The changing face of international solidarity is reflected in the fact that in recent years, poorer countries neighbouring to the conflict zones have incurred an overwhelming responsibility for refugees.[245] It is reported that the least developed countries with weak human assets and a high degree of economic vulnerability cannot integrate or provide basic rights to the refugees since there are difficulties in meeting the needs of their own

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the dreadful events which have driven so many people from their own homes and their own fatherland, but at least we can in the most practical fashion show our sympathy for those less fortunate than ourselves who have been the innocent victims of conflicts and upheavals of which in our own land we have been happy enough to know nothing', Retrieved at https://www.destinationaustralia.gov.au/stories/motivations/world-refugee-year-1959-60.
Whereas, the British Prime Minister, Harold Macmillan, stated accordingly: 'Some people may think that the best contribution that we can make in the WRY is to take in a large number of refugees ourselves…. But precisely because in our small country we have welcomed so many, we cannot raise further hopes in this direction. Essentially our contribution must be money', Peter Gatrell, 'Introduction: World wars and population displacement in Europe in the twentieth century' (2007) Contemporary European History, 16(4), 415-426, 4.

[243] Mathew, Harley, (2016) (n 4).

[244] See 4.3.1.2

[245] ibid 101. The statistics of UNHCR are indicative of the fact that developing countries at the end of 2012 hosted 86 per cent of the world's refugees, a proportion that has increased from 70 per cent in the last ten years. Moreover, it is reported that at the end of 2012 the 49 least developed countries were providing asylum to 2.8 million refugees.
Also, latest statistics (as of 2018) show that there are 74.79 million persons of concern worldwide. There are 70.8 million forced displaced persons in the world, out of which 41.3 million are internally displaced people, 25.9 million are refugees and 3.5 million are asylum seekers. Top hosting refugee countries are: Germany 1.1 million, Sudan 1.1 million, Uganda 1.2 million, Pakistan 1.4 million and Turkey 3.7 million accessed from UNHCR, Refugee Data Finder and UNHCR, Figures at a glance.

nationals.[246] However, burden-sharing in terms of international solidarity is a functional necessity for an effective operation for a comprehensive *non-refoulement* policy.[247]

Non-refoulement remains the cornerstone of protection. The 1951 Refugee Convention and its 1967 related Protocol provided the UNHCR with an international framework within an extended supervisory responsibility role and mandate. The abolition of the geographical boundaries, which is the central scope of the Protocol, abolishes the difficulty experienced today by many asylum seekers who must be outside of the country to request international protection. Refugee protection has been realized within narrow and broad interpretations in various disciplines; however, thus far, no interpretation has concluded that irregular migration should form a new category of persons in need of protection, even outside the 1951 Refugee Convention's framework.

3.2.3 Interdisciplinary Analysis of International Protection

The question that is explored in more depth in this section revolves around the distinction between the categories of migrants coming from vulnerable situations and refugees as per the 1951 Refugee Convention definition.

'Migrants on the move' refers to mixed flows of people who travel irregularly, including refugees and it is the host states' obligation to identify them as such. However, the phenomenon has been researched within various disciplines. Contrary to other disciplines, a legal analysis of the phenomenon seems to limit the definition of protection. For example, in international relations, the international organizations' responsibility in terms of protection could depend exclusively on their personality. In

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[246] ibid 102.
[247] ibid.

political science, the concept of protection could be narrowed due to scrutinized national and political interests.

This research supports the rights of irregular maritime migrants based on international principles and values that transformed into human rights when these were incorporated in the UDHR. Thus far, the thesis has demonstrated the responsibility of the UNHCR, in collaboration with governments, as the main responsible Office. A detailed analysis will follow concerning the potential responsibility of other actors.

In addition to the approaches mentioned above relating to the analysis of the refugee phenomenon, sociological theories also play a crucial role. In proximity to this hypothesis is Kunz's analysis on the acute[248] and anticipated[249] refugee within a kinetic model.[250] It is based on the circumstances under which a person passing through the border of his country does not influence his refugee status but it circuscribe his chances of resettlement.[251] Kunz explains that what distinguishes all refugee decisions from the voluntary migrants is their motive. Refugees, unlike voluntary migrants, are reluctant to uproot themselves.[252]

In 1969, Kunz referred to a new dimension of migration. His analysis was based on a motivational and kinetic model of a push and pull theory of refugee movements. Accordingly, some refugees leave their home country prepared with a clear knowledge

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[248] E.F. Kunz, 'The refugee in flight: Kinetic models and forms of displacement' (1973) International migration review, 7(2), 125-146. Kunz, explains that acute refugee movements contrast with anticipatory sharply both, in selectiveness and in kinetics. They arise from great political changes and refugees flee either in mass or in bursts of individual or group escapes, and their primary purpose is to seek asylum to a neighbouring or near-by country.

[249] ibid Kunz refers to an anticipatory refugee as a person 'who arrives door-to door to the country of immigration, leaves his home country before the deterioration of the military or political situation prevents his orderly departure', 131-132.

[250] ibid.

[251] ibid 130.

[252] ibid.

of their destination, and others pass through the borders of their homeland under military pressure or on a sudden refugee movement without a desire to gain citizenship from other states but to settle in a country willing to offer them hospitality.[253] Anticipatory movements follow a 'push-permit' model, while acute refugee movements rely on the 'push' motive. For example, following the Second World War, Jewish refugees belonged in the anticipatory movement resulting in their migration to nearby countries which then turned into an acute refugee situation when the country of asylum came under Germany's pressure.[254]

Understanding the differences between migrants and refugees is challenging. While some argue that a distinction is not possible, others have distinguished between forced and voluntary migration.[255] Crawley and Skleparis, argue that the distinction between refugees and migrants fails to reflect upon the migratory processes since people travel together with different motives, change status or satisfy the criteria for two statuses simultaneously.[256] For example, forced migration is understood as an involuntary movement of people which is always part of much larger assemblages of socio-political and cultural processes and practices, whilst all displaced, they find themselves in qualitatively different predicaments.[257] The migration-asylum nexus suggests that political upheavals, conflicts, and economic difficulties often coincide thus providing different motives for moving. [258] Another point is that the longer the conflict continues, different political and economic factors shape the experiences of those living in times of

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[253] ibid 131.
[254] ibid 135.
[255] Heaven Crawley, Demetris Skleparis, 'Refugees, migrants, neither both: categorical fetishism and the politics of bounding in Europe's "migration crisis"' (2018) *Journal of Ethnic and Migration Studies,* 44(1), 48-64, 50.
[256] ibid.
[257] ibid 52.
[258] ibid 53.

war. Simultaneously protracted situations affect the economic infrastructure and increase prices of goods and commodities, making people want to move.[259] Accordingly, people may move between categories, especially during more extended periods of stay in another country. [260]

Regional actors, like the EU, explore, interpret, and incorporate into their structures the international framework of protection for refugees by either including or excluding legal aspects of migration movements. The question which arises is whether the EU can do better in incorporating the 1951 Refugee Convention within its own legal order, or whether Member States can be more linear towards a humanitarian approach. What is noteworthy is that not all States have interpreted who is a refugee in the same way; for example, African states have developed a broad definition for a refugee that does not exclude migrants in vulnerable situations, (explained below). There is, therefore, a possibility that migrants coming from vulnerable situations and travelling irregularly from Africa may be under the false impression that the EU would consider them as refugees and offer them protection because of the Convention in force by their regional actor.

The 1969 Organization of African Unity (OAU) in Article 1(2) provides that

> The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is

[259] ibid 54.
[260] ibid 55-59.

> compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. [261]

Similarly, the 1984 Cartagena Declaration for Refugees establishes a broad definition of refugees for the Central American area. Accordingly, it provides that the definition or concept of a refugee suggested for the region

> […] includes in addition to containing the elements of the 1951 Convention and the 1967 Protocol, persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.[262]

This section aims to present some of the main variables surrounding the definitions of 'refugees' and 'protection' to enhance the understanding of complexities within the frameworks and the attitude of states in policy making. In international relations, the new definition of 'refugee' had an independent causal effect on the trajectory of world politics.[263] In a continuously changing political world, the definition of who is a refugee has broadened. It includes people fleeing human rights violations, not necessarily persecution, internally displaced persons (IDPs) and the drivers of forced migration.[264]

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[261] Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ('OAU Convention'), 10 September 1969, 1001, U.N.T.S. 45. The Convention entered into force on 20 June 1974.

[262] Regional Refugee Instruments & Related, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, Part III.

[263] Betts & Loescher (2011) (n 48)

[264] ibid 2-5,13. Further to their analysis on the causes of forced migration from a political perspective, the authors argue that there is a relationship between displacement and colonialism. Human displacement's causes are identified to relate to the trends in international system, geopolitics, and the global political economy. Relatedly, Gilbert writes about the authority of protection by the UNCHR and notes that Courts and States should recognize and

In international relations it is understood that the relationship between the state (country of origin) and the citizen (vulnerable categories of migrants, refugees, asylum seekers, IDPs) has more likely broken down.[265]

Hathaway and Foster argue that a sound understanding of the context also affirms the duty to interpret refugee law in a way that allows it to evolve to meet contemporary protection imperatives and further support that with the Final Act.[266] The governments clearly determined that the Convention should have value as an example exceeding its contractual scope.[267] Goodwin-Gill also acknowledges that structural reform of the international protection mandate should be extended to migrants without protection, and other categories of persons in need of international protection, not only refugees but also stateless and internally displaced persons.[268]

For international relations scholars, refugees are people of concern to the international community because it is the one that should fulfil the protection gap created by the country of origin.[269] This position is based on the principal-agent action where all broken contracts between the state and citizen must recur.[270]

Puggioni, arguing in favour of rethinking protection within the context of international relations, explains that the meaning of protection 'remains open to interpretation since

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acknowledge it. Geoff Gilbert, 'UNHCR and Courts: Amicus curiae… sed curia amica est?'. (2016) International Journal of Refugee Law, 28(4), 623-636.

[265] Betts & Loescher (2011) (n 48) 6.

[266] Hathaway & Foster (2014) (n 234) 9. Also, Final Act and Convention relating to the Status of Refugees, 1951. Retrieved at: UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, A/CONF.2/108/Rev.1,

[267] Hathaway & Foster (2014) (n 234) 9.

[268] Guy S. Goodwin-Gill, 'The Movements of People between States in the 21st Century: An Agenda for Urgent Institutional Change' (2016) *International Journal of Refugee Law*, 28(4), 679-694) 679.

[269] ibid 4.

[270] ibid 5.

it conflates with the concept of assistance'.[271] Accordingly, there is a different rationale within the international relations discipline which has traditionally focused on the limits of protection rather than protection itself.[272] The limits of protection exist in the mechanisms developed to make access to protection almost impossible.[273] State sovereignty and admission policies are identified as the barriers to protection or assistance to protection. Protection could be legal or political, or it could be a haven. Puggioni, further argues that refugees' protection refers to diplomatic protection, namely the protection accorded by states to nationals abroad[274] based on states' obligations under international law. Therefore, protection is defined by states' actions in favour of refugees and the functioning of the administrative and judicial systems.[275]

However, from a legal perspective, refugees enjoy universal rights as human beings most of whom are victims of persecution. The principle of solidarity places an obligation on states to act in good faith, both within their territories and extraterritorially, and to respect their international obligations and responsibilities regarding *non-refoulement*. In the context of structural changes to the international protection mandate, Goodwin-Gill expressed the view that radical change is required not only institutionally but particularly in the attitudes of the developed countries. The author points to a responsibility deficit dating back to the creation of the UNHCR and the 1951 Refugee

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[271] Raffaela Puggioni, 'Rethinking International Protection' in Raffaela Puggioni, *Rethinking International Protection: The Sovereign, the State, the refugee* (Palgrave Macmillan 2016) 209-215.
[272] ibid 3.
[273] ibid.
[274] Theory developed by Antonio Fortin in its 2000 Article on the meaning of 'Protection' in the Refugee Definition. The author argues that the meaning of the refugee definition is often misunderstood and that the term 'protection' means 'diplomatic protection'. The article further considers the circumstances and parameters within which the notion of 'internal protection' is relevant to the determination of refugee claims. Antonio Fortin, 'The meaning of protection in the Refugee definition', (2000) *International Journal of Refugee Law,* 12(4), 548-576
[275] Puggioni (2016) (n 271) 8.

Convention when States declined to accept the UN Secretary-General's proposal on cooperation which was essential in order to relieve the burden by initial reception countries.[276] Such failure is partly replicated in the EU's continuing struggle to provide meaningful content to its treaty provisions on sincere cooperation, solidarity and fair sharing of responsibility.[277] However, the EU has a unique identity as a regional organization and its system places a heavier responsibility on its Member States to comply with its legal acts.

This section has demonstrated that the concept of protection for refugees and irregular migrants has a broader meaning when approached as a socio-legal or human phenomenon. The concept of protection is defined in broader terms in different (other than legal) disciplines; however, its limitation in the legal definition does not engage much with the international obligation to justice and the normative nature of its cornerstone principle of *non-refoulement.*

Recent developments concerning international protection and the vulnerability element within irregular migration at the international level indicate the limitations of the legal concept of the definition of a refugee within the 1951 Refugee Convention. At the same time, a further need to correct the international framework on protection for migrants coming from vulnerable situations within an irregular migratory cycle was also identified.

[276] Goodwin-Gill, ' (2016) (n 268) 688.
[277] ibid.

3.2.4 Developments in International Protection and the Vulnerability Concept Within Irregular Migration.

The international framework on protection has remained the same since the adoption of the 1967 Protocol, without any attempt to amend it or draft another convention.

The evolution of the European Communities and the European integration theory created a new, yet parallel, legal order to international law. International protection in the EU will be explored and analysed in terms of the polity's responsibility (within its own legal order and in international law) in Study Two of this thesis. However, since this section deals with the historical development of international protection and its relationship to the irregular migration phenomenon in the Mediterranean, the recent international efforts to address the phenomenon holistically are explored.

The aim of strengthening solidarity is encouraged by the UNGA's New Declaration of 2016,[278] following the UN Summit on Refugees and Migrants,[279] the 2030 Agenda for Sustainable Development,[280] and the International Dialogue for Migration.[281] Specifically, the 2030 Agenda for Sustainable Development provides a critical framework for understanding and minimizing the drivers of irregular migration.[282] This commitment

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[278] UN General Assembly, 'New York Declaration for Refugees and Migrants'.
[279] UN Summit on Refugees and Migrants, 19th September 2016, New York, General Assembly.
[280] UN General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development', 21 October 2015, A/RES/70/1.
Also see: <http://www.migration4development.org/sites/default/files/en_sdg_web.pdf>
[281] The International Dialogue on Migration, under the auspices of the International Organization for Migration, which is currently an UN agency. Retrieved at: <https://www.iom.int/international-dialogue-migration>
[282] UN (2017) Issue Brief 2, *Supra*-7. 17 Commitments refer to the ending of poverty (SDG1), hunger (SDG2), improve health systems (SDG3), ensuring quality education for all girls and boys (SDG4), clean water and sanitation (SDG 6), affordable and clean energy (SDG7) promoting decent jobs for all (SDG8), industry innovation and infrastructure (SDG9), reducing inequalities, (SDG 5&10), sustainable cities and communities (SDG11), responsible consumption and production (SDG12), climate action (SDG 13), Life below water, (SDG14), Life on land (SDG15), Peace and Justice strong institutions (SDG16), partnerships to achieve the goal (SDG17). Available at: https://www.un.org/sustainabledevelopment/sustainable-development-goals/

focuses on the sustainable development of an inclusive environment for all in their communities by ensuring access to justice. The goal is also to reduce[283] the drivers of migration by addressing the obligations of actors and allowing individuals to live in healthy, safe, and secure societies.[284]

The UN Summit on Refugees and Migrants can be characterized as a global call by the UN, incorporating a holistic approach for a game-changing response to large movements[285] of refugees and migrants by all actors involved.[286] The UN Summit on Refugees and Migrants produced the New York Declaration,[287] which aims for greater responsibility-sharing for refugees and migrants between the UN Member States, including measures in host countries and host communities globally. The Declaration acknowledges the separate legal frameworks of refugees and migrants, but it indicates

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[283] The UN is its brief, explain that to reduce the adverse drivers of irregular migration there are three prevention aspects. Those are: '(i) early action to address the political differences that lead to or perpetuate violent conflict; (ii) ensure that no one is left behind, including peace agreements, development programmes and humanitarian assistance so as to avoid further instability and violence; and (iii) endure the sustainability of peace through strengthening democracy and rule of law, building stronger, more resilient, accountable state institutions with adequate checks and balances and working to establish effective democratic control over armed forces'. UN (2017) Issue Brief 2, ibid 8.

[284] UN (2017) Issue Brief 2, ibid 7.

[285] A large movement of persons is a contemporary term and most probably the same as mass influx. In accordance with a recent report of UNHCR and the Global Migration Group, 'a large movement depends less on the absolute number of people moving than its geographical context, the receiving States' capacities to respond and the impact caused by its sudden or prolonged nature on the receiving country', UN Office of the High Commissioner for Human Rights (OHCHR), Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, February 2017, 13. Available at: http://www.refworld.org/docid/5a2f9d2d4.html

[286] UNHCR spokesperson Melissa Fleming speaks at the Palais des Nations briefing, Retrieved at: <http://www.unhcr.org/news/latest/2016/9/57ceb07e4/un-summit-game-changer-refugee-migrant-protection.html>

[287] On 19 September 2016, at the UN Summit on Refugees and Migrants, called by the General Assembly, 193 States signed the New York Declaration, as one plan of addressing large movements of refugees and migrants. 'The Summit was a watershed moment to strengthen governance of international migration and a unique opportunity for creating a more responsible, predictable system for responding to large movements of refugees and migrants'. Retrieved at: <https://refugeesmigrants.un.org/summit>

that both categories have the same universal human rights and fundamental freedoms. The Declaration addresses irregular migration in the context of forced displacement in large movements, often presented with complex challenges.[288] The global commitment to addressing large movements of refugees and migrants while ensuring their dignity and human rights is evident from the legal obligations set in the international human rights treaties adopted since the 1951 Refugee Convention.[289]

The New York Declaration refers to irregular migrants (not illegal migrants). In the absence of a universally accepted definition of an irregular migrant, the glossary of the International Organization for Migration (IOM),[290] addresses irregular migration as a movement that takes place outside the regulatory norms of the countries of origin, transit and receiving countries.[291] A similar definition to irregular migrants is the one recommended by the Office of the High Commissioner for Human Rights (OHCHR) for 'migrants who may be at risk at international borders', including 'migrants in irregular situations, migrants in smuggling situations, trafficked persons as well as migrants who are … children [and] … women ….'[292]

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[288] UN General Assembly, 'New York Declaration for Refugees and Migrants', (n 159) para 4.

[289] International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Convention for the Protection of All Persons from Enforced Disappearance and the Convention on the Rights of Persons with Disabilities.

[290] IOM became a UN Interrelated Agency on 19/09/2016.

[291] Retrieved at: https://www.iom.int/key-migration-terms. Also, one author, interprets undocumented migration to mean an organized travel 'specifically to avoid the institutionalized system of state regulation [which has] become increasingly common across the Mediterranean', Michael Collyer, Russel King, 'Narrating Europe's migration and refugee "crisis"' (2016) 9(2) Human Geography: a new radical journal 1.

[292] '(c) The term 'migrants who may be at particular risk at international borders' includes but is not limited to migrants in irregular situations, migrants in smuggling situations, trafficked

The OHCHR recommends that states do not consider it a criminal offence when adopting or amending their legislation to endure the irregular entry or the attempt to enter in an irregular manner or irregular stay, given that the border crossing is an administrative issue and further proposes that administrative, rather than criminal sanctions, apply to irregular entry.[293] Accordingly, in Resolution 3449 of 1975, the UNGA provides that the term 'illegal' should not be used to refer to migrants in an irregular situation.[294] The same applies to refugees and asylum seekers.[295] Asylum seekers are not penalised for unlawful or irregular entry, and they should not be penalised for the use of forged documents if they intend to seek asylum in a safe territory.

The New York Declaration describes today's migration and refugee crisis, which has been escalating for several years into a global phenomenon. According to the UN, the Declaration recognizes the unprecedented level of human mobility and an exceptionally high number of persons forcibly displaced from their homes. In addition, it states that even more refugees and migrants find themselves in life-threatening situations which create an overwhelming situation for the receiving states, especially those in the front lines.[296] The Declaration addresses the drivers of migration, including those of irregular

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persons, as well as migrants who are; children (accompanied by family members as well as unaccompanied and separated children), women (including pregnant women and new and/or breastfeeding mothers), persons who have suffered abuse including sexual and gender based violence, victims of torture and cruel, inhuman and degrading treatment and victims of violence and trauma, persons with disabilities, older persons, stateless persons, indigenous peoples, persons who are members of minority communities, persons with HIV or particular health concerns, and lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, human rights defenders and political dissidents', 4. UN Office of the High Commissioner for Human Rights (OHCHR), 'Recommended Principles and Guidelines on Human Rights at International Borders', 23 July 2014, A/69/CRP.1.

[293] ibid 8.

[294] UNGA Res 3449(XXX), 'Measures to ensure the human rights and dignity of all migrant workers', 9 December 1975.

[295] An asylum seeker is an applicant of international protection whose application is pending examination.

[296] UNHCR, 'New York Declaration, Quick Guide', June 2017 Update, 5. >

migration. It highlights that beyond the search for new economic opportunities, people move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses. Furthermore, people migrate in response to the adverse effects of climate change, natural disasters (some of which may be linked to climate change), other environmental factors, or a combination of these reasons.[297] Thus, the Declaration is a first step towards protection not only to refugees but also to persons who face such challenges in their countries. It is argued that it describes a new category of people in need of protection, which this thesis identifies as irregular migrants coming from vulnerable situations.

The Declaration further acknowledges the same universal human rights and fundamental freedoms to refugees and migrants because they face many common challenges and have similar vulnerabilities.[298] It clarifies that large movements may involve mixed flows of people, whether refugees or migrants, who move for different reasons yet may use similar routes.[299] Therefore, the author argues that the Declaration identifies the same human rights for refugees and migrants because of their vulnerability, which stems from humanitarian situations.

To this end, the development of the legal concept of international protection within a global response acknowledges all forms of grave events or drivers that lead persons or populations to seek ordinary residence in another state. This argument, when compared to the international framework of protection, particularly since the 1967 Protocol, could lead to a positive step in addressing any shortfalls created then, by the removal of the

[297] ibid para 1.
[298] ibid para 6. Vulberabilities and/or vulnerable situations are also mentioned in the Declaration paragraphs 8(i), 12, 23, 29,30, 31, 37, 51, 52, 58, 59, 60.
[299] ibid para 7.

geographical and chronological boundaries of the 1951 Refugee Convention, which did not include the entirety of the irregular migration cycle. Such a development draws similarities to the ICRC proposal prior to the entry into force of the 1951 Refugee Convention, which, as analysed earlier, derived from an international obligation to justice.

Türk and Garlick, following the New York Declaration, point out that the complexity, scale and global response of movements of asylum seekers, refugees and migrants today highlight the need for international cooperation more starkly than at any other point in recent history.[300] On a profound examination of the legal foundations of international cooperation, solidarity, and responsibility-sharing, clear support emerges from international legal sources from states' obligation to cooperate in responsibility-sharing and responding to the refugee displacement.[301] The UN Declaration for Refugees and Migrants is a strong expression of political will to address more effectively the large movements of refugees and migrants, save lives, protect their rights and share responsibility. The commitments[302] addressed in the Declaration have led to discussions in the two Global Compacts that followed the New York Summit.

[300] Volker Türk & Madeline Garlick, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees', (2016) *International Journal of Refugee Law*, 28(4), 656-678, 656. Ahmar Afaq, & Nishant Sirohi, The New York Declaration For Refugees And Migrants, (2018) *World Affairs: The Journal of International Issues*, *22*(1), 80-97.
[301] ibid.
[302] ibid.

Two Global Compacts,[303] one for refugees and the other for migrants, have been adopted in 2018.[304] The Global Compact on Safe, Orderly and Legal Migration (GCM) addresses the humanitarian, development-related and human rights aspects of migration. It is the first intergovernmental agreement to cover all international migration dimensions holistically and comprehensively. It is intended to change the perception of migration, make it work for all and leave no one behind. The Global Compact on refugees aims to strengthen the international response to large movements of refugees, including protracted refugee situations.[305] It is clarified that people displaced across the border are refugees rather than migrants and their situation is addressed within the framework of the Global Compact on Refugees.[306]

In an analysis on the Global Compact on Refugees, Hathaway argues that to make protection for refugees real, robust and reliable, the 'accidents of geography' approach to the allocation of burdens and responsibilities should be replaced by delivering real benefits to real host communities.[307] As he put it, '[w]e cannot succeed by hunkering

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[303] The Global Compact is framed consistent with target 10.7 of the 2030 Agenda for Sustainable Development in which Member States committed to cooperate internationally to facilitate safe, orderly and regular migration and its scope is defined in Annex II of the New York Declaration. Global Compact on Safe, Orderly and Legal Migration, Zero Draft, 5 February 2018.

[304] The Global Compact on Safe, Orderly and Legal Migration will be adopted in the 73rd session of the UN General Assembly. (The Global Compact on Migration is by now, adopted, in an Intergovernmental Conference in Marrakesh., Morocco, on the 10th December 2018, to which I have attended, as part of the Delegation of Cyprus).

[305] Key objectives of the Global Compact on Refugees are the following: to ease the pressures on host countries, to enhance refugee self-reliance, to expand access to third-country solutions and to support conditions in countries of origin for return in safety and dignity. Retrieved at: http://www.unhcr.org/towards-a-global-compact-on-refugees.html
Global Compact on Refugees, 26 June 2018. Retrieved at: http://www.unhcr.org/events/conferences/5b3295167/official-version-final-draft-global-compact-refugees.html

[306] UN (2017) Issue Brief 2, It is also clarified by this UN Paper, that even outside of refugee flows, the negative socio-economic impacts of war, may drive migration through negative impacts on labor markets, livelihoods, food and health security, social service delivery and through political instability and social tensions and the growth of criminal networks.

[307] Hathaway, (2019) (n 229).

down and pretending that the challenges to the vitality of human rights and multilateralism can be papered over by adopting vague guiding principles coupled with never-ending talkfest'.[308]

The same reasoning regarding the benefits of migration also applies within the principles of the GCM. The GCM aims to ensure that the phenomenon of migration in the Mediterranean, which reached its peak in 2015, characterized by increased irregular migration flows, deaths and gross human rights violations, will not be repeated.[309] The UN Member States are urged to address migration concerns comprehensively and do more to ensure respect and protection of migrants' rights, regardless of their migration status, while also taking into consideration the security and prosperity concerns of countries across the migration spectrum.[310] Both Compacts agree that in order to achieve protection, acceptance and sustainable rights for refugees and migrants, economic support by states is necessary.

Irregular migrants at sea have been a major concern for the EU Member States because of the unauthorized irregular crossings from the Middle East to the EU. With

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[308] ibid 7.

[309] The IOM's Missing Migrant Project reports the dead/missing at sea for all migration routes. Statistically, the Mediterranean has been the deadliest worldwide route for irregular migrants. The project started in 2014, with the beginning of the migration phenomenon in the Mediterranean and it continues to this day. It also records the migration flows of all regions. All info can be retrieved at: https://missingmigrants.iom.int/
Also, see IOM, 'Fatal Journeys, Tracking Lives Lost during Migration', 2014; IOM, 'Fatal Journeys – Improving data on Missing Migrants', Volume 3, Part I and Part II, 2017; United Nations University, UNU-GCM, Institute on Globalisation, Culture and Mobility, 'Identifying Migrant Bodies in the Mediterranean', 2018. Retrieved at: https://i.unu.edu/media/gcm.unu.edu/publication/4375/Identifying-Migrant-Bodies-in-the-Mediterranean_0502.pdf
Also, see latest statistics, retrieved at: https://www.iom.int/news/mediterranean-migrant-arrivals-reach-91093-2018-deaths-reach-1852

[310] IOM, 'A Force for Good: The Global Compact Aims to Make Migration Safer', 31.10.18. Retrieved at: <https://medium.com/@UNmigration/a-force-for-good-the-global-compact-aims-to-make-migration-even-safer-123c3359fe48>

vulnerability as a common characteristic, refugees and irregular migrants coming from situations where widespread and systematic violations of human rights occur need international protection, within the scope of the 1951 Refugee Convention or from rights derived from other international human rights instruments. Irregular maritime migrants in the Mediterranean are not only those who face persecution but also populations or persons escaping environmental collapse, disasters, or other 'state fragility'.[311]

The concept of vulnerability within migration is a foundational element of the human rights framework and human dignity, as previously explored.[312] Migrants in vulnerable situations are unable to enjoy their human rights effectively and are at increased risk of violations and abuse. It has been acknowledged that these persons are entitled to call on a duty bearer's heightened duty of care.[313] This, results from the drivers for irregular migration, which the UN has categorized into the following: (i) economic and demographic, (ii) environmental and (iii) human-made crises.[314] Accordingly, the UN supports that:

> [T]he ways that different drivers interact in different dimensions (scale, location, distance, and duration) affects how governments and the international community can respond in order to effectively protect migrants, govern migration and harness its benefits.[315]

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[311] Betts & Loescher (2011) (n 48) 2.
[312] UN Office of the High Commissioner for Human Rights (OHCHR), Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, February 2017, available at: http://www.refworld.org/docid/5a2f9d2d4.html
[313] UN Office of the High Commissioner for Human Rights (OHCHR), ibid 5.
[314] UN (2017) Issue Brief 2.
[315] ibid.

Migrants coming from vulnerable situations is a broad category that includes mixed flows migrants, including refugees, asylum seekers, stateless persons, trafficked persons, migrant workers.[316]

The migrants' vulnerability could be personal or situational, and it may occur prior to, in transit, or in the middle of their irregular journey. During the journey, irregular migrants may lack food and water, face violence and become vulnerable to exploitation. Human trafficking and human smuggling are commonly reported within the politics and policies developed to tackle irregular migration. Accordingly, several factors[317] may place a migrant in a vulnerable situation, in terms of health, violations of human rights, and needing some form of protection. A relevant question to be asked at this point, is whether there is a nexus between the aspect of vulnerability in irregular migratory situations and *non-refoulement*?

The IOM's thematic report on negotiations for the GCM, acknowledges that although the normative framework of international human rights[318] applies to all persons, regardless of their status (regular or irregular), the vulnerability of migrants or migrants

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[316] UN Office of the High Commissioner for Human Rights (OHCHR).

[317] Ibid In accordance with a 2017 Report of the UNHCR and the Global Migration Group, on the Principles and Guidelines on the protection of the human rights of migrants in vulnerable situations, the practices in reference include, 'closure of borders, denial at the border, collective expulsion, violence by State officials and other actors (including criminals and civilian militias), cruel, inhumane or degrading reception conditions, denial of humanitarian assistance and failure to separate the delivery of services from immigration enforcement'.

[318] the International Covenant on Economic, Social, and Cultural Rights; 1 the International Covenant on Civil and Political Rights; 2 the International Convention on the Elimination of All Forms of Racial Discrimination; 3 the Convention on the Elimination of All Forms of Discrimination against Women; 4 the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 5 the Convention on the Rights of the Child; 6 the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; 7 the International Convention for the Protection of All Persons from Enforced Disappearance; 8 and the Convention of the Rights of Persons with Disabilities.

in vulnerable situations, is not defined.[319] Accordingly, it is stated that while some organizations have developed internal definitions, there is no internationally recognized definition to date which contributes to potential protection gaps. This is addressed in the report by the Special Representative of the Secretary General on Migration, which proposes efforts to develop a working definition of 'migrants in vulnerable situations and non-binding instruments to identify protection gaps.[320] Vulnerability may be contained in legal texts or considered as an element to the human condition. Even though these are related they are not the same. Vulnerability as an element of the human condition, applies to all people by virtue of their human nature. [321] As such, vulnerability applies to all human persons from the moment they are born until the moment they die. At the heart of vulnerability, therefore, is our inherent human dignity which states are called upon to address. In a way if a state fails to address people's vulnerabilities it fails to respect their human dignity. Human dignity is the inherent value of humanity which underpins states' legal obligation to implement and incorporate human rights in their policies. Similarly, this obligation applies to all actors, including international public organizations and, more specifically, the EU. Principles that underpin the irregular migrants' protection are drawn from the UN Charter, international human rights frameworks, and international refugee law.

The phenomenon of irregular migration in the Mediterranean urged the two Offices of the UN, namely the UNHCR and IOM to warn political leaders that the

[319] IOM, Global Compact Thematic Paper, 'Protection of the Human Rights and Fundamental Freedoms of Migrants and the Specific Needs of Migrants in Vulnerable Situations', 3.
[320] UNGA 'Report of the Special Representative of the Secretary General on Migration' (3 February 2017) 71st Session UN Doc A/71/728.
[321] Martha Albertson Fineman, 'The vulnerable subject: Anchoring equality in the human condition', (2008) Yale Journal of Law & Feminism, 20 (1).

> political discourse concerning refugees and migrants, particularly those arriving by boat, has become dangerously toxic in some countries, even at a time when arrivals to Europe are declining. This narrative is stoking unnecessary fears, making it harder for countries to work together and blocking progress towards solutions.[322]

This statement came as a warning to the policies developed within the EU by Member States' leaders in relation to both international protection and irregular migration in the Mediterranean. Nevertheless, the obligation to protect and the normative character *of non-refoulement* as customary international law,[323] cannot but allow the protection of persons or populations in vulnerable situations. The principle of *non-refoulement* is therefore consistent with the principle of vulnerability endorses vulnerability and the drivers of migration.

To summarize, in 2018, migration became a significant matter of concern for the UN. As a worldwide phenomenon, it has been a source of human tragedy and loss and has revealed major deficiencies in migration policies. Gaps in the implementation of the EU *acquis* and its external competences have further created tensions in the regional sphere.

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[322] IOM, 'UNHCR and IOM Appeal to European Leaders to Tackle Mediterranean Deaths', Press Release, 17.10.2018.
IOM Director (newly elected), Antonio Vitorino stated that 'Perilous irregular migration is in no one's interest. Together we must invest more in regular migration, enhanced mobility, and integration to foster growth and development that benefits both sides of the Mediterranean,' ibid.

[323] Customary international law emerges from practice and opinion juris. Article 38 of the International Court of Justice reads that the Court functions in accordance with international law, and in para 3 that international law includes international custom, as evidence of a general practice accepted as law. Statute of the International Court of Justice. United Nations, Statute of the International Court of Justice, 18 April 1946.

Despite the charged climate caused by the refusal of some states to attend (i.e., Hungary and Poland), the UN managed to bring States together to remind them of their obligations and the values and principles of the UN. Saving lives, either in the Mediterranean or in the Sahara Desert, is the UN's primary goal, clearly stated in the International Dialogue on Migration[324] prior to the Marrakesh Conference[325] for the adoption of the Compact on Migration. As the ex-Director of the IOM, Ambassador William Lacy Swing, argued prior to the adoption of the Global Compact on Migration, the Compact is a move away from a toxic approach that migration has become a negative world besides the history.[326]

The International Dialogue on Migration, which began in 2016, ran parallel with the EU's discussions on the migration-development nexus. The migration-development nexus is the result of a UNGA declaration which created the Global Forum on Migration and Development. However, the Forum is consultative and provides a platform for States to discuss and develop policies linking migration to development in countries of origin and destination.[327] However, the nexus indicates that there is a link connecting the drivers of migration to policies that remain open to protection or to development at a regional level.

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[324] International Dialogue on Migration 2017, United Nations, 18-19 July 2017, 'Understanding vulnerabilities: A solution-based approach towards a global compact that reduces vulnerabilities and empowers migrants.'

[325] The author attended the 10-11/12/2019, the United Nations, Intergovernmental Conference for the Adoption of the Global Compact on Safe, regular, and orderly Migration, Marrakesh, Morocco.

[326] https://www.iom.int/press-room/quote-of-the-day

[327] The author attended the 7th meeting of the Global Forum on Migration and Development, Dialogue on Global Compact implementation, Room XII, Building A, Palais de Nations, United Nations Geneva, 03-05/9/2018. Also, the author attended 21/02/2019, United Nations, Global Forum on Migration and Development, First Meeting of the Forum, Palais de Nations, Geneva and on 29/5/2019 the Second meeting of the Global Forum on Migration and Development, Friends of the Forum, International Labour Organization, Geneva.

As a result, a common approach to human mobility has become a significant UN goal especially in the last few years further requiring the EU, as an international regional organization, to adjust its legislative framework accordingly and ensure appropriate implementation through its legal acts and monitoring of the European Commission. Before examining the EU's potential responsibility stemming from its legal acts, the thesis proceeds with an analysis of the states and EU's recent responses to irregular migration. The question explored in the subsequent section is whether the Member States have in any way misunderstood the very essence of protection as developed in international law.

3.2.5 The Recent Response to the Phenomenon of Irregular Migrants in the Mediterranean

As political decisions fall short of the post-war human rights instruments' objectives as a response to irregular migration in the Mediterranean, there is a tendency that views these instruments as less valued.[328] Similar to the British policy on *refoulement* aiming to completely block illegal immigration by sea to Palestine, an EU-Turkey Action Plan, activated on 29th November 2015, attempted to block the migratory flows of irregular migrants to the EU's Member States.[329] The Action Plan reinforced by the EU-Turkey Statement on 18th March 2016 by the Heads of EU Governments,[330] provided that all irregular migrants crossing from Turkey to the Greek islands from 20th March 2016 are to be returned to Turkey.

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[328] Hathaway refers to Harlan Cohen and argues that there is a lack of enthusiasm for multilateralism, leading to too little by way of deliverables at the national level. Hathaway, (2019) (n 229).

[329] European Commission, 'EU-Turkey Action Plan' 15 October 2015.

[330] European Council, 'EU-Turkey statement' 18 March 2016.

The Statement foresees that for every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled from Turkey to the EU, considering the UN vulnerability criteria.[331] The discontinuance of the said mechanism is to apply when the number of returns is reduced, and the Member States will then contribute to resettlement on a voluntary basis while the cost of the return operations is funded by the EU.

The European Council[332] justified the measure based on the return taking place (i) in accordance with the relevant international standards, (ii) in line with the principle of *non-refoulement*, (iii) as necessary to end human suffering, and (iv) to restore public order. The statement came to be known as the EU-Turkey deal and aimed at preventing further unchecked arrivals while alleviating intra-EU pressures on Schengen and European political and economic projects.[333] Moreover, the deal was also a result of political pressure by Turkey on the EU and upon political statements which underlined that Turkey would open the doors for unregulated migration towards Europe.[334]

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[331] Para 2. It is reported that '[t]he EU agreed to assist Turkey in meeting the mounting burden of hosting approximately three million refugees via provision of more than six billion Euros in financial support […] and increased resettlement of Syrian refugees residing in Turkey. EU member states will accept one Syrian refugee in Turkey for every one sent back up to total of 72.000', Kelly M. Greenhill, 'Open arms behind barred doors: fear, hypocrisy and policy schizophrenia in the European migration crisis'(2016) European Law Journal, 22(3), 317-332, 327.
Also, United Nations, Human Rights Office, Office of the High Commissioner, Retrieved at: https://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf
[332] European Council, 'EU-Turkey statement, 18 March 2016'.
[333] Greenhill, K (2016) (n 331) 325. The author rightly points on this deal that 'the fact that a group of 28 states with increasingly divergent interests was able to find consensus speaks to the level of concern that leaders have their own domestic political features'. Quoted from E. Collett, 'The paradox of the EU-Turkey refugee deal' March 2016 Migration Policy Institute. Retrieved at: <https://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal>
[334] It is reported that Turkish President Recep Tayyip Erdoğan, at a G20 meeting on 16 November 2015, in Antalya, threatened the European Commission President, Jean-Claude Juncker that Turkey could send refugees to Europe by opening the doors to Greece and Bulgaria anytime and put refugees on buses. Greenhill (2016) (n 331) 325. Also see, Burak Akinci and Stuart Williams,

Turkey and Greece were assisted in the implementation of the Action Plan and Statement respectively by EU institutions and agencies. An EU policy approach of hot spots at the EU external borders[335] was created in Italy and Greece due to a large number of irregular arrivals, aiming to reduce irregular flows from Turkey to Greece. The hot spots operated in cooperation between the hosting Member State and the EU agencies of EASO, Frontex, Europol and Eurojust,[336] but failed to prove respectful to the rights of irregular migrants who crossed the Mediterranean.

A 2016 study[337] by the European Parliament's Policy Department indicated that in Greece, for example, there is considerable overcrowding of migrants who are not allowed to move to another European state. The dire conditions following the ruling of the ECtHR in the case of *M.S.S. v Belgium and Greece,*[338] has been a confirmation of this.

There are two main concerns over the EU's policy on the returns of irregular migrants from an EU Member State to Turkey: first, the possibility of violating the principle of

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Insider, 'Erdogan threatens to send millions of refugees in Turkey to Europe' 11 February 2016, accessed at <https://www.businessinsider.com/afp-erdogan-threatens-to-send-refugees-to-eu-as-nato-steps-in-2016-2>;
Euractiv, Erdogan threatened to flood Europe with refugees, 9 February 2016, accessed at <https://www.euractiv.com/section/justice-home-affairs/news/erdogan-threatened-to-flood-europe-with-refugees/>

[335] Hot spots at external borders of the EU, operated as first reception facilities in the EU to better regulate the floes of refugees, asylum seekers, migrants arriving irregularly from the Mediterranean. See, European Parliament, Briefing Hot Spots at the EU external borders, State of Play, 2018. Retrieved at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623563/EPRS_BRI(2018)623563_EN.pdf

[336] European Commission, 'The Hot Spot Approach in Managing Exceptional Migratory Flows', Retrieved on: <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf>

[337] European Parliament, 'On the frontline: the hotspot approach to managing migration', (2016), Directorate General for Internal Policies, Policy Department C, Citizens' Rights and Constitutional Affairs'. Retrieved at <http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU(2016)556942_EN.pdf>

[338] M.S.S. v. Belgium and Greece, App no. 30696/09 (ECtHR 21 January 2011).

non- refoulement, and, second, the potential responsibility of the EU in signing the Agreement. Regarding the first concern, the possibility of a violation of the principle of *non-refoulement,* burdens the Member State responsible for the return of an irregular migrant. Regarding the EU's responsibility in adopting such an agreement, a response is provided by the EU's General Court. In an action for annulment of the EU-Turkey Statement before the General Court,[339] the EU was cleared of any responsibility concerning the adoption of the Statement. The responsibility for its adoption lies with the Heads of States or Governments of States of the European Union.

The reasoning is further reinforced in the *First Report on the progress made in the implementation of the EU-Turkey Statement*, in that it is stated that 'decisive action was taken by European leaders to break the cycle of uncontrolled flows of migrants creating an unsustainable humanitarian crisis.' The Report moves on to say that

> [t]he goal was to remove the incentive for migrants and asylum seekers to seek irregular routes to the EU, through a combination of action as close as possible to the entry point into the EU - in the Greek islands - and close cooperation

[339] The CJEU declared that it lacked jurisdiction to the actions brought by three asylum seekers against the EU-Turkey statement. Paragraph 57 is indicative of the ruling in that it states that 'the expression 'Members of the European Council' contained in the EU-Turkey statement must be understood as a reference to the Heads of State or Government of the Member States of the European Union, since they make up the European Council'. In addition, it ruled that 'the EU and [the Republic of] Turkey' had agreed on certain additional action points is explained by the emphasis on simplification of the words used for the general public in the context of a press release'. General Court of the European Union PRESS RELEASE No 19/17 Luxembourg, 28 February 2017 Orders of the General Court in Cases T-192/16, T-193/16 and T-257/16 NF, NG, and NM v European Council.
Retrieved at:
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=188483&doclang=EN>

between the EU and Turkey … aim[ing] … to restore a legal and orderly admission system.[340]

In the European Commission's *Fifth Report on the Progress in the implantation of the EU-Turkey Statement*,[341] it is acknowledged that there is little evidence to suggest that efforts to control the flows in the Eastern Mediterranean route have caused any major re-routing from Turkey. The total number of Syrians resettled from Turkey to the EU on the 'one-to-one' framework provided in the Joint Statement, as of 27 February 2017, was 3,565 but the pace on resettlement from the Greek islands remains poor.[342] The resettlement of Syrians from Turkey under the 'one-to-one' mechanism reached a total number of 4,378 by 4th April 2017, according to the International Organization for Migration's (IOM) statistics, while readmission from Greece reached 943 migrants since 4th April 2016.[343] It is calculated that from April 2016 (after the start of the mechanism) until 10th May 2017, there have been 105 deaths in the Eastern route of the Mediterranean. However, there are total 5.658 reported deaths in the Mediterranean between the same periods.

While the mechanism developed to prevent flows of irregular migrants from the Eastern Mediterranean route reduced the number of deaths in the Eastern route, it nevertheless

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[340] Commission 'First Report on the progress made in the implementation of the EU-Turkey Statement' COM/2016/0231 final. To this day (12.05.2017) there are currently five reports on the progress made in the implementation of the EU-Turkey statement. Next report is expected in June 2017.

[341] Commission, 'Report from the Commission to the European Parliament, the European Council and the Council – Fifth Report on the Progress in the implantation of the EU-Turkey Statement', COM (2017)204 final.

[342] ibid 8.

[343] International Organization for Migration, 'Migrant Presence Monitoring, Situation Report March 2017'. Retrieved at: <http://migration.iom.int/docs/Sitrep%20Turkey%20_30-03.pdf> Newest statistics are found at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200318_managing-migration-eu-turkey-statement-4-years-on_en.pdf

increased the number of deaths in the central and western Mediterranean,[344] thus not contributing to the reduction of irregular migration in the Mediterranean as a whole, contrary to the European Commission's opinion.[345]

The EU Member States' restrictive immigration policies spread inlands with fences being erected throughout the Western Balkan region.[346] In 2015 and 2016, an anti-migrant front unified Visegrad group (Czech Republic, Hungary, Poland, and Slovakia) shifted their focus in aiding the countries of origin rather than relocating migrants within the EU.[347] Hungary erected physical barriers to entry and amended its legislation on asylum to restrict refugee access and oppose EU quotas for the relocation of asylum seekers, erected border fences and closed its borders with Croatia and Serbia. The closure affected Slovenia and 150,000 migrants seeking an alternate route.[348] The general atmosphere of anti-migrant narratives results in the implementation of intolerant

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[344] Recorded deaths in the Mediterranean Sea by route, January 1 – May 10, 2017 accessed at http://missingmigrants.iom.int/mediterranean on 12/05/2017.

[345] European Commission Press Release, 'Commission calls for renewed efforts in implementing solidarity measures under the European Agenda on Migration', 02.03.2017. The European Commission Press Release calling for Member States solidarity for relocation and resettlement included the following statement: 'After almost one year, the implementation of the EU-Turkey Statement of 18 March continues to deliver tangible results, despite the challenging circumstances. Daily crossings from Turkey to the Greek islands have gone down from 10,000 persons in a single day in October 2015 to 43 a day now. Overall, arrivals have dropped by 98%. The number of lives lost in the Aegean Sea since the Statement took effect has also substantially fallen, from 1,100 (during the same period in 2015-2016) to 70'. Retrieved at: http://europa.eu/rapid/press-release_IP-17-348_en.htm

[346] Eugenio Ambrosi, International Organization for Migration, Euractiv 'Migration: A safe investment in humanity', 29 June 2017. Retrieved at: <https://www.euractiv.com/section/justice-home-affairs/opinion/migration-a-safe-investment-in-humanity/>

[347] Verlag Bertelsmann Stiftung, 'Escaping the Escape: Toward Solutions for the Humanitarian Migration Crisis' (Verlag Bertelsmann Stiftung 2017)

[348] ibid.

migration agendas since the European Commission's response to the migration crisis[349] has proven ineffective.[350]

It is argued that the consequences of the EU's disjoint, anti-humanitarian and conflicting responses came to be known as the European migration crisis,[351] which made the EU particularly susceptible to a unique brand of coercive bargaining that relies on the threat of mass population movements as a non-military instrument of state-level coercion.[352] This statement is justified by the Member States' response to the mass arrivals of migrants and refugees, which was mainly driven by national interests rather than European solidarity.[353] It is argued that (i) the lack of European solidarity and (ii) the absence of a collective response to the humanitarian and political challenges, with the reinstitution of internal border controls by States under the measure of exceptional circumstances provided in the Schengen Border Code, proved to be, at least, unsatisfactory.[354] Accordingly, border controls may be reintroduced as a last resort in

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[349] In 2015 over one million refugees and migrants arrived in Europe. At that time, the phenomenon was named by the EU and Member states as the European migration crisis. Greenhill, (2016) (n 331).

[350] Stiftung (2017) (n 347); Also see Collyer & King (2016) (n 291) 1.

[351] Greenhill (2016) (n 331).

[352] ibid 317.

[353] It is also argued that this gave push to the rise of right-wing nationalistic political parties. ibid 317.

[354] Member States of Austria, Denmark, France, Germany, Norway and Sweden used Article 26 of the Schengen Border Code, under the procedure for prolonging border control at internal borders, which reads that: 1. Member States may only prolong border control at internal borders under the provisions of Article 23(2) after having notified the other Member States and the Commission. 2. The Member State planning to prolong border control shall supply the other Member States and the Commission with all relevant information on the reasons for prolonging the border control at internal borders. The provisions of Article 24(2) shall apply. Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2016] OJ L 77, 1–52.

the Member States upon the European Commission's proposal, which then must be adopted by the Council.[355]

The EU and Member States' response has strengthened the securitization of migration and created a discourse that views migration as a threat through narratives of insecurity and unease.[356] The securitization narratives of migration as perpetuated by the EU and Member States' responses to the migration crisis have contributed further to a sense of fear, threat, and insecurity. [357]

In addition to the securitization narratives, the EU has overlooked any opposition against Turkey's human rights' records and instead recognized it as a safe country of return thus suggesting that the principle of *non-refoulement* is not violated and that adequate protection is provided.[358] This assumption can be contested considering Turkey's human rights records and makes it questionable whether this country abides by the international framework on refugee and asylum protection.

Further to the above, the international response to the Syrian crisis is also relevant to the European migration crisis, particularly concerning the arrival of large numbers of irregular migrants in the EU. The UN funding proved insufficient to cover the

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[355] These measures may be introduced for a period of six months and be prolonged for up to two years. European Commission, 'The Schengen Rules Explained', Info retrieved at: <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/the_schengen_rules_explained_20160210_en.pdf>

[356] Greenhill, (2016) (n 331) 318.

[357] ibid. Greenhill,points out the reaction of political leaders, for example, the then Prime Minister, David Cameron which characterized the phenomenon as an illegal invasion into Europe. Other negative reactions by political leaders include the Hungarian and Polish Prime Minister.

[358] Relevant Articles are in the Recast Procedures Directive, specifically, Articles 36-39 of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, [2013] OJ L 180, 60–95.
Retrieved at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013L0032.

humanitarian needs of displaced persons from the war in Syria and it has been reported that 'the UN Syria Regional Refugee and Resilience Plan had received less than 40% of the more than $4.5 billion it said it needed to cover basic humanitarian needs'.[359] It has also been reported that in 2015 'the World Food Program announced that it would reduce food vouchers to Syrian in Lebanon by half as a result of funding shortfalls'.[360] In this regard, it is argued that the EU and the international community may not have provided sufficient financial incentives either to Turkey or other neighboring states in the efforts to manage irregular migration in Europe.[361] However, financing other states in order to curb migration may point to deeper structural problems within the EU that go beyond humanitarian aid provided by the UN.

To sum up, the so-called migration crisis involving Syrian refugees arriving by boats at the shores of EU states revealed shortcomings in human rights and other areas. It must be reminded that the Syrian refugees are not the only ones reaching the shores of EU countries since irregular migrants coming from vulnerable situations are also part of the same category, as previously explained. The migration crisis revealed major gaps and weaknesses in the application of the Refugee Convention, particularly regarding the clause on the 'outside of the country' requirement for asylum seekers. It further showed the unwillingness of states to provide alternatives to resettlement. Generally, it can be argued that the gaps and deficiencies of the international and European system did not do much for the thousands of lost lives in search of protection. It also revealed that during a crisis, human rights are not prioritized by the political agenda. Natural law,

[359] Greenhill (2016) (n 331) 329.
[360] ibid.
[361] ibid.

human rights and international humanitarian principles are rather forgotten or suspended while states appear incompetent to develop or utilize innovative policies.

New legal pathways were not created during the EU migration crisis as per the UN's advice. The UN resettlement scheme proved successful for thousands of persons in need of protection but did not include the millions of refugees from Syria. This thesis does not suggest an open-door policy for all resulting in millions of people coming to Europe; rather, it argues that within an efficient international or European scheme, lives could have been saved and the perilous journeys in the Mediterranean, either by refugees or other migrants in vulnerable situations, avoided.

3.2.6 Concluding Remarks

Study One has focused on the international framework of protection, its main principles and the envisioned rights, starting historically with reference to what prompted the right to asylum in the 1920s leading to how that protection was defined in the 1951 Refugee Convention. The definition of refugee, drafted after the Second World War, is influenced by the circumstances and characteristics of that time, leading to limitations in its application to today's irregular maritime migrants. This Study has identified the two basic elements contributing to the increase of irregular migrants at sea. As a result, the author puts forward the need to recognize irregular maritime migrants as a new category of persons whose vulnerabilities justify a legal right to protection. The need to recognise a new category of persons that can enjoy legal protection has become evident during the the international dialogues leading to the GCM examined earlier.

So far, this Study has introduced the concept of vulnerabilities which will be expanded upon in the following Study focusing on the EU's responsibility under the AFSJ. The analysis on vulnerabilities build on Fineman's theory, supported by Baumgärtel,

suggesting that vulnerabilities are universal and constant, inherent in the human condition and must be at the heart of state responsibility without violating any principles, such as equality. As we have seen in this Study, maritime migrants' vulnerabililities can be identified in relation to their irregular journey, including the likelihood of smuggling (see 5.1.3) in addition to the drivers of migration as identified at an international level (see 5.1.2). Section 3.1.6, identifies that the CJEU could extend protection to irregular maritime migrants as a category due to the vulnerabilities that can be assosciated with this specific category (see 4.3.4 concerning *non-refoulement*).

Although it has been identified that the concept of vulnerabilities was at the centre of asylum protection in the first refugee definitions concerning Armenians and Russians and was included in the first Refugee Convention, nevertheless, the term 'persecution' prevailed in the 1951 Refugee Convention due to the situation of Jews prevailing at the time.

Currently, the irregular maritime migrants' vulnerabilities, while at sea, are not at the core of protection and their category is not presently recognized as a separate category of persons in need of protection based on their human rights. Perhaps, the concept of vulnerabilities, should be further developed within the new challenges brought to surface by the irregular maritime migration, which may differ from the core vulnerabilities identified for Armenians and Russians, but are similar in terms of human conditions.

The right of irregular migrants to protection is not waived by the means they choose to move. This is supported by the UNGA resolutions that refer to 'irregularity' rather than 'illegality', adopting a more realistic viewpoint and, therefore, banning the criminalization of migrants based on the means of entry, further enhanced by the *non-*

refoulement principle. The author argues that, vulnerability is the key element that links irregular migration to *non-refoulement* and international protection. At the same time, while some irregular migrants could be potential refugees, others may be migrants who fall outside the scope of the 1951 Refugee Convention without satisfying the requirements for international protection in the strict interpretation of the refugee definition.

In general terms, the 1951 Refugee Convention applies to persons or populations in vulnerable situations to be welcomed by the international community based on respect for the principle of solidarity, responsibility-sharing, protection, and the promotion of peace and justice. After all, international protection is a declaratory act, not constitutive, suggesting that protection is not a matter of law but a matter of fact.

The following Study examines the EU's responsibility as an actor in the international and EU legal order.

4. STUDY TWO: THE EU'S RESPONSIBILITY AS AN ACTOR AT THE INTERNATIONAL AND EU LEGAL ORDER

Part 1 – THE RESPONSIBILITY OF THE EU IN THE UNION ORDER AND THE ARIO.

4.1.1 Introduction

The Part adopts a theoretical approach in order to explore the EU's responsibility for the protection of irregular migrants in the Mediterranean at the international and European legal orders, respectively. The EU's responsibility at the international level is explored in accordance with the Articles on the Responsibility of International Organizations (ARIO), drafted by the ILC, while its responsibility at the European level is analysed based on the jurisprudence of the CJEU and the ECtHR.

This Part focuses on the binding effect of the ARIO on the EU as an international organization and, to that effect, it examines the provisions of *lex specialis.*[362] Once responsibility for the EU is theorized in its capacity as an international organization, the focus shifts to the European legal order and, more precisely, the Treaty provisions in asylum and migration found within the AFSJ. Specifically, the Treaty provisions relating to the fields of migration and asylum could be valuable indicators concerning the extent of the EU's responsibility for the protection of irregular migrants in the Mediterranean. Particularly, while the ARIO indicate whether any responsibility is possible for the EU as an international organization, the extent of the potential responsibility depends on the

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[362] Article 64 ARIO on Lex specialis provides that '[t]hese draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members'.

degree to which the Member States have conferred their powers in accordance with the EU Treaties and, subsequently, on the actions of the EU institutions.

The hypothesis is that the EU has evolved into an international organization with the capacity to owe international responsibility for its actions or omissions according to its own legal order. To this end, the chronological unfolding of the treaties in the areas of concern is significant. This concerns the three-pillar structure and the latter's eventual abandonment with the Treaty of Lisbon, leading to the development of an AFSJ based on shared competence.[363]

The Part focuses on two elements that are of particular significance in this context and need to be explored: (i) the responsibility of states in accordance with the EU treaties and because of the developments in the areas of migration and asylum, and (ii) the jurisprudence of the European Courts concerning the doctrines developed regarding the Member States' responsibility when implementing EU acts including the potential breach of an international obligation.

In this regard, the doctrine of the presumption of equivalent protection developed by the ECtHR in the *Bosphorus* case,[364] preceded the ARIO, is significant in determining the responsibility of the EU and its Member States, respectively, for a breach of any right

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[363] Article 2 para 2. 'When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.' Also, Article 4(2) TFEU provide for the areas which are shared between EU and Member States; this means that both, the EU and Member States can adopt legally binding acts, provided that the EU did not exercise or decided not to exercise its own competency. The Area of Freedom, Security and Justice is one of the areas provided for in Article 4(2) TFEU. European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01.

[364] Bosphorus v Ireland, App No 45036/98 (EctHR 30th June 2005).

contained in the ECHR or in the context of other international obligations. As derived from obligations for implementing EU acts, the Member States' responsibility is presumed to exist in parallel with their obligations as members to the Council of Europe. Another issue arises in the context of the *Bosphorus* decision concerning whether any responsibility for the EU is excluded when the Member States are not implementing EU law. In addition, the concept of the EU's autonomy perplexes the situation concerning responsibility especially on behalf of the EU.

In Opinion 2/13[365] the CJEU discusses the autonomy of the EU and highlights issues regarding the relationship between the CJEU, the ECtHR (for correct implementation of the ECHR by the Member States) and the CJEU (for the correct implementation of EU legislative acts by the Member States). A question that arises is whether the *Bosphorus* doctrine remains relevant in terms of responsibility. To demarcate, as much as possible, the potential responsibility of the EU, this Part explores (i) the doctrine of the presumption of equivalent protection developed in the *Bosphorus* case, and (ii) the international framework on the responsibility of international organizations according to the ILC.

This examination aims to put forward the argument that the EU's responsibility in international law is possible. However, within its own legal order, its responsibility is limited to the extent allowed by its autonomy and the doctrine of equivalent protection.

4.1.2 The Doctrine of 'Equivalent Protection' as a Determinant of State Responsibility

According to its preamble, the ECHR is based on the idea of peace and justice as it 'aims at securing the universal and effective recognition and observance of the Rights therein'.

[365] Opinion 2/13 pursuant to Article 218(11) TFEU, EU:C:2014:2454 [2014].

It reaffirms its members' 'profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained … by an effective political democracy and … a common understanding and observance of the human rights upon which they depend'.

The ECtHR decides on any violation of human rights by a Member State, if it is within its jurisdiction *ratione personae* and *materiae*, thus excluding EU institutions and agencies acting on behalf of the EU.

In the case of *X v Federal Republic of Germany*,[366] as early as 1958, it was observed that if a State entered into an international agreement that conflicted with the ECHR, it would remain responsible under the ECHR for any breach. At the same time, even though a Member State implemented and enforced Community acts, it could still be held responsible for violations under the ECHR.

As a result, in 1990, the European Commission of Human Rights developed the 'equivalent protection' doctrine. The rationale for this doctrine is to allow the ECtHR to accommodate the EU legal order's autonomy while being compatible with the ECHR standards.[367]

Accordingly, the ECHR does not prohibit a Member State from transferring powers to international organizations, nor does it necessarily exclude a state's responsibility for exercising transferred powers.[368] The doctrine relates to the Member States' obligation,

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[366] M. & Co. v. the Federal Republic of Germany, App. No. 13258/87 (EctHR 9 February 1990).
[367] Catherine Costello, 'The Bosphorus ruling of the European Court of Human Rights: Fundamental rights and blurred boundaries in Europe' (2006) Human Rights Law Review, 6(1), 87-130, 91.
[368] The doctrine is explained in the case of M & Co v. the Federal Republic of Germany, (n 366) in that the Convention does not prohibit a Member State from transferring powers to international organizations.

when entering into an international agreement, not to violate its commitment under the ECHR. Therefore, the Member States' transfer of powers to an entity does not exclude them from the responsibility to examine whether the new agreement would contradict or breach international human rights law.

To this end, the Commission had noted that the European Communities, secured fundamental rights and provided control for their observance, even though the constituent treaties (prior to the constitutionalization of the Charter in the Treaty of Lisbon), did not contain a specific catalogue of rights.[369] The ECHR's significance was stressed in a joint statement[370] by the Parliament, Council and Commission (of the European Communities).

The doctrine of equivalent protection developed in the 1990s safeguarded any responsibility for the EU and its organs at the time. In 1999, the ECtHR in the case of *Matthews v UK,*[371] on the basis of the equivalent protection doctrine, exercised scrutiny over the Community's acts by subjecting an EC law measure to an explicit review not amenable to review by the ECJ. No responsibility was indicated for the Community acts to the Community organs; instead, States remained responsible for implementing Community law and international obligations under the ECHR.

Nonetheless, the Member States' responsibility was challenged in the landmark case of *Bosphorus.* The examination of the *Bosphorus* doctrine aims to show that the Member States do not own exclusive responsibility for a violation of a fundamental right in the

[369] ibid.
[370] Joint Declaration by the European Parliament, the Council and the Commission, concerning the protection of fundamental rights of the European Convention for the protection of human rights and fundamental freedoms. OJ C 103, 27.4.1977, 1–1.
[371] Matthews v The United Kingdom, App. No. 24833/94 (EctHR 18 February 1999).

European legal context. This approach could mean a shift of the burden of responsibility to the EU.

4.1.3 The Implications of the *Bosphorus* Doctrine

In *Bosphorus,*[372] the ECtHR developed the doctrine on the presumption of equivalent protection stemming from the ECHR. According to this doctrine, the ECtHR presumes that the EU Member States do not depart from their obligations under the ECHR in their implementation of EU law since EU law offers equivalent protection of fundamental rights to that of the ECHR.

The *Bosphorus* doctrine is significant for the Member States or Agencies acting within the EU when implementing EU laws. Regarding irregular migration in the Mediterranean, the potential responsibility could be derived from obligations under the ECHR or other international instruments, which, if in breach, could violate the principle of *non-refoulement*. For example, a presumed responsibility for the Member States or Agencies acting within the EU framework may arise from an obligation to protect while

[372] Bosphorus v Ireland, (n 364).
Para 152 states that, 'The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a *supranational*) organization in order to pursue cooperation in certain fields of activity (see M. & Co., p. 144, and Matthews, § 32, both cited above). Moreover, even as the holder of such transferred sovereign power, that organization is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party (see Confédération française démocratique du travail v. European Communities, no. 8030/77, Commission decision of 10 July 1978, DR 13, p. 231; Dufay v. European Communities, no. 13539/88, Commission decision of 19 January 1989, unreported; and M. & Co., p. 144, and Matthews, § 32, both cited above)". Accordingly, in Para 153 the EctHR held that: "On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention (see United Communist Party of Turkey and Others v. Turkey, judgment of 30 January 1998, Reports 1998-I, pp. 17-18, § 29)'.
Also, it is noted that the application to the EctHR was lodged in 1997 and was declared admissible on 13 September 2001.

at sea from any misconduct or action taken in violation of the principle of *non-refoulement* or from measures and policies which indirectly lead to pushbacks of irregular migrants or cause inhuman or degrading treatment, suffering or even death. The question arises as to whether, by conferring rights to the EU, the Member States' responsibility can be said to shift towards the Union. In *Bosphorus,* a question on responsibility between the Member State in concern and the European Community was raised in relation to a Member State acting in accordance with an EC regulation which was based on a UN resolution. The ECtHR's decision in *Bosphorus* indicates that responsibility lies with the Member States. Accordingly, the Member States remain responsible for all acts and omissions of their organs 'regardless (of) whether the act or omission was a consequence of domestic law or the necessity to comply with international legal obligations'.[373]

Nevertheless, the *Bosphorus* case provides one exception to this responsibility, i.e., when the Member States presume that the implementation of an EU act is in accordance with the obligations under the ECHR. Particularly, the ECtHR states in para 156 that, '(i)f such equivalent protection is considered to be provided by the organization, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization'. [374] However, the judgement allows for the presumption to be rebutted if, in the circumstances of a particular case, the Member State considers that the protection of Convention rights was manifestly deficient.

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[373] Tobias Lock, 'Beyond Bosphorus: The European Court of Human Rights' case law on the responsibility of member states of international organizations under the European Convention on Human Rights, (2010) Human Rights Law Review, 10(3), 529–545, 530.
[374] Bosphorus v Ireland (n 364) para. 156.

With the ECtHR's judgement, it is pointed out that a state's action is justified if the relevant organization is considered to protect fundamental rights in an equivalent manner to the Convention.[375] 'Equivalent' could mean identical or comparable to the international cooperation pursuit. This general approach based on the equivalent presumption doctrine, or the *Bosphorus* doctrine, places the responsibility for a breach of the ECHR on states and requires a prior evaluation of the EU legal act as to its potential deficiency. This obligation leaves considerable leeway to the Member States because they have a margin of discretion in implementing EU directives. Consequently, it is arguable that the equivalent protection doctrine is rebuttable on a case-by-case basis.

It is assumed accordingly that the decision on the presumption of equivalent protection is attributed to a Member State, especially when there is a considerable margin of discretion when applying EU acts. This reasoning also applies when a Member State develops its policies for which it could be held accountable for a violation of the ECHR if it is a result of such policies. Such discretion is found in the EU directives that bind the Member States as to their result and intended purpose. The Member States also have that discretion when implementing EU regulations. This is the reason that *M.S.S. v Belgium and Greece* was successful for the applicants. In *M.S.S. v Belgium and Greece,*[376] the ECtHR extended a Member State's obligation to ensure that another Member State respects the fundamental rights as set in the ECHR before implementing an EU act.[377] In that case, there was a violation of Article 3 of the ECHR[378] that was attributed to the

[375] ibid para 155.
[376] It is noted that in M.S.S. v Belgium and Greece there was discretion in the implementation of the EU Regulation.
[377] Lize R. Glas & Jasper Krommendijk, 'From Opinion 2/13 to Avotiņš. Recent Developments in the Relationship between the Luxembourg and Strasbourg Court', (2017) Human Rights Law Review 17(3) 567–587, 573; para 194 of Opinion2/13.
[378] Para 360.

Member State. The case arose in the context of the Dublin II Regulation (Regulation 2003/343/CE) on the Member State responsible for examining an asylum application. In this case Belgium returned the applicant, an Afghan asylum seeker, to Greece through which he had irregularly entered the EU. Upon his return to Greece, the applicant was detained twice, where he faced degrading treatment before he was left out in the streets without any support by the relevant authorities. These conditions amounted to a violation of Article 3 ECHR and both Greece and Belgium were found responsible. According to the ECtHR, Belgium in particular was responsible for 'indirect *refoulement*' by exposing the applicant to the deficient asylum system in Greece as well as exposing him to the degrading detention and living conditions in that country.

Responsibility extends to EU secondary acts and even non-binding acts, namely action plans or recommendations drafted by the EU's institutions and negotiated with the Member States prior to their adoption or publication. For example, recommendations by the European Commission to the Member States are not mere exhortations but abide by the principle of sincere cooperation (Article 4(3) TEU), since the Member States have a duty to act positively towards them in the spirit of mutual trust and the principle of sincere cooperation.

The doctrine of equivalent presumption could have a different application if the EU accedes to the ECHR. This stems from the decision according to which the Member States have conferred powers to an international (*supranational*) organization, in order to pursue cooperation in certain fields of activities. However, that organization is not itself responsible under the Convention for proceedings before, or decisions of its

organs, if it is not a contracting party.[379] Therefore, it seems to suggest that there is no responsibility for the EU if the EU is not a party to the ECHR. Is the conferral of rights to the EU a concrete argument or is it just a mere justification by the Member States? The answer mostly depends on the relationship between the two European Courts, which will probably change if the EU eventually accedes to the EU.

In an analysis on the findings of the Court, Shaelou[380] explains that through the doctrine of 'equivalent protection', the principle of transfer of sovereign powers to the EU, does not absolve ECHR contracting parties completely from responsibility under Article 1, although the finding of minimum equivalence of protection of fundamental rights by the EU was only a presumption, which could be rebutted if the protection of the Convention's rights was manifestly deficient.

The presumption of equivalent protection becomes even more complicated due to the relations of the European courts. Shaelou explains,[381] that, the fact that the EU is not a party to the ECHR means that the EU is only an intervener, and as a result, the mode of governance shifts from *supranational* governance to intergovernmental governance. The author concludes that Member States are primarily responsible for an action taken at the *supranational* level while the role of the EU is undermined.[382]

In the same line of thinking, Casteleiro identifies that the EU's non-accession to the ECHR means that no responsibility can arise for the EU but only for the Member States. Accordingly, he argues that, on the one hand, the Court dealt with a situation in which

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[379] Bosphorus v Ireland, (n 364) para 152. (Reference to EU acts will be explored in Section 3, Study One).
[380] Stephanie L. Shaelou, *The EU and Cyprus: Principles and Strategies of Full Integration*, (Brill 2009) 205.
[381] ibid.
[382] ibid.

a state has transferred sovereign power to an international (*supranational*) organization but further notes that the organization cannot itself be held responsible under the ECHR for decisions of its organs if it is not a party to the ECHR. If, however, the EU was to accede to the ECHR, the conduct could be attributed to the EU.[383]

The Union, through its institutions, cannot provide the required equivalent protection in accordance with ECHR at all instances. Accordingly, Casteleiro argues that the ECtHR will accept jurisdiction in holding the EU Member States responsible for violations of the Convention by an EU institution in these areas.[384] In addition, inadequacy of equivalency, could include the improper or inadequate protection by the Court of Justice of the rights guaranteed by the ECHR as evidenced by a 'manifest deficiency' of the protection.[385] This argument could relate to legislative acts adopted within an area of shared competence between the Member States and the EU, i.e., the AFSJ.

Lock identifies an exception to the *Bosphorus* doctrine, that relates to the area of Common Foreign and Security Policy.[386] In his argument, the *Bosphorus* case contradicted the traditional view in public international law that members of international organizations cannot be held responsible for acts or omissions of international organizations. This argument is supported by the fact that international organizations have a legal personality distinct from that of their Member States,

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[383] Andrés D. Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press, 2016) 70.
[384] ibid.
[385] ibid.
[386] Lock, (2010) (n 373) 545. Lock compared between the judgments of Bopshorus and Matthews to the approach in Behrami, which followed the Bosphorus judgment, and explained that 'the extention of the Behrami approach to cases where there was no domestic act or omission by the contracting Party can be interpreted as a return to the more traditional view regarding the responsibility of the Contracting Parties for acts and omissions committed by international organizations of which they are members', 544–545.

therefore action taken by the EU under the Common Foreign and Security Policy will not be subjected to the ECtHR because of the EU's special competences in that area. This means that acts and omissions can burden the Member States rather than the EU itself.[387] The relationship of the EU with its Member States may influence how the *Bosphorus* doctrine attributes responsibility to either of them, however, the accession of the EU to the ECHR is crucial for identifying potential responsibility for the EU.

To this end, Klabbers, in the context of political theory, argues that expecting to build the EU on human rights and facilitate the integration process,[388] a future accession of the EU to the ECHR could limit the ECtHR. He argues that 'on the level of political theory, it seems highly implausible that the focus on human rights alone can legitimize a political enterprise, which otherwise suffers from a legitimacy deficit'.[389] This argument is powerful because it demonstrates a potential deficiency in safeguarding human rights at the EU level, even though the EU appears to provide an equivalent protection to that of the ECHR. The responsibility falls upon the Member States to guarantee the rights within the ECHR.

Another aspect concerning the identification of potential responsibility for the EU and its Member States when applying the ECHR relates to the implementation of the obligations of the UN Charter. Following *Bosphorus*, the Member States are considered responsible for examining whether they comply with their international obligations when implementing EU acts. The challenge is for the Member States to implement their

[387] ibid.
[388] Jan Klabbers, 'On Myths and Miracles: The EU and Its Possible Accession to the ECHR', (2013) Hungarian Yearbook of International Law and European Law 45, 45.
[389] ibid 46.

EU obligations and avoid penalization for non-compliance while at the same time complying with the international human rights framework.

The ECtHR examined the responsibility of the Member States when implementing EU acts and the risk of violating their international legal obligations. However, the ECtHR does not have jurisdiction over UN measures or its Member States' obligations in international law. In the case of *Behrami,*[390] the ECtHR distinguished between the obligations originating from the UN Charter, including the obligations stemming from the Security Council and other international legal obligations declaring them to be (i) supreme and (ii) not under the scrutiny of the ECtHR.

Importantly, however, the ECtHR in *Bosphorus* and *Behrami,* pointed out the difference between the EU and the UN explaining that UN is 'an organization of universal jurisdiction fulfilling its imperative collective security objective'.[391] The ECtHR in *Behrami* examined the Member State's responsibility for acts or omissions outside its territory (i.e., extraterritorially) and did not depend on the concerned Member State's decision but upon Kosovo Force (NATO) and United Nations Mission in Kosovo because of the jurisdictional transfer to international organizations.

Although the ECtHR's competence was restricted, the possibility of jurisdiction over extraterritorial acts was confirmed in the case of *Bankovic.*[392] In *Bankovic*, no collective state responsibility was examined by the ECtHR for breaches committed in the context

[390] Behrami and Behrami v France, Samarati v France, Germany and Norway, App nos. 71412/01 & 78166/01, para 149.
[391] ibid para 151.
[392] Para 67, In keeping with the essentially territorial notion of jurisdiction, the Court has accepted, only in exceptional cases, that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention. Bankovic and Others v Belgium and 16 other Contracting States [GC], App no 52207/99 (EctHR, 12 December 2001).

of NATO's military operations. The applicants argued that NATO's structure was such that it afforded 'neither substantive nor procedural protection for the fundamental human rights guaranteed under the Convention'. The case was thus declared inadmissible.[393]

As the Member States generally exercise discretion when implementing EU law, they have an obligation to respect the ECHR standards, even if the EU is not a party to the ECHR. As accession is a legal requirement of the Treaty of Lisbon and, following Opinion 2/13, there has been a greater effort on behalf of the CJEU to incorporate the Charter making direct references to the ECHR. Nevertheless, the EU's first attempt to accede to the ECHR failed in December 2014 following the CJEU Opinion 2/13, which declared the Draft Agreement incompatible with the specific characteristics and autonomy of EU law.[394] The CJEU argued that the Draft Agreement was incompatible with Article 6(2) TEU and Protocol No 8 TEU and the reasons for the Court's rejection were provided in Article 258 TEU.[395]

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[393] The decision of the EctHR was highly criticized, see for example Eric Roxstrom, Mark Gibney, Terje Einarsen, 'The NATO Bombing Case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection' (2005) Boston University International Law Journal, 23, 55–136.

[394] Glas & Krommendijk (2017) (n 377).

[395] The CJEU rejected the Agreement by offering the following reasons, stated in Article 258 in that: '-it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU;
- it is liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope ratione materiae of EU law being brought before the EctHR;
-it does not lay down arrangements for the operation of the correspondent mechanism and the procedure for the prior involvement of the Court of Justice that enable the specific characteristics of the EU and EU law to be preserved; and it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the

The Court's Opinion 2/13 holds the Draft Agreement to be incompatible with the EU Treaties for five fundamental reasons:

(i) it disregards the specific characteristics of EU Law in that Article 53 ECHR gives the power to Contracting States to lay down higher standards in their national laws or international agreements, while the CJEU has given an interpretation of the similarly worded Article 53 according to which it precludes higher standards that undermine the primacy, unity, and effectiveness of EU Law. Moreover, the specific characteristics of EU law would be incompatible with the principle of mutual trust, especially in the area of Freedom, Security, and Justice;[396]

(ii) it violates Article 344 TFEU and the method of settlement of disputes as provided by EU law by allowing Member States or the EU to initiate proceedings against one another under Article 33 ECHR;[397]

part of the EU in CFSP matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body'.

[396] The ECJ held that Member States could not have higher standards than the EU Charter in cases where the EU has fully harmonized the relevant law. There was no provision in the draft agreement to ensure coordination between the EctHR and the CJEU. Sionaidh Douglas-Scott (2014) Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice. Retrieved at: https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/
Also, Halberstam, identifies a concrete clash of standards in asylum law particularly with the principle of mutual trust and the implementation of the Dublin system, where Member States must trust each other's procedures for the protection of fundamental rights. Daniel Halberstam, 'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward'(2015) *German Law Journal*, *16*(1), 105-146.

[397] Ibid, The corresponding mechanism proposed allows for the Contracting Party is to become a co-respondent either by accepting an invitation from the EctHR or by decision of the EctHR upon the request of that Contracting Party. This means that the EctHR is to assess the rules of EU law governing the division of powers between the EU and its Member States, which can affect the division of powers between the EU and its Member States. *Also see* Stefan Reitemeyer, and Benedikt Pirker (2015), Opinion 2/13 of the Court of Justice on Access of the EU to the ECHR – One step ahead and two steps back. Retrieved at:

(iii) it would have an impact on the co-respondent mechanism that would eventually allow the ECtHR to decide on a question of EU law and infringe the CJEU's exclusive jurisdiction to rule on the division of responsibilities among the EU and the Member States;

(iv) the prior involvement procedure, which does not guarantee that the CJEU can decide on all questions of EU law;

(v) it would entrust judicial review, including fundamental rights and ECHR compliance of some Common Foreign and Security Policy matters exclusively to the ECtHR.

The decision created uncertainty around the application of the *Bosphorus* doctrine and came as a surprise to the traditionally referred and applied judgments of the ECtHR by the CJEU.[398] According to Halberstam, in line with *M.S.S. v Belgium* and what we have looked at thus far, the ECtHR's considers challenges regarding the mutual trust with considerable deference.[399] The Member States' actions are presumed to be lawful under the ECHR as long as such actions are subject to an equivalent standard of fundamental rights protection within the EU.

To gain a better understanding of the impact of the ECHR and the Charter of Fundamental Rights on the judgments of the CJEU and the ECtHR reference is made to

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https://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/. Also see

Paul Craig, Gráinne de Búrca, EU Law: Text, Cases, Materials (Oxford University Press 2015) 356-357.

[398] Glas & Krommendijk (2017) (n 377); It is explained that the CJEU started citing the rights protected by the ECHR in the mid-1970s and the first time that it referred to EctHR was in 1996. This practice allowed CJEU to 'conclude that fundamental rights constituted general principles of EU law because they resulted from the constitutional tradition common to the Member States', 568-569.
[399] Halberstam, D (2015) (n 396), 30.

Glas and Krommerndijk's insights.[400] Accordinlgy, they mention that since the entry into force of the EU Charter, the 'homogeneity clause' of Article 52(3) stipulates that the rights within the ECHR should be accorded with the same scope and meaning as those under the EU Charter, while Article 53 guarantees a minimum level of protection equivalent to the ECHR.[401] The ECtHR has followed and relied upon the CJEU to advance or adapt its interpretation of the ECHR and although it has not been regularly citing the CJEU, as vice versa, such references seem to be gradually increasing.[402]

It is observed that the EU's non-accession to the ECHR is particularly problematic for the Member States in terms of their responsibility when acting within the EU *acquis*. The application of fundamental rights can be verified by the Member States through the CJEU's mechanism of preliminary rulings to secure the highest possible level of compliance with the ECHR. Glas and Krommendijk indicate that with the application of the *Bosphorus* case, the ECtHR demonstrates its respect towards the CJEU and the autonomy of the EU legal order since it relied heavily on the CJEU's fundamental rights case law and the role of that court in supervising fundamental rights in the EU since the Bosphorus doctrine seems to suggest a desired relationship of comity, or even cooperation.[403]

However, the implications of the Bosphorus doctrine in the AFSJ are visible in Opinion 2/13. Accordingly, the CJEU granted the principle of mutual trust a constitutional status[404] by referring to it as being of fundamental importance in EU law but determining that accession is problematic in that the requirement for Member States to check one

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[400] Glas & Krommendijk (2017) (n 377).
[401] ibid 3-4.
[402] ibid 4.
[403] ibid 5.
[404] *Avotiņš* v Latvia App no 17502/07 (EctHR, 23 May 2016), para 116.

another on the protection of fundamental rights under the ECHR will undermine the autonomy of EU law.[405]

Two years following Opinion 2/13, the *Bosphorus* doctrine was applied by the ECtHR in *Avotiņš.*[406] The ECtHR reiterated that when applying EU law, 'the Contracting States remain bound by the obligations they freely entered into on acceding to the Convention' which nevertheless must be assessed in the context of the presumption of the *Bosphorus* judgment and developed in *Michaud*.[407]

The ECtHR, on the case of *Avotiņš*, delivered a judgment concerning the mutual recognition of judgments in civil matters under the Brussels I Regulation but it pointed that the methods used to create an area of freedom, security and justice must not infringe the fundamental rights of the persons affected by the resulting mechanisms, as per Article 67 para 1 of the TFEU.[408] Next, the ECtHR observed that where the domestic authorities give effect to European Union law and have no discretion in that regard, the *Bosphorus* presumption is applicable.[409]

At this point, while the mutual trust of the Member States does not seem to prevail over violations of fundamental rights, (*M.S.S. v Greece and Belgium*), case is that the EU and Member States may need to reconsider the Dublin II Regulation, as the recent refugee crisis, showed that, the likelihood of violations of the ECHR and of the EU Charter, remains high.

[405] Glas & Krommendijk (2017) (n 377), 7 Also see Piet Eeckhout, 'Opinion 2/13 on EU accession to the ECHR and judicial dialogue: Autonomy or autarky' (2015) *Fordham International Law Journal*, *38*, 955.
[406] Avotiņš v Latvia (n 404).
[407] ibid para 101.
[408] ibid para 114.
[409] ibid para 115.

4.1.4 The EU's Responsibility According to the International Law Commission's Draft Articles on the Responsibility of International Organizations

This part explores whether it is possible for the EU to owe international responsibility under the ILC's Draft articles on the Responsibility of International Organizations. For the purposes of this section's analysis, the EU is referred to as a sui generis international organization, although unique as its legal order is recognized by the CJEU as autonomous, it remains an international actor especially seen in its external action. It differs from the UN in that its Member States have conferred their powers to this supranational entity. As a sui generis organization, it contradicts the standard models of international organizations, with its supranational components, the development of its treaties, and the rule of law. ARIO, as will be seen next, considers the EU as an international organization, and identifies the *lex specialis* for purposes of responsibility. However, this section, and the characterization of the EU as an international orginisation, does not purport to change the character of the EU in this respect. The purpose is to examine two of the conditions that it meets under the ARIO. The EU's role as a global actor has developed a network of relations.[410]

The international organizations' international responsibility is codified in the titular draft articles of the ILC adopted in 2001 by the UNGA, while the ILC was simultaneously working on the draft articles on the responsibility of states for an internationally

[410] Paul Craig, Gràinne de Búrca, *European Union Law: Foundations* (Oxford University Press 2015) 317–318. Also, see Kateřina Čmakalová, Jan Martin Rolenc, 'Actorness and legitimacy of the European Union' 2012 *Cooperation and conflict*, *47*(2), 260-270. Gráinne de Búrca, 'The road not taken: the European Union as a global human rights actor' 2011 *American Journal of international law*, 105(4), 649–693. Alberto Martinelli, 'Global governance, power accountability and the European Union' 2001 *Sociological Bulletin*, *50*(1), 16–36.

wrongful act.[411] The work of the ILC on international organizations (IOs) codifies their responsibility in parallel to the articles on the responsibility of states. Accordingly, the articles are 'without prejudice to any question of the responsibility under international law of an international organization or any State for the conduct of an international organization'.[412]

The Special Rapporteur of the ILC, Gaja, explains accordingly that 'the articles on the responsibility of international organizations define all the cases in which an international organization incurs international responsibility.'[413] The Draft Articles on the Responsibility of International Organizations (ARIO) define international organization as an organization which has two characteristics: (i) is established by a treaty or other instrument governed by international law, and (ii) possesses its own international personality.[414] The EU, following the Treaty of Lisbon, satisfies both characteristics.[415]

Considering the particular importance of an international organization's powers and functions, the ILC adds a potential influencing factor in the application of ARIO, namely *lex specialis*.[416] The ARIO do not apply **'**where and to the extent that the conditions for the existence of an internationally wrongful act are governed by special rules of international law between that organization and its members.' [417] The wording for *lex*

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[411] ILC, 'Draft Articles on the responsibility of international organizations, with commentaries', 2001, Yearbook of the International Law Commission, 2011, Vol. II, Part Two.
[412] ILC, Report, GAOR 66th Sess., Suppl. 10, Doc. A/66/10, 54 et seq.
[413] Georgio Gaja, 'Articles on the Responsibility of International Organizations', Audiovisual library of International Law, New York, 9 December 2011 accessed at http://legal.un.org/avl/ha/ario/ario.html
[414] Article 1 (a), ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.
[415] Reference to the Lisbon Treaty and its related provisions will be analysed in Study Two – Part 2.
[416] ARIO para 7.
[417] ibid Article 64.

specialis indicates its not absolute character. The extent of ARIO application becomes the main question when applying the *lex specialis*. In this regard, the relevant provisions need to be further explored. The ILC's following commentary supports this argument.[418] Particularly, the ILC emphasizes that there are significant differences between IOs and states as well as between the functions and competencies of the IOs. Due to the diversities of the IOs, the *lex specialis* provision could affect the application of certain articles. As the Commission put it would be impossible to try and identify each of the special rules and their scope of application. According to the Commission of the European Union, that conduct would have to be attributed to the Community; the same would apply to other potentially similar organizations.[419]

In relation to the EU's responsibility, the ILC recognizes that it is impossible to identify each of the special rules and their scope of application for *lex specialis* purposes.[420] The ILC identifies that one such special rule is the attribution of the Member States' conduct when implementing EU acts. Accordingly, conduct would have to be attributed to the Community in the same way that such conduct would apply to other potentially similar organizations.[421] The responsibility in relation to the conduct of an organ or agent of the IO is also considered an act of that organization under international law regardless of the agent's position.[422] A closer examination of the ARIO provisions might indicate when the EU may or may not owe exclusive responsibility.

[418] ibid para 7.
[419] ibid para 2 of the Commentary in Article 64.
[420] ibid.
[421] ibid.
[422] ibid Article 6 (1).

Article 4 of the ARIO clarifies that the conduct of an act or omission should constitute a breach of an international obligation of that organization. In relation to the above, a question arises as to whether the rulings on the attribution of conduct when it is under the effective control of a Member State, indicate that the EU could have a joint responsibility with its Member States for their acts or its Agencies' conduct.[423]

The ARIO further provide that

> The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.[424]

The essence of the matter lies, not in the administrative position but in the mission's nature.[425] In this regard, the mandates of the EU agencies in concern may indicate potential responsibility. An analysis concerning the mandates of the EU agencies acting in the field of migration and asylum in the Mediterranean context takes place in Study Three.

Concerning the element of the attribution of conduct,[426] no intention is required rather than establishing a link between the breach and the international legal subject.[427] Arguably, an EU agency acting within, and on behalf of, the EU in accordance with the

[423] The responsibility of the EU agencies will be explored in Study Three – Part 1.
[424] Article 8 ARIO.
[425] ARIO commentary relating to Article 6.
[426] It is clarified by the author that a link ranges from institutional to factual or an acknowledgement of the act as its own, ibid 62.
[427] ibid 62.

latter's rules and regulations, could shift responsibility towards the EU for a breach of an international obligation. A joint responsibility would then depend on the Member States' conduct acting outside the field of EU law and order.

The ARIO provide that the determination of the functions of the organization's organs and agencies could be based on its rules;[428] it is the legal actor, however, who exercises effective control over the conduct that would be the subject of international law.[429] The rulings of the European Courts concerning the Member States' conduct when implementing EU acts and UN decisions, i.e., sanctions imposed on persons or entities, indicate several complications caused by the relationship between the EU and its Member States. Further to that, the rulings indicate that the EU Courts' jurisdictional competences are not always present, as evident from our discussion above on the implications in terms of responsibility arising from the EU's non-accession to the ECHR and the issues of EU's autonomy.

This understanding of the ARIO on the responsibility of EU Member States arising from their conduct is confirmed by the ECtHR's ruling in *Behrami and Samarati*. Accordingly, the effective control requirement would depend on the conduct exercised by each actor in the operation.[430] The ECtHR pointed out that it would be difficult to attribute responsibility to the UN, which results from contingents operating under national rather than UN command. It also stated that in joint operations, international responsibility would be determined, absent an agreement, according to the degree of effective control

[428] ibid Article 6 (1).
[429] ibid Article 7.
[430] Para 32.

exercised by either party in the conduct of the operation.[431] Therefore, the attribution of conduct was based on a factual criterion.[432]

The effective control of conduct was also a judicial matter in *Bosphorus*, where the ECtHR held that it could not review UN acts because of the UN legal order's primacy as attributed by Article 103 UN Charter.[433] The Court distinguished between the effective control of the UN and the actions of the UN Member State.[434] Two conditions need to be satisfied for responsibility to arise in relation to an international organization; (i) there must be a breach of an international obligation, and (ii) the breach must be attributed based on the conduct arising from the international organization's effective control. Fink, identifies that Article 7 of the ARIO, concerning conduct of an organ of a state or organs of an international organization when the latter exercises effective control, observes that it only requires the control of the international organization to be effective but not exclusive.[435]

The *lex specialis* provision could function as a potential influencing factor in the application of the ARIO. Because of European integration and the expansion of EU

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[431] ibid.
[432] Behrami (n 390) para 32, 'What has been held with regard to joint operations … should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the [UN] and the [TCN]. While it is understandable that, for the sake of efficiency of military operations, the [UN] insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion.'
[433] Article 103 UN Charter, Chapter XVI — Miscellaneous Provisions states that 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'
[434] ibid para 106.
[435] This is important in terms of joint operations of FRONTEX, where multiple actors are involved in the Operational Plan. Also see section 5.1.8. Also, Melanie Fink, *Frontex and human rights: responsibility'in'multi-actor situations' under the ECHR and EU public liability law*. (Oxford University Press 2018) 5.

competences, including the development of human rights within the EU legal order, the *lex specialis* provision may function in a way that the EU's responsibility is instead limited. However, the conduct of the EU agencies acting in accordance with the EU legal order comes under scrutiny when deciding the extent of the conduct and the effective control exercised.

When the issue of hierarchy between the international legal order and EU acts was brought before the CJEU in the cases of *Yusuf and Al Barakaat Foundation v Council* and *Kadi v Council*, the European Court of First Instance (ECFI) placed EU law within the international legal order. The ruling signals the hierarchy of the international legal order over EU law.

The ECFI firstly indicated that the Community should not infringe obligations imposed on its Member States by the UN Charter or impede their performance. Secondly, in the exercise of the Community's powers, the EU is bound by its establishing Treaty, to adopt all the measures necessary to enable its Member States to fulfil those obligations.[436]

From the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty.[437]

[436] Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, T-306/01, (Court of First Instance, 20 September 2005) para 231.
[437] ibid.

The ECFI ruled that it had no jurisdiction to review the UN's resolution. The EU, as an international organization, is bound by the hierarchy of international law, in accordance with the CJEU, and has a duty in international law to comply with the human rights framework in its internal and external policies and legislation. The EU's external relations policy can be explored through communication and diplomacy, its international autonomous acts, and its treaty-making powers.[438]

Casteleiro argues that 'the system of responsibility does not distinguish between an obligation enshrined in an international agreement, customary international law or any other source of international obligations'.[439] The same author further concludes that the specific features of the international organization's responsibility should not in principle affect how a breach of an international obligation is established.[440] Rather, the international organizations would be breaching an international obligation, if they do not act in conformity with an international obligation.[441]

Klabbers similarly argues that the potential problems of attribution, hypothetically, arise when the *raison d' être* of the international organizations is oversubscribed by the Member States, undermining the organizations' powers.[442] In support of that argument, the same author argues that

> If an organization's powers are limited to those powers explicitly granted, then the organization remains, in effect, merely a vehicle for its members rather than an entity with a distinct will of its own, and, if it is merely a vehicle for its member

[438] Casteleiro (2016) (n 383) 3.
[439] ibid 61.
[440] ibid 62.
[441] ibid 62.
[442] Klabbers (2013) (n 388) 55.

> states, then it is difficult to see why the particular form of organization was chosen by those members […].[443]

This is also true about the rule of interpretation of implied powers, where the *effet utile* must be guaranteed to interpret the treaty rules.[444] The EU's international responsibility depends on the elements of attribution and conduct.[445] It is not particularly easy to differentiate between the attribution and conduct of the EU and its Member States or the EU's Agencies if there is no explicit clause in their mandate. The answer regarding the EU's responsibility in accordance with the ARIO is affirmative. The EU can be responsible for an international obligation under international law. The doctrine of *lex specialis* certainly concerns the EU; however, the extent to which responsibility may be attributed for a specific conduct and the effective control exercised by the EU agencies or the Member States implementing EU acts is decided based on (i) the factual evidence of the case and (ii) the EU's competence to act within a specific area. The EU's responsibility depends on the complexity of the individual facts of each case but most importantly on the potential responsibility of the EU as an international legal actor, based on the presumption of equivalent protection. Regarding the development of human rights (referred to as fundamental rights in the EU context) is required as a next step to identify the competences of the EU and Member States. A more extensive analysis of the EU agencies in terms of operation and responsibility in the context of irregular migration in the Mediterranean will take place in Study Three.

[443] ibid 55.
[444] Relatedly, as part of the argument, it is noted that even in the absence of a specific legal basis, the EU was not prevented from acting or joining international organizations. ibid 293.
[445] Casteleiro (2016) (n 383) 53.

4.1.5 A Promise to Balance Human Rights with Security and Justice within the AFSJ

The responsibility of the EU, which gradually developed from a regional organization with *supranational* powers to an entity with a legal personality, has arguably expanded to human rights protection based on a fair balance within the AFSJ. This argument is explored with reference to the EU Treaty amendments.

Human rights within the EU, were gradually incorporated into its legal order and became subject to the jurisdiction of the Union's Courts. The EU's initial efforts centre on a 'functional need of economic cooperation'[446] and prosperity. The gradual incorporation of human rights into the EU through its treaties begun with the Single European Act in 1986.[447] The CJEU, gradually elevated fundamental freedoms to the level of fundamental rights as basic tenets of law.[448]

Within the European Communities, the asylum affairs were primarily held in the Ad Hoc Working Group on Immigration and Asylum, which consisted of senior officials acting on non-binding terms to which only the European Commission had observer status.[449] The European Parliament and the Council did not have any role. Another working group, namely TREVI (Terrorism, Radicalism, Extremism of Violence Internationally), created by the European Council in 1975, was working on matters of justice and home affairs.[450] It is stated that TREVI's work, which emphasized the mutual acknowledgement that the EC member states share certain threats and vulnerabilities , managed within a common

[446] Klabbers (2013) (n 388) 49.
[447] Single European Act, [1987] OJ NL.169/4.
[448] Klabbers (2013) (n 38) 49. Also see White, N. D. 'The ties that bind: the EU, the UN and international law' (2006) Netherlands Yearbook of International Law, 37, 57–107, 67.
[449] Joanne van Selm-Thorburn, 'Asylum in the Amsterdam Treaty: a harmonious future?' (1998) Journal of Ethnic and Migration Studies, 24(4), 627–638.
[450] 'The gradual establishment of an area of freedom, security and justice' accessed at <https://eur-lex.europa.eu/legal-content/LT/TXT/?uri=LEGISSUM:a11000>

coherent policy, opening thus perspectives for the abolition of internal borders and strengthening of the external borders, through the emergence of the Justice and Home Affairs policy.[451] TREVI was integrated into the Justice and Home Affairs pillar since the adoption of the Maastricht Treaty. Weinar, explains that this first intergovernmental group had a significant effect on the perception of migration as a border management issue.[452]

The four freedoms,[453] including the free movement of people [454] within an area with no internal frontiers, was expanded with accompanying measures for asylum, immigration, police measures and border controls to fight terrorism, drug trafficking, and other criminal activity. This is crucial in identifying the paradox of an international human right, which stems from natural law and the values of the UN, such as asylum, linked to border controls and security within the EU.

The free movement of persons was encapsulated in the Schengen Agreement of 1985 between France, Germany, Belgium, Luxembourg, and the Netherlands.[455] Gradually,

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[451] Position Paper on Home Affairs, 'Debate on the future of Home Affairs policies' Under the European Commission's Your Voice in Europe Programme. Accessed at: <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-is-new/public-consultation/2013/pdf/0027/academics/mohamed-hegazy_en.pdf>

[452] Agnieszka Weinar, 'EU Cooperation Challenges in External Migration Policy', European University Institute, EU-US Immigration Systems 2011/02; Weiner states that TREVI worked primarily on intra-EU migration, organized crime, and terrorism. The development of the EU migration policy has been set upon inter-governmentalism by the works of ministries of justice and interior, 2.

[453] The four freedoms are the free movement of people, goods, services, and capital.

[454] The legal basis of the free movement of persons derives from Article 3(2)TEU, Article 21 TFEU, Titles IV and V TFEU, Article 45 of the EU Charter. To clarify this reference, it is noted that the 1957 Treaty establishing the European Economic Community, addressed the free movement of workers and freedom of establishment, while the Treaty of Maastricht established the EU citizenship which gives the right to each EU citizen to move and reside freely within the territory of the Member States. The Lisbon Treaty confirmed this right, which is included in the general provisions on the Area of Freedom, Security and Justice.

[455] The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic

the area expanded to include other Member States.[456] The Benelux countries[457] decided to remove any internal barriers between their territories and to facilitate the free movement of people. The Benelux countries signed the agreement since there was no consensus with other States regarding the free movement of non-European nationals, referred to as *aliens,*[458] who were residing in the European Communities.

The intergovernmental cooperation between the five States signatories to the Schengen Agreement expanded to almost all the Community Member States, with the Schengen Convention signed in 1990 and brought into effect in 1995. The Schengen Convention removes checks at most of the EU's internal frontiers[459] and strengthens the controls at the Union's external borders.[460] There are no border controls when travelling by land

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of Germany, and the French Republic on the gradual abolition of checks at their common borders, [2000] OJ L239.

[456] Italy joined in 1990, Spain and Portugal in 1991, Greece in 1992, Austria in 1995, Denmark, Finland, and Sweden in 1996, The Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia in 2007, Switzerland in 2008 (associated country). Bulgaria, Cyprus, and Romania are not yet fully-fledged members of the Schengen area since the conditions for abolishing internal border controls are not yet met.

[457] Belgium, Luxemburg and the Netherlands signed the Treaty of the Benelux Economic Union in 1958, which became 'the first free international labour market. The movement of capital and services was also made free. Postal and transport rates were standardized, and welfare policies were coordinated. In 1970 border controls were abolished'. House of Lords, Library Note, Charlie Coleman, 'Schengen Agreement: A Short History', 7 March 2016, LLN 2016/013.

[458] ibid 'alien: shall mean any person other than a national of a Member State of the European Communities.'

[459] In relation to that, Article 2 (1), regarding 'internal borders' provides the following: 'Internal borders may be crossed at any point without any checks on persons being carried out. 2. However, where public policy or national security so require a Contracting Party may, after consulting the other Contracting Parties, decide that for a limited period national border checks appropriate to the situation shall be carried out at internal borders […]' ibid.

[460] ibid Article 3 (1). 'External borders may in principle only be crossed at border crossing points and during the fixed opening hours. More detailed provisions, exceptions and arrangements for local border traffic, and rules governing special categories of maritime traffic such as pleasure boating and coastal fishing, shall be adopted by the Executive Committee. 2. The Contracting Parties undertake to introduce penalties for the unauthorised crossing of external borders at places other than crossing points or at times other than the fixed opening hours.'

between the Schengen members, nonetheless passport and visa requirements continue to apply at the external Schengen borders for non-EU member nationals.

The 1990 Schengen Convention defined the application for asylum to mean the obtaining right of residence for any alien who submits in writing, orally or otherwise, an application to be recognized as a refugee, in accordance with the 1951 Geneva Convention relating to the Status of Refugees and its additional Protocol.[461] It further defines an asylum seeker as 'any alien who has lodged an application for asylum within the meaning of this Convention and in respect of which a final decision has not yet been taken'.[462]

For reasons of security, a European police force, namely Europol, was created and, as part of this response, the Schengen Information System (SIS) was established as an exchange information system. The new developments created pressure and the need for further cooperation for the Justice and Home Affairs matters. The following Treaty of Maastricht, aimed to improve the cooperation between states in relation to internal borders and transnational crimes.

The Maastricht Treaty, which entered into force in 1993, depicted the Union as being based on human rights, democracy, the rule of law, and the market economy. Klabbers points out that 'the EU founded on human rights, democracy and the rule of law (with or without the market) is too bland, too non-committal and, in an important sense, too dishonest'.[463] Continuing the analysis in relation to human rights in the EU, the author

[461] Ibid Article 1, definitions.
[462] ibid
[463] Klabbers (2013) (n 388) 50–53.

rigidly points out that if Europe is the birthplace of human rights, democracy and the rule of law, it is also the birthplace of slavery, colonialism, nationalism and genocide**.**

The inclusion of human rights is articulated by an obligation to respect the European Court of Justice's decisions.[464] The Court was given certain powers by the Treaty classified into three 'pillars'. However, the Union was operating on a single institutional structure, consisting of the Council, the European Parliament, the European Commission, the Court of Justice, and the Court of Auditors, that exercised their powers according to the Treaties.

The Union's operation was based on the European Communities and supported by policies and forms of cooperation in the Maastricht Treaty. The third pillar referred to the cooperation in the fields of justice and home affairs with the objective to develop common action and provide citizens with a high level of safety within an AFSJ. Within that area, the control of illegal immigration and common asylum policy were included. However, the Treaty of Maastricht did not contain a list of human rights and was criticized for the lack of gravity of its human rights as 'a rather empty chain, more impressive in its rhetorical quality … than in actual application'.[465] Nowhere in the Treaty, migration is regulated or referred to, in the way that the phenomenon is experienced today.

The Maastricht Treaty imposed formal intergovernmental cooperation between the Member States and abandoned the Ad Hoc Working Group's informal discussions on immigration and asylum. It also upgraded the European Commission's role as the

[464] Elizabeth F. Defeis, 'Human Rights, the European Union, and the Treaty Route: From Maastricht to Lisbon', 2017 Fordham International Law Journal, 35 (5), 1207.
[465] Klabbers (2013) (n 388) 53

initiator in cooperation with the Member States for judicial cooperation matters and matters of asylum and immigration.

The subsequent Treaty of Amsterdam, signed in 1997, came into effect in 1999 and amended the Treaties establishing the European Communities. It increased the Union's powers and proclaimed that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.[466] It elaborated on the concept of human rights and expanded the parameters of rights, particularly equality rights. Notably, Member States agreed to transfer powers to the EU in the area of immigration (borders and security) and enact a common foreign and security policy. The Community method applied in the third pillar areas, which included asylum, immigration, and external borders, among others.[467]

The Amsterdam Treaty brought various changes regarding the decision-making and policies in the fields of immigration and asylum as these were included in the Treaty establishing the European Communities under the title of *Visas, asylum, immigration and other policies related to free movement of persons.*[468]

With the introduction of the Schengen Convention framework in the Amsterdam Treaty, the national rules on asylum, border management, trafficking, fight against illegal

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[466] Article 1 (8), 'Substantive amendments', amending Article F Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, [1997] OJ C340/3.

[467] Other major areas included combating fraud, customs cooperation, and judicial cooperation in civil matters, in addition to some of the cooperation under the Schengen Agreement. In addition, intergovernmental cooperation in the areas of police and judicial cooperation was strengthened and created a new legal instrument similar to a directive, later developed to the common foreign and security policy and the new office, the 'Secretary-General of the Council responsible for the CFSP', and a new structure, the 'Policy Planning and Early Warning Unit'.

[468] van Selm-Thorburn (1998) (n 449) 627–638.

migration flows, visa policy and the rights of legal migrants, were harmonized with the EU level.[469]

The Amsterdam Treaty was expected to take the process on immigration and asylum matters first into the realm of semi-Community activity and then into a full Community activity.[470] The police and judicial cooperation remained in Title VI of the TEU. Asylum and immigration matters were transferred under *Visas, asylum, immigration and other policies related to free movement of persons.*[471] The Treaty enhanced the Court of Justice's role, and its jurisdiction was expanded to include questions of interpretation and the validity or interpretation of acts of the Community in this area, except for matters relating to internal security and the maintenance of law and order.[472] Thornburn, observes in an analysis that asylum and immigration controls cannot stand alone in a single border-free zone, since Justice and Home Affairs reflects the Common Foreign and Security Policy, from which Member States have traditional sovereign control.[473]

The AFSJ aims to facilitate the free movement of persons in conjunction with appropriate measures regarding the external borders control, immigration, asylum, and the prevention and combating of crime.[474] The Lisbon Treaty, signed in 2007, came into

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469 Weinar, (2011) (n 494) 2.
470 Semi-community activity means that 'the first five years after entry into force, the Council is to act unanimously, although qualified majority voting (QMV) will apply for deciding on the lists of third countries whose nationals require and do not require a visa to enter the EU, and on the uniform format of visas. The Commission will continue to have a right of joint initiative during this initial five-year period, and the Parliament will be consulted' van Selm-Thorburn (n 449) 631.
471 ibid.
472 ibid.
473 ibid 634.
474 Article 1, Substantive Amendments on Article B, 'to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime […]' Treaty of Amsterdam.

effect in 2009 with great emphasis on the AFSJ.[475] As a reform treaty, it introduces several important new features, including a more efficient and democratic decision-making procedure in response to the abolition of the old pillar structure. Accordingly, it increases the powers for the Court of Justice and strengthens the national parliaments' role. The basic rights are strengthened by the Charter of Fundamental Rights that now enjoys the same legal effect as the treaties.

The Treaty of Lisbon absorbs the remaining third pillar aspects of freedom, security and justice regarding police and judicial cooperation in criminal matters into the first pillar. The former intergovernmental structure ceases to exist while the acts adopted in this area are made subject to the ordinary legislative procedure (qualified majority and co-decision procedures) using the legal instruments of the Community method (regulations, directives, and decisions) unless otherwise specified.

The Lisbon Treaty confirms the EU's development as an international organization and an international actor with a recognized legal personality 'making it an independent entity in its own right'.[476] Accordingly, the recognition of the EU's legal personality means that it can now negotiate and conclude agreements, enjoy membership in international organizations, and join international conventions like the ECHR (Article 6(2) TEU).[477]

Prior to the Lisbon Treaty, the EU was engaging in legal relations with non-EU countries as well as with international organizations.[478] The EU enjoyed an international legal

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[475] European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01.
[476] Article 47 TEU.
[477] Consolidated Version of the Treaty on European Union [2008], OJ C115/01.
[478] Ramses A. Wessel, Alan Dashwood, Mark Marescеau, 'The EU as a party to international agreements: shared competences, mixed responsibilities' 145–180 in Ramses A. Wessel, Alan

status on the outset, but a distinguished external regime existed compared to Community law.[479] Post Lisbon, the EU reiterated its character and strengthened its institutional basis. This is well reflected in the common foreign and security policy of the Union indicating its important role as a global player.[480] Following the Lisbon Treaty, the EU is identified as a legal actor and a global player contributing towards the maintenance, protection and safeguarding of human rights.[481]

Within the meaning of Article 3(5) TEU, the Union exists as a particular actor in international relations for peace and security, solidarity, and mutual respect between peoples,[482] and the delegation of powers by states.[483] A politico-legal statement of Tomuschat,[484] explains accordingly that international responsibility for the EU is essential as an entity enjoying personality under international law.

Following the failure to adopt a Constitution for the EU and up to the time of writing, the EU has not joined the ECHR. The Treaty of Lisbon provides for the accession of the EU to the ECHR on the term that such an accession will not affect its competences as

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Dashwood, Mark Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press 2008) 152.

[479] ibid 153.

[480] Jonida Mehmeta, 'International Law and the Role of the European Union as an Actor in International Dispute Settlement' 2015 European Scientific Journal, 11(13) 87–97. The author particularly identifies the role of the EU as an international legal actor in terms of resolving disputes and conflicts. In addition, the author supports that the Union is perceived and described as an international actor in different ways, as a normative power, civil and structural, 93.

[481] Treaty of Lisbon

[482] Mehmeta, (2015) Supra 94.

[483] ibid 95; The author concludes the following: 'The fact that the Union has on many occasions failed as an important international actor Union does not overshadow his merits in many other cases in which has played an important role in international dispute settlement and regional conflicts'.

[484] The author refers to Christian Tomuschat, 'The international responsibility of the European Union' 177–191, 183 in Enzo Cannizzaro (ed.), *The European Union as an actor in international relations*, (Kluwer Law International 2002).

defined in the Treaties.[485] For the EU to accede to the ECHR, further amendments to that Convention are required or, alternatively, an accession treaty must be concluded between the EU and all existing parties to the ECHR,[486] i.e., the state's parties to the Council of Europe (CoE). It remains doubtful whether the CoE has such a competence.

Klabbers, argues that the EU should reconcile human rights with the alienation and individualization that they bring along for its Member States' citizens, with a veritable sense of society and solidarity. Provided that the political and legal problems of accession are overcome, then the EU will have decent reasons for accession based on solidarity. The latter, he argues, very much depends on how the Member States presently react to the ECHR but he points to the development of the EU as a market which created a competition between the Member States. To change the identity of that, he points out, would not be an easy task. As he expressed it, 'the EU needs a "thicker", more substantively oriented self-justification than either the anodyne market or the near-empty vessels of human rights may ever be expected to provide'.[487]

4.1.6 Concluding Remarks

This Part focused on the responsibility of the EU as an international organization. It examined the question on the EU's responsibility at an international level, particularly in accordance with the ILC's Draft Articles on the Responsibility of International Organizations.

As a starting point, and to emphasize the evolving character of the Union, it clarified that two pre-conditions need to be met by an international organization in terms of

[485] Article 6 para 2TEU provides that 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Un'on's competences as defined in the Treaties'.
[486] Klabbers (2013) (n 388) 56.
[487] Klabbers (2013) (n 388) 61.

responsibility: (i) to have been established by a Treaty, and (ii) to have its own international personality. The fact that the EU fulfils those two conditions indicates its capacity to have international responsibility as an international organization.

According to the ARIO, the EU can commit an internationally wrongful act or omission, for which responsibility may be attributed. Theoretically, this can be proved if a wrongful conduct is attributed to the EU. No other intention is required but to establish a link between the breach and the international legal subject. Accordingly, Article 4 of the ARIO clarifies that the conduct of an act or omission should constitute a breach of an international obligation of that organization. Furthermore, Article 8 of the ARIO provides that an organ or agent's conduct shall be considered an act of that organization. Notably, it is the legal actor, who exercises effective control over the conduct and could be held responsible in international law.

As argued in this Section, the EU's responsibility is possible; however, the ARIO make a specific reference to *lex specialis*. The *lex specialis* concerns the agreement or the relationship of the organization with its Member States. It is accepted that when there is a special agreement between the organization and the Member States upon a subject matter, then responsibility could shift between them.

The *lex specialis* does not supersede the international legal order. This is evident from the ECtHR's ruling in the case of *Bosphorus*, which concerned the primacy of the UN legal order over its European counterpart as attributed by Article 103 UN Charter. This means that in the event of a conflict between the obligations of the Members of the United Nations and their obligations under the EU, responsibilities under the UN Charter prevail. Consequently, responsibility for violating an international obligation shifts to the

Member States from the EU. The Member States need to make sure that they comply with the scope, principles, values, and obligations of the UN Charter, which was further confirmed by the ECFI's ruling in *Yusuf and Al Barakaat Foundation v Council* and *Kadi v Council*.

Responsibility within the EU is decided, based on the doctrine of equivalent protection when Member States implement fundamental rights in accordance with the ECHR. In the early 1990s the doctrine of equivalent protection was developed, which secured the Union and the ECtHR's autonomy, notwithstanding the conferral of powers by Member States to the Communities at the time. The doctrine underlies that a State remains responsible for its international obligations even if that State has transferred powers to the organization. This argument was supported, as we saw, in the case of *Matthews v UK*.

The ECtHR in *Bosphorus*, developed the doctrine of the presumption of equivalent protection to provide protection for the Member States when transferring their powers to the organization and avoid responsibility for a breach of fundamental rights. The ECtHR presumes that the EU Member States do not depart from their obligations under the ECHR in their implementation of EU law, since the latter, offers equivalent protection of fundamental rights to that of the ECHR.

Nevertheless, Opinion 2/13 emphasizes the autonomy of the EU in order not to undermine the role of the EU institutions by assigning primary responsibility to them. However, even though there is a Treaty obligation, the EU has not yet acceded to the ECHR, making it a highly unlikely possibility for the EU to be held responsible before the ECtHR. This argument is supported in *Avotiņš,* where the ECtHR reiterated that,

obligations must be assessed in accordance with *Bosphorus*, and that such responsibility remains with the contracting parties.

The *Bosphorus* doctrine is significant in terms of responsibility because it allows the ECtHR to exercise scrutiny over EU actions on each case's merits, upon an assessment of the area in concern. The development in the areas of migration and asylum within the European Communities indicates the states' and the EU's responsibility, to protect. Whether the protection offered by the EU is equivalent to the international obligations of its Member States requires a further analysis of the legal acts of the EU institutions (which will follow in the next Part) and an understanding of the development of migration and asylum within the AFSJ.

Responsibility in the areas of migration and asylum in the EU require an analysis of its Treaties. On closer examination, responsibility within the areas of migration and asylum, shifted or developed in parallel to the character of the Union during its evolution as an international organization. The responsibility shifts between the Member States and the EU. It can also shift towards agencies acting on behalf of the EU. This aspect is examined in the following Part, in parallel to the relationship between the EU and its Member States.

Part 2 – INTERNATIONAL PROTECTION WITHIN THE EU: THE EFFECT OF INTERNATIONAL LAW IN THE EU LEGAL ORDER

4.2.1 Interlude: The Role of the European Integration Theories, Particularly Functionalism and Neo-Functionalism

At the core of the EU's developmental rationale is the process of integration evident through the various theories on that subject. The integration theories[488] explain the distribution of preferences and conduct[489] and identify future developments concerning governance and responsibility within the EU.

The EU's rationale towards integration falls into phases with different characteristics with a goal of 'an ever-closer Union', which initially was not well defined or agreed upon.[490] The creation of a united Europe is based on the belief that any future wars will be prevented. The Union's establishment aimed to achieve financial sustainability, rebuilding, and development, thus transforming its internal and external profile. The 1957 EEC Treaty was first amended 29 years after its introduction with further four amendments.[491]

The EU's evolving character impacts its competences and its relationship with its Member States. Integration theories may help us identify future developments[492] and

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[488] Graig and de Búrca (2015) refer to five theories of European integration, namely: (1) Neofunctionalism, (2) Liberal Intergovernmentalism, (3) Multi-level governance, (4) Rational-choice Institutionalism, and (5) Constructivism. Craig, de Búrca, European Union Law, 2015 (n 410)
[489] Stone Sweet, Sandholtz, 'European integration and *supranational* governance' (1997) (n 61)
[490] Lorna Woods, Philippa Watson, *Steiner & Woods EU Law* (Oxford University Press 2012) 19–20.
[491] Single European Act 1985, Treaty of Maastricht in 1992, Treaty of Amsterdam in 1997, Treaty of Nice in 2001, and Lisbon in 2009.
[492] Antje Wiener, Thomas Diez, *European integration theory* (pp. 3-17) (Oxford University Press 2009) 4

future responsibilities of the EU. Theoretically, the EU's responsibility and the extent of its reach cannot be identified outside integration theories. Therefore, a brief analysis of European integration theories which best reflects the EU's responsibility, for the purposes of this research.[493]

4.2.2 Early Writings on Functionalism

Neofunctionalism is the developed ideology of functionalism, a 1950s ideology of Community integration created by Hass.[494] This theory is based on the concept of a functional spillover from one sector to the other, for example from economic to political.[495] A political spillover means that the development of integration in one sphere creates pressure for integration in other areas on the oversight of *supranational* authorities.[496] It is seen as a vehicle towards achieving Community integration, through the major Community player, namely the Commission. [497]

In his early writings on the theory of functionalism, Hass, in *Uniting of Europe*, developed an earlier version of the theory of functionalism, which distinguishes federalism from *supranational*ism.[498] The European Coal and Steel Community (ECSC) served as the agency of European integration at the time. [499] Haas observed that the ECSC's

[493] The analysis is limited to functionalism and neofunctionalilsm, only, and not all European integration theories. Other theories concern Liberal Intergovernmentalism, Multi-level goernance, Rational Choice institutionalism and Constructivism.

[494] Neofunctionalism is also explained in the work of Leon Lindberg; Craig P, de Búrca G, European Union Law, 2015 (n 410) 24; Ernst Haas (1950) 'The uniting of Europe: Political, social and economic forces'(n 60); Haas (1961) 'International integration' (n 60); Haas, 'Regionalism, functionalism, and universal international organization' (1956) (n 60).

[495] Craig, de Búrca (2015) (n 410) 24.

[496] Andrew Moravcsik, 'Preferences and power in the European Community: a liberal intergovernmentalist approach', (1993) Journal of Common Market Studies, 31(4), 473-524, 475.

[497] Craig P, de Búrca G, EU Law, 2015 (n 410) 24.

[498] Haas (1950) 'The uniting of Europe: Political, social and economic forces', (n 60) 38-58.

[499] ibid 59.

characteristics, specifically, the 'ability to implement decisions and to expand the scope of the system independently', pointed towards its development as an international organization.[500]

Functionalism arose from the Community's powers acting towards integration, administratively and doctrinally, since there was no meaningful alternative (e.g., no veto procedure as in international organizations, for example the OEEC).[501] Functionalism theory reflects a dynamic process of development from an institutional to a *supranational* level.[502] The spillover representing the functionalist theory occurs within the *supranational* level causing changes in social expectations and behaviour. These changes return to policy-making at the *supranational* level.

***4.2.2.*1 Functionalism developed into neo-functionalism**

As the theory on European integration progressed, Haas refined the theory of neo-functionalism as a 'process whereby political actors in several distinct settings are persuaded to shift their loyalties, expectations and political activities toward a new and larger center, whose institutions possess or demand jurisdiction over the pre-existing national states'.[503]

During Haas' time, he suggested that more states within the European region should be part of European integration. If extended to other regions of the world, regional integration would contribute to international peace,[504] following the paradigm of

[500] ibid 58.
[501] Organization for European Economic Cooperation, 1948–1960, later renamed Organization for Economic Cooperation and Development (OECD). Haas, E. (1950). The uniting of Europe: Political, social, and economic forces. Section: New Forms of intergovernmental Co-operation, p. 521-527.
[502] Stone Sweet, Sandholtz, (n 61) 300–301.
[503] Haas, 'International integration: The European and the universal process' (1961) (n 60).
[504] ibid 366.

European integration. Hass, supported that the progress of European integration should extend beyond the inherent myth of cultural-history antecedents towards conflict resolution as a common denominator. The idea was to redefine any potential conflict and find a solution through the transfer or expansion of competences from the national to the regional/European/international level'.[505] The effect of achieving this extension would be through the 'spill-over' effect of international decisions; in other words, a compromise by states on a common task achieved through an institutional mediator with a range of autonomous powers.'

In Haas' words, such a method would 'combine intergovernmental negotiation with the participation of experts and spokesmen for interest groups, parliaments, and political parties. It is this combination of interests and institutions which are identified as "*supranational*"'.[506] The important elements of this identification involve, on the one hand, 'creative compromise' and, on the other, 'identical and converging policy aims'.

Neo-functionalism is understood as an integrated process where governments become 'less and less proactive and more and more reactive' to changes of the *supranational* system.[507] Integration assessment is based on the economic, social and communication factors of each community.

4.2.2.2 Neo-functionalism and supranationality

Neo-functionalism supports that parliamentary diplomacy rests on common interests. In communities, for example, the fundamental decisions are based on a continuous compromise on behalf of bodies with constitutional powers. The compromise results

[505] ibid 368.
[506] ibid 368.
[507] Sweet, Sandholtz, (n 61).

from their contact with *supranational* voluntary associations and interest groups. Consequently, all actors work on common positions creating enormous pressure on governments and their employees to apply European norms and political processes.[508]

In the context of the UN, the integration theory of neofunctionalism becomes relevant.The neo-functionalism identifies, two elements shared by international organizations: (i) common interests, and (ii) *supranationality*.[509] Haas, argues that the UN environment has a 'volatile and dynamic' character and whereas its institutional structure is complex because of its tasks diversity, its functions extend beyond intergovernmental diplomacy to *supranational*ity.[510] Notably, UN efforts to deal with crises are dealt with by the Secretary-General through *supranationalism* and common interests.

As we have seen thus far, neofunctionalism is one of the dominant integration theories which has received greater attention, especially following the abolition of the pillar structure.

This shift towards neofunctionalism has affected the principal-agent theories that viewed Member States' governments as the principals wanting to delegate competences and responsibilities to other agencies, except for the Commission exercising its traditional role.[511] In functionalism, the law is understood as a primarily normative institution, which presumes an agreement based on acts and common rules

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[508] Haas, (1961) (n 61) 369.
[509] The term '*supranationality*' is used by Haas in his article titled 'International integration: The European and the universal process', (n 60) 385.
[510] Haas, (1961) (n 60) 385.
[511] From the Abstract of J. Peterson and M. Shackleton, The College of Commissioners, Craig, de Búrca, European Union Law (2015) (n 410) 40.

accepted by the Community. This creates a 'common pattern of culture' [512] and is characterized as a hybrid, expedient system, expected to change and grow.[513]

The neo-functionalist 'spillover' is elicited by the interconnectedness of the EU's institutions and the relationship of the EU with its Member States, post-Lisbon. The Council, for example, has become more proactive in the legislative process through its powers to propose legislation to the Commission, which in turn must report any reasons for objecting. [514] Moreover, the Council can also delegate powers to the Commission to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.[515] The Council, jointly with the European Parliament, exercises legislative and budgetary powers. This confirms the interconnectedness between the EU institutions and their shared powers.

The close connection between the institutional powers and competences is politically influenced by the fundamental role of the European Council. The Presidency of the European Council, which rotates among the Member States every six months, provides the Union with the necessary impetus for its development and defines the political priorities and initiatives of the institutions.

The following analysis concerns the EU's potential responsibility for international protection in international law based on the Union's characteristics such as: (i) the

[512] Stuart Scheingold, *The rule of law in European integration: The path of the Schuman Plan* (Quid Pro Books 2013) 62.
[513] James P. Sewell, *Functionalism and world politics: A study based on United Nations programs financing economic development*, (Princeton University Press 2015)
[514] Craig, de Búrca, European Union Law, 2015 (n 410) 44; Article 16 (1) TEU.
[515] Article 290 TFEU. The conditions upon which the Commission can act are provided for in para 2.

autonomy of the Union, (ii) its legal personality in accordance with its Treaties, (iii) the content of the Treaties, (iv) the EU's competences, and (v) the EU's hierarchy of norms.

4.2.3. The Development of an Early EU Protection System and Parallel UN Developments

4.2.4 Introduction

The phenomenon of irregular migration in the Mediterranean entails obligations for the EU Member States towards those migrants. These obligations arise from the EU *acquis* and to Member States' obligations under the international commitments towards the UN. Nevertheless, as was argued in the previous Part, not only Member States have such obligations in international law.

The extent of the EU and Member States' responsibilities within the EU's AFSJ forms the subject of this section. A subsequent issue concerns the direct or indirect effect of international law in EU law. Since the Lisbon Treaty, the Union has undergone two major reforms, which arguably have affected its level of responsibility. The first reform concerns the EU's legal personality, and the second, the replacement of the 'Community' by 'Union' indicates an idea of state entity.

Additionally, the evolving character of the EU, in both its internal and its external capacities, has created the need for the establishment and operation of supplementary organs acting on its behalf, for example, the European Asylum Support Office and the European Coast and Board Guard. The evolving character of the Union, reflected in its competences and the creation of sub-actors, strengthens the argument that the Union acts as a global actor. However, the responsibility of the Agencies acting on behalf of the

EU*, vis-à-vis* the EU and the Member States, may have created a new category of responsibility which is one of the main arguments of the present thesis.

This Part explores the research question that focuses on whether the European Union has any responsibility to protect irregular migrants in the Mediterranean based on its own legal order and, subsequently, if it does so, what the limits are of this responsibility. Responsibility is a term rarely used in the EU Treaties, and even in those rare references[516] it addresses only the Member States.[517] Certain delimitations regarding the EU's responsibility stem from one of its founding principles, namely the principle of conferred powers. These delimitations are based on two factors: first, the overall relationship between the EU and the Member States, and second, the competences of the EU defined by the Treaties.

A growing relationship exists between the EU and the Member States from the founding of the EEC[518] up to the entry into force of the Lisbon Treaty. That relationship is defined by the competences of the EU institutions and Member States which are divided, i.e., shared or exclusive competences according to the EU Treaties.

The next section explores irregular migration, asylum and issues concerning protection as these arise within the AFSJ.

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[516] That observation regards the Treaties of the EU, Treaty of the European Union and Treaty of Functioning of the European Union.
[517] TFEU refers to responsibility in the following Articles: 73, 80, 88(3), 146, 165, 166, 207(4)(b). It also refers to the responsibility of the Secretary General of the Council of Ministers in Article 240.
TEU refers to responsibility in the following Articles: 4, 17, 18, 34, 38.
[518] Following European Coal and Steel Community (ECSC) signed in 1951, the EEC Treaty came into effect in 1967. The EEC Treaty was signed by 6 States. Those are France, Germany, the Netherlands, Belgium, Italy, and Luxemburg. In 1986 the Community moved to the Single European Act (SEA) and from there in 1992 to the Maastricht Treaty (the Treaty of the European Union). In 1999 the Treaty of Amsterdam came into effect followed by the Nice Treaty in 2003.

4.2.5 The Area of Freedom, Security and Justice

The AFSJ within which asylum and migration developed is a shared competence area.[519] This area has incorporated the three-pillar system, which existed before – it is arguable as to whether this was done sufficiently and effectively – and has indirectly included security within external migration and the cooperation of the EU with third states. An overview of the origins of the AFSJ helps us understand (i) the shared or possibly shifting responsibility of the EU towards its Member States and (ii) the element of security in the AFSJ.

It is argued that the architects of the European Community did not intent to regulate migration and its external dimension at a *supranational* level, as migration primarily related to the free movement of workers, mainly EC nationals.[520] Further, legislation adopted by the Council and the Commission during the late 1960s and early 1970s related to the circulation of workers and adhered to national authorities' decisions as to who may enter and reside in the EC in the context of economic integration.[521]

The transformation of the external dimension of migration into a security issue seems to be the result of objections raised by Member States that the conditions of entry, residence, and employment of third country nationals affected their ability to provide security for their own nationals.[522] The Member States argued that migration fell outside

[519] Article 2 para 2, TFEU

[520] Meng-Hsuan Chou, 'The European security agenda and the "external dimension" of EU asylum and migration cooperation' (2009) *Perspectives on European Politics and Society*, *10*(4), 541–559, 544.

[521] ibid. The decision to enter involved the worker's family members.

[522] ibid. The reference in question related to Article 118TEC (in 1985) that gave the Commission competence to promote closer cooperation among the member states in the social field, i.e., employment and labour law. However, objections were raised by UK, Germany, France, Denmark, and the Netherlands, including the fact that the Commission didn't consult the Economic and Social Committee.

the social field of employment and labor law. The ECJ overturned their objections, but it annulled the Commission's decision for other reasons.[523] The outcome was that the ECJ rejected the argument that external migration was to remain solely within the competence of the Member States, and that public security reasons are not to jeopardize external migration.[524] Gradually, external migration came under intergovernmental governance with the 1985 Schengen agreement, discussed previously.

In the treaties of Maastricht, Amsterdam[525] and Nice, the policies on asylum and migration were included in Justice and Home Affairs[526] (JHA) of the EU legal system comprised of three pillars.[527] This meant that decision and policy making was taken at an intergovernmental level.[528] It should be stressed that the Commission's efforts to push the external migration agenda and the cooperation with third countries, for migrant workers and their families was influenced by the political situation at the time.

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[523] The other reasons in reference concern the Commission's decision which somehow prevented the Member States ability to implement drafts, agreements, and measures which it might consider not to be in conformity with Community policies and actions. Para 34. Joined cases 281, 283, 284, 285 and 287/85, Federal Republic of Germany and others v Commission of the European Communities, ECR 03203
Also, Chou (2009) (n 520) 545 and notes 3–7.

[524] ibid. Also, in para 25 of the ECJ (1987) ruling, the Court held that, *"The French Republic's argument that the whole area of policy on foreign nationals falls outside the social field inasmuch as it involves questions of public security for which the Member States alone are responsible cannot be accepted. "Whilst it is true that pursuant to their rules governing foreign nationals Member States may take measures with regard to workers who are nationals of non-member countries — either by adopting national rules or by negotiating international instruments — which are based on considerations of public policy, public security and public health and which are, as such, their sole responsibility, this does not mean that the whole field of migration policy in relation to non-member countries falls necessarily within the scope of public security".*

[525] The Amsterdam Treaty stated that the Member States would engage in external migration in order to establish progressively an area of freedom, security, and justice. Asylum and migration cooperation moved from the JHA pillar to the Community pillar. Chou, M. H. (2009) (n 520) 543, 547.

[526] With the Lisbon Treaty JHA is addressed as the area of freedom, security and justice.

[527] The three pillars legal system in the EU existed between 1993 to 2009.

[528] Craig, de Búrca, European Union Law (2015) (n 410) 15.

There is a nexus between the shifting level of migration and asylum policy, decision-making and geopolitical changes in the EC.[529]

The pillar system no longer exists in its initial form as the JHA policies of the previous third pillar have been incorporated in the new TFEU[530]and they have gradually shifted towards a *supranational* level. Asylum and immigration policies are incorporated in the AFSJ of the TFEU, which have gradually developed in the multi-annual programmes in the area of justice and home affairs, namely the Tampere, Hague and Stockholm programmes.[531] The AFSJ is comprised of five distinct chapters, including policies on border checks, asylum and immigration.[532] In this area, the decisions regarding the Union's legislative framework are decided by the Ministers of the Member States at the Council meetings.[533] Importantly, the legislation is adopted according to the ordinary procedure, which allows exceptions and reservations on provisions by Member States.[534]

[529] It is reported that the securitarian approach of the Maastricht Treaty in 1992, was influenced by the collapse of the Soviet Union and the lack of progress in European cooperation. It was also influenced by the changes brought by the Cold War in Germany and by the lack of legislative progress at a *supranational* level. Chou, M. H. (2009) (n 520) 546.

[530] Since Lisbon, the third pillar is transferred within the Lisbon Treaty, TFEU Articles 67-89.

[531]Retrieved at: https://eur-lex.europa.eu/summary/chapter/justice_freedom_security.html?root_default=SUM_1_CODED%3D23.

Also see David Edward, Robert Lane, *Edward and Lane on European Union Law* (Edward Elgar Publishing 2013) 662-667.

Also, see Tampere European Council, Presidency Conclusions 15 and 16 October 1999, https://www.europarl.europa.eu/summits/tam_en.htm; *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 13 December 2004, 2005/C 53/01;*The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens*, 2 December 2009, 17024/09.

[532] Other chapters of the area of freedom, security and justice are general provisions, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation.

[533] Edward & Lane (2013) (n 531) 667.

[534] ibid.

Following the Treaty of Lisbon, the AFSJ forms one of the non-exclusive competence areas for the EU.[535] Article 5 TEU, specifies that the limits of the Union's competences are governed by the principle of conferral, which means that the Union can act only based on competences attributed by the Member States.[536] The TFEU specifies the areas of exclusive or shared competence.[537] Article 2 TFEU, provides that 'when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of acts of the Union.'

The shared competence of the EU is expressed in Article 2 (2) TFEU, when the Union and the Member States may legislate and adopt legally binding acts in that area, when the Union has not exercised its competence or to the extent that the Union has decided to cease exercising its competence.

Since the EU does not enjoy an exclusive competence within the AFSJ, the EU's responsibility concerning international protection in relation to the vulnerable category of the irregular migrants in the Mediterranean, cannot be automatically assumed. An analysis on the legislative actions taken by the EU in the field of asylum and migration is therefore necessary. The EU's efforts to address international protection dates to late 1980s. Prior to that time, no reports have indicated the need to address international protection through legislative measures within the EU legal order. Since then, there is a

[535] Article 4 (2) (j) TFEU.
[536] Article 5 para 2 TEU.
[537] Articles 2-6 TFEU.

continued process of modification in both fields of asylum and migration within the EU's internal and external competences.

External migration, central to which is the phenomenon of irregular migration in the Mediterranean, has been linked to issues of security, which has been triggered as a response to terrorist attacks both in the 1990s and early 2000s and intensified with the global war on terror following the attacks in New York on 11 September 2001. Since 2001 leaders from all over the world, have imposed security measures in the fight against terrorism both internally and externally to protect public order and security and to guard entry into Europe, respectively.

Entry into Europe has since become increasingly difficult and expensive especially for irregular migrants who are either refugees according to the 1951 Refugee Convention or irregular migrants in other vulnerable situations. Their journey as reported, is not linear.[538] Prior to finalizing their irregular sea journey, migrants go through a fragmented journey,[539] often through desert, or facing strict border controls in several countries, which are at least exhausting for them physically.

It is reported that long and dangerous fragmented journeys are a common feature of today's migration. In 2010, before the so-called refugee and migration crisis in Europe, it has been identified that the fragmented journeys are caused by structural change in the migration systems caused by the apparent relationship to other major developments in the organization of migration.[540] Those who survive in reaching the

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[538] Collyer, King (2016) (n 291) 6.
[539] Michael Collyer, 'Stranded migrants and the fragmented journey' (2010) *Journal of Refugee Studies*, *23*(3), 273-293.
[540] ibid. The author concludes that technology, communications, and commerce suggest that there is a structural change on the organization of migration and that this leads to a requirement

Mediterranean shores, make an exceptional category of vulnerable refugees and migrants. However, the human cost of these fragmented journeys has created the need to re-examine and redefine the concept of protection which does not fall within the meaning of protection as defined in the 1951 Refugee Convention. It requires a closer examination into the humanitarian protection that the phenomenon in the Mediterranean represents in today's migratory and refugee systems in the EU.

Collyer and King also explain that, the fragmented journeys are not linear, but they result from continuous attempts to secure safety and security within the journey.[541] This is true especially due to the significant implications for control, new regulations on border crossing and, generally, the overall functioning of the legal systems of asylum and migration within the EU.

4.2.6 The 1990 Dublin Convention

The EU's efforts to provide protection to persons in need of asylum begun at a European Council in 1989,[542] whereby the aim was set to harmonize the asylum policies of Member States. That aim materialized with the adoption of the Dublin Convention in 1990 concerning the determination of the state responsible for examining asylum applications lodged in one of the Member States.[543] The Dublin Convention points towards an adequate, possibly equivalent, protection for refugees to the 1951 Refugee

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to reassess the ways in which we think about both, migration, and protection. In his analysis the author identifies that at the time (2010) in the African region and states amongst them Morocco, Algeria and across the Sahara, there are more than one category of migrants who are refugees. The author identifies the category of stranded migrants, the terminally stranded and those who require humanitarian assistance.

[541] Collyer, King, (2016) (n 291) 6.

[542] European Council meeting in Strasbourg on 8 and 9 December 1989.

[543] European Union, *Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities ('Dublin Convention')*, 15 June 1990, Official Journal C 254, 19/08/1997 p. 0001 – 0012.

Convention and its 1967 Protocol.[544] It was initially signed as an intergovernmental treaty outside the EU's legal framework,[545] which was later incorporated into the EU legal structure and gradually became *supranational*ized.The inspiring words of the Dublin Convention urge for guidance and continued dialogue between the Heads of the Member States and the United Nations.

The Convention built upon the principles of subsidiarity, solidarity, and shared responsibility as part of the harmonization process in the area of asylum. Subsidiarity stems from a commitment of a Member State to acknowledge responsibility to examine an asylum application. Solidarity stems from an obligation to accept any such application and assumed responsibility stems from the obligation to assess upon it. The principle of subsidiarity is related to competences and the extent to which the EU can act to achieve objectives that cannot be sufficiently achieved by the Member States.

The next phase towards adopting a common system of international protection in the Member States occurred ten years after the 1990 Dublin Convention. It is no coincidence that this next step emerged at a time of unrest and conflict in Kosovo during which more people were seeking international protection in the neighboring EU states. As with the adoption of the Refugee Convention (followed by the Protocol), which was deemed necessary at the end of the Second World War, so was the need to identify the Member State responsible for examining asylum applications within Europe triggered by the war

[544] Preamble European Union, *Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities ('Dublin Convention')*, 15 June 1990, Official Journal C 254, 19/08/1997, 0001 - 0012.
[545] Florian Trauner, 'Asylum policy: the EU's 'crises' and the looming policy regime failure' (2016) Journal of European Integration, 38(3), 311-325.

in the Balkan region. The legal framework on international protection within the EU needed to be balanced due to the pressures faced by EU states neighbouring Yugoslavia.

A common European asylum system based on solidarity and subsidiarity was therefore desirable for Member States to address the needs of the vulnerable population requesting protection temporarily or otherwise. The conflict in the region has heightened the need for the EU to seek more appropriate mechanisms that would offer protection to persecuted populations. It clearly derived from the fact that a mechanism of burden sharing was absent from the 1951 Refugee Convention.[546]

The Dublin Regulation proved problematic during the 2015 migration and refugee crisis both for the Member States at the EU's external borders and migrants and refugees. Member States at the EU's external borders, especially Greece and Italy, could not cope with high numbers of migrants and refugees coming to the EU. For example, Greece was already burdened financially but did not have a well-functioning asylum or other protection systems, at the time.[547] The conditions worsened, leading to the suspension of Dublin transfers in Greece following a ruling from the ECHR.

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[546] Hathaway (2019) (n 229).

[547] It is reported that even before the 2015 migration and refugee crisis in the EU, the Court of Justice of the EU in the joined cases *of C-411/10* and *C493/10* of 2011 delivered a judgement whereby it held that member states may not transfer an asylum seeker to a State where it is possible to be subjected to torture or inhuman or degrading treatment of punishment. Accordingly, the CJEU held that states cannot be unaware that systematic deficiencies in the asylum procedures and reception conditions of asylum seekers […] amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman and degrading treatment. Trauner (2016) (n 545).
Also, reference to the financial crisis and the dramatic reductions in state expenditure is identified as one of the reasons which deeply affected the two countries in the migration crisis. Collyer & King, (2016) (n 291) 4.
Also see, Opinion of the Advocate General delivered on 22 September 2011, CJEU.
Similarly, in 2014 the ECtHR decided upon suspension of transfers to Italy, *Tarakhel v. Switzerland,* App. no. 29217/12 (ECtHR, 4 November 2014).

Collyer and King argue that the 2015 migration and refugee crisis has led to the gradual collapse of the Dublin system as the principle concerning the country of first arrival was deemed ineffective.[548] During this time at the peak of the migration and refugee crisis**,** Germany suspended all returns to Greece under the Dublin Convention.

The EU was criticized for being remarkably slow in providing much needed financial and other assistance to front-line states. With reference to Greece, the Greek Prime Minister characterized the reception places (camps) as a 'cemetery of souls', due to the slow or ineffective policy of the EU regarding resettlement of refugees from Greece, as a front-line state, to other Member States.[549]

Part 3 – THE RELATIONSHIP BETWEEN THE EU AND FRONTEX IN TERMS OF RESPONSIBILITY

4.3.1 European and International Efforts Towards the Establishment of Temporary Protection

The UNHCR firstly mentioned temporary asylum (protection) in 1977.[550] It was within the context of a mass influx of displaced persons that the doctrine was first referred to in the UNHCR's EXCOM Conclusion. The EXCOM Conclusion stated that in the event of a mass influx of displaced persons, the latter should receive at least temporary refuge.[551] Further, this is reflected in the UNGA resolution,[552] calling upon the international

[548] Collyer & King (2016) (n 291) 6.
[549] Greenhill, (2016) (n 367) 319.
[550] Lambert H, 'Temporary refuge from war: Customary international law and the Syrian conflict' (2017) 66(3) International & Comparative Law Quarterly 723, 731.
[551] ibid.
[552] UNGA Resolution 69/152, OP39, 18 December 2014. Lambert (2017) ibid 731.

community to act for the protection of persons (especially those fleeing from armed conflicts) in the spirit of international solidarity and burden-sharing.[553]

During the serious conflicts in former Yugoslavia and Kosovo, the Council issued a Directive addressing the minimum standards for providing temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between the Member States in receiving such persons and bearing the consequences thereof.[554] In order to reduce the burden and the disparities between the asylum systems in the Member States, caused as a result of mass influx, the EU adopted the Temporary Protection Directive.[555]

The EU enhanced solidarity for the Member States and offered immediate protection for those populations in need. The Directive was also a product of political considerations of the Council of Ministers of immigration discussed at their meetings in 1992 and 1993.[556] The EU regulated admission and residence in the Member States, on a temporary basis, for people in need of protection[557] by adopting burden-sharing approach in 1995.

In parallel, at the international level, in its 49th Session, the UNGA adopted the Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees of its 45th Session, which in its Conclusions highlighted that temporary

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[553] Lambert (2017) (n 550) 730-731.

[554] European Union: Council of the European Union, *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof*, 7 August 2001, OJ L.212/12-212/23; 7.8.2001, 2001/55/EC.

[555] ibid.

[556] London on 30 November and 1 December 1992 and Copenhagen on 1 and 2 June 1993, Preamble, para 3, *Council Directive 2001/55/EC of 20 July 2001* ibid*.*

[557] Council Resolution of 25 September 1995 on burden-sharing regarding the admission and residence of displaced persons on a temporary basis, Official Journal *OJ C 262, 7.10.1995, 1–3.*

protection, as a Comprehensive Response to the Humanitarian Crisis in the former Yugoslavia and admission to safety, respect for basic human rights, protection against refoulement and safe return when conditions permit to the country of origin, can be of value as a pragmatic and flexible method of protection.[558]

The UNGA further expressed that the beneficiaries of temporary protection may include persons who qualify as refugees under the terms of the 1951 Convention and the 1967 Protocol as well as others who may not qualify. In providing temporary protection, the UNGA stressed that states and the UNHCR should not diminish the protection afforded to refugees under those instruments.[559]

Meanwhile, the UNHCR called for concerted action through the 1994 General Conclusion on International Protection for States to assist countries that receive and care for large numbers of refugees.[560] The voluntary act by states was seen as humanitarian rather than an international obligation by states to provide protection, at least on a temporary basis.[561] Further, it was acknowledged that the vulnerable population could be refugees within the 1951 Refugee Convention and its 1967 Protocol.

Temporary protection was not addressed in any other situation within Europe, rather than in former Yugoslavia at the time of the civil unrest. The Temporary Protection Convention highlighted the rights of migrants or potential refugees, further to an obligation of Member States to solidarity. The commitment to temporarily protect remained non-legally binding and did not give rise to potential responsibility for any

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[558] Para (r), United Nations, GENERAL A/49/12/Add.1 20 October 1994 Forty-ninth session, Report of the United Nations High Commissioner for Refugees.
[559] ibid
[560] UNHCR, 'The scope of international protection in mass influx', EC/1995/SCP/CRP.3, 02 June 1995.
[561] ibid para 19.

State. However, it is reported that temporary refuge is a facilitative admission in situations of mass influx where states face various crucial issues[562] not limited to humanitarian issues, such as problems of public order and national security.[563] The doctrine emerged at a time when asylum was more of a permanent situation rather than temporary.[564] Nevertheless, temporary refuge (or protection) is rooted in the *non-refoulement* principle expressed in the 1951 Refugee Convention.

The *non-refoulement* principle and the right to temporary refuge, respect the right to leave any country. It would be an oxymoron to claim acknowledgment of the need to respect the *non-refoulement* principle but at the same time to reject the right of anyone to leave any country.A person must be outside of a country to request asylum protection or a temporary refuge, and that right to asylum must be safeguarded. Whether the right to leave any country has entered the EU acquis, and how it later developed, starts with the Temporary Protection Directive. The next section proceeds with an analysis of how the Temporary Protection Directive remained an unwanted framework during the EU's latest migration and refugee 'crisis'.

4.3.1.1 Temporary Protection Directive

At the EU level, temporary protection is considered a procedure of exceptional character.[565] The Temporary Protection Directive 2001/55, was to be implemented by Member States by 2002; however, several Member States, such as Luxemburg, Greece and the UK, were condemned by the Court of Justice for failing to implement it on

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[562] Lambert (2017) (n 550) 726.
[563] ibid*.*
[564] ibid. The author is citing Guy Goodwin-Gill, '*Non-refoulement, temporary refuge, and the "new" asylum seekers'*, in David Cantor, Jean-François Durieux (eds), R*efuge from Inhumanity? War Refugees and International Humanitarian Law* (Leiden: Brill Nijhoff 2014) 433-459.
[565] Article 2.

time.[566] The Directive presupposed mass influx[567] of persons who could not be returned to their country of origin and provided for a mechanism that allowed populations to request asylum on a temporary basis. No individual interviews or determination procedures were required as the grounds for protection were self-evident and supported by the mass influx of affected populations collectively. Article 1 of the said Directive provided that temporary protection would apply to persons (individuals rather than populations) whom the Member States were prepared to admit on a temporary basis.[568] The said mechanism was based on the principle of burden-sharing but was not meant to be triggered automatically. A Council decision was required on the grounds provided in the Temporary Protection Directive.[569]

The Directive applies to imminent mass influx or to mass influx of persons on either a spontaneous exodus (right to migrate) legally or irregularly, or upon evacuation.[570] Temporary protection is not prejudiced to the rights accorded in the 1951 Refugee Convention and its 1967 related Protocol. Its duration is of maximum two years. Persons under the Temporary Protection Directive have the right to freely move to another State

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[566] C-454/04 Commission v Luxembourg, judgment [2005] OJ C 182, C-476/04 Commission v Greece, judgement 17 November 2005, Case *C-455/04, Commission v UK, Judgment* 23 February 2006.

[567] UNHCR's position on mass influx, Para 3: 'Large-scale influxes include persons who are refugees within the meaning of the 1951 Refugee Convention and 1967 Protocol, as well as persons who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of, or the whole of their country of origin or nationality are compelled to seek outside that country. What constitutes a "mass or large-scale influx" cannot be defined in absolute terms but must be defined in relation to the resources of the receiving country. The expression should be understood as referring to a significant number of arrivals in a country, over a short time period, of persons from the same home country who have been displaced under circumstances indicating that members of the group would qualify for international protection, and for whom, due to their numbers, individual refugee status determination is procedurally impractical'. UN High Commissioner for Refugees (UNHCR), *UNHCR Commentary on the Draft Directive on Temporary Protection in the Event of a Mass Influx*, 15 September 2000.

[568] ibid Article 1.

[569] ibid Article 5.

[570] Steve Peers, (2011), "*EU justice and home affairs law (non-civil)",* p.342.

using the documents provided in the first Member State, while Member States can authorize the entry of the family. Temporary protection is terminated by the Council following proposal by the European Commission.[571] Once the temporary protection is terminated, the same legal requirements apply as with persons not residing in the EU.

The Temporary Protection Directive is a valuable tool in the hands of the Member States and EU institutions.[572] It does not distinguish between geographical areas and respects the principle of *non-refoulement* and the fact that persons from countries where instability prevails due to war or conflicts, or where public order is seriously disturbed, cannot be returned. Only when the Council of the EU decides that the situation is terminated, that temporary protection ceases, and populations are returned to safety in their countries of origin or have access to other measures regarding their right to reside in the host or other State.

The Temporary Protection Directive respects human dignity as it primarily aims to save human lives and offer immediate protection from serious and life-threatening human rights violations. Its objectives align with the international human rights instruments and the 1951 Refugee Convention, and its 1967 related Protocol. Notwithstanding this fact, temporary protection was not included in the Common European Asylum System (CEAS) developed in the following years. This is mainly because states were unwilling to apply the Temporary Protection Directive in practice and to establish national temporary protection regimes based on the newly developed burden-sharing principle.

During the latest migration and refugee crisis, the Temporary Protection Directive remained inactivated. The European Commission did not suggest its activation or

[571] ibid 342-345.
[572] Temporary Protection Directive applies to all member states except Denmark.

inclusion in the CEAS, potentially because of two reasons: (i) the previous unwillingness of its Member States to apply its provisions and (ii) because of a risk faced by the Member States in the application of a lower standard of protection rather than the standards implicitly provided for in the 1951 Refugee Convention.[573] The EU, arguably, chose not to use the Temporary Protection Directive but instead to rely on the Member States to apply the Refugee Convention and EU law provisions.[574]

The departure from the temporary protection doctrine, indicates a responsibility gap for the EU if we consider that the mechanism provided is triggered by the EU itself. Instead, the Commission decided to better address the latest migration and refugee crisis through measures envisaged within the political European Agenda on Migration.[575] Accordingly, it was considered that a relocation scheme developed within the European Agenda on Migration would ensure compulsory sharing of efforts between the Member States and provide access to asylum procedures at the same time.

However, it can be taken into account that the voluntary relocation schemes during the 2015 refugee and migration crisis in Europe indicate the reluctance of Member States regarding the even distribution and burden sharing of asylum seekers.[576] At the same time, exceptions were present, such as the suspension of transfers as a policy measure

[573] Peers (2011) (n 570) 345.
[574] Lambert (2017) (n 552) 723.
[575] Information retrieved by European Parliament on parliamentary questions, Answer given by Mr Avramopoulos on behalf of the Commission, on 26 February 2016. http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-016015&language=EN.
https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/backgroundinformation/docs/communication_on_the_european_agenda_on_migration_en.pdf
[576] Trauner (2016) (n 545).

in Germany in order to allow more refugees to enter the country and, maybe, join their families without the fear of being returned to the first country of entry.[577]

The European integration is influenced by parallel UN efforts. The development of CEAS within the EU derives from the necessity to better manage the flows of the refugee population in the Balkan route based on burden-sharing, in alignment with the developments in the UN concerning the doctrine of temporary protection. The legal acts of CEAS adopted by the European institutions indicate the political influences within the EU's powers.[578]

The CEAS comprises legal instruments that refer to extra-regional refugees and migrants (irregulars or otherwise) excluding EU citizens, who, in the case of persecution or other drivers of migration, can exercise their right to free movement within the EU.

4.3.1.2 From Temporary Protection to the CEAS

Drawing from the above analysis, it becomes apparent that the divergence and disparities in the policies of Member States regarding temporary protection caused a considerable burden to some but not the other Member States.[579] In 2003 and 2004 the

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[577] Germany announced itself to suspend the Dublin regulation for refugees coming from Syria. Angela Merkel's phrase "We can do this" meant that Germany was willing to implement its fair of burden sharing in accordance with the relocation scheme of for 160000 migrants from Greece and Italy. Generally, though the relocation scheme results remained poor. ibid.

[578] It is nowadays stressed that, there is a profound gap between the principle of burden sharing and solidarity to what actually occurs on the ground. The principle of burden sharing is not obligatory for Member States, and therefore is limiting in all respect. Sergio Carrera, Daniel Gross, Elspeth Guild, 'What are the priorities for the new European agenda on migration?', CEPS Commentary, 22 April 2015.

[579] European Commission, January 2016. *Study on the Temporary Protection Directive – Final Report.* Para. 3.1.2., p.11. Retrieved at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/temporary-protection/docs/final_report_evaluation_tpd_en.pdf

Council of the EU adopted the first phase of CEAS,[580] which was agreed in Tampere in 1999 by the European Council.[581] The second phase of the CEAS[582] was agreed by the

[580] Council Directive 2003/9/EC *laying down minimum standards for the reception of asylum seekers* (Reception Directive), OJ 2003 L31/18.
Council Regulation (EC) 343/2003 *establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin Regulation),* OJ 2003 L50/1.
Council Directive 2003/86/EC *on the right to family reunification (Family Reunification Directive*), OJ 2003 L251/12.
Council Directive 2004/83/EC *on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive),* OJ L304, 30/09/2004, p.0012-0023.
Council Directive on minimum standards of procedures in Member States for granting and withdrawing refugee status, OJ L 326; 13 December 2005, pp. 13-34.
The first phase of CEAS was from 1999 to 2003. The implementation by Member States was completed in 2013.
[581] European Union: Council of the European Union, "*Presidency Conclusions, Tampere European Council, 15-16 October 1999"*, 16 October 1999, available at: http://www.refworld.org/docid/3ef2d2264.html, para 13-17. It is noted that the Programme was started when the Amsterdam Treaty was into force.
[582] "CEAS in its second phase the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection, as well as strengthening practical cooperation between national asylum administrations and the external dimension of asylum". European Union: European Commission, "*Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Policy Plan on Asylum. An Integrated Approach to Protection Across the EU"*, 17 June 2008, COM (2008) 360.
On 04/05/2017 the Commission presented the following first package of proposals: reform of the Dublin system to better allocate asylum applications among member states and to guarantee timely processing of applications; the reinforcement of the Eurodac regulation to increase the efficiency of the EU fingerprint database for asylum seekers; the strengthening of the European Asylum Support Office's mandate to turn it into a fully-fledged EU agency for asylum. Retrieved at: http://www.consilium.europa.eu/en/policies/migratory-pressures/ceas-reform/ceas-reform-timeline/
The second phase consists of the following proposals, presented on 13/07/2017 by the Commission:
Proposal for a Regulation of the European Parliament and the Council *establishing a common procedure in the Union and repealing Directive 2013/32/EU.*
Proposal for a Regulation of the European Parliament and Council *on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*
Proposal for a Directive of the European Parliament and of the Council *laying down standards for the reception of applicants for international protection (recast).*

Commission based on a Policy Plan in 2008.[583] The TFEU as amended by the Treaty of Lisbon set out the modification and development of the European system on asylum. Both Treaties incorporated the international framework on asylum protection, i.e., the 1951 Refugee Convention and its 1967 Protocol. The temporary protection framework for vulnerable people or populations was not incorporated or referred to in the CEAS.

Legal concepts relating to who qualifies for international protection within the EU's legal order are provided in the Qualification Directive and its Recast.[584] Accordingly, international protection at the EU level consists of two status categories: (i) refugee protection and (ii) subsidiary protection. The refugee status refers to persons who qualify as refugees in accordance with the 1951 Refugee Convention's definition.[585] The subsidiary protection status refers to persons who, if returned, would face serious harm.[586] However, both categories of international protection apply to situations of non-temporary nature.[587]

The basis for subsidiary protection differs from temporary protection. Subsidiary protection requires an individual assessment of facts, whereas temporary protection adheres to a broader concept. It could be argued that those asylum seekers who do not fall within the terminology of the 1951 Refugee Convention's, or an equivalent one, may

[583] European Union: European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Policy Plan on Asylum. An Integrated Approach to Protection Across the EU', 17 June 2008, COM (2008) 360.
[584] Council Directive 2004/83/EC, Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU.
[585] ibid Article 2 Qualification Directive, 2004 and Article 2 (d) Qualification Directive Recast.
[586] ibid Article 2 (g) and Article 15, Qualification Directive Recast, 2011.
[587] ibid Principle 26, Qualification Directive Recast 2011.

fall within the temporary protection concept. However, the application of the temporary protection concept is activated upon a decision by the European Commission, whereas international protection is decided by the Member States.

The EU legislation allows Member States to adopt more favorable measures than the ones provided in the EU legislative acts. The Member States are responsible for ensuring that any more favorable measures do not undermine the EU adopted measures. Indeed, some Member States have incorporated the concept of collective protection within their national systems.[588]

The CJEU has confirmed that the 'right to asylum' is a broader concept than the refugee status.[589] The ECtHR reiterated that the ECHR does not explicitly provide for the right to asylum; however, this right is subject to the states' treaty obligations, including the ECHR 'which contains various protections concerning the expulsion and other forms of removal of third country nationals such as protection against refoulement'.[590]

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[588] European Commission, 'Comparative overview of national protection statuses in the EU and Norway', EMN Study 2019. Final Version 11th February 2019.

[589] CJEU, *B & D*, Joined Cases C-57/09 and C-101/09, judgment (Grand Chamber) of 9 November 2010, ECLI:EU:C:2010:661, para. 121. It is noted that France and Italy contain a right to asylum which is broader than the definition in the 1951 Refugee Convention.

[590] UN High Commissioner for Refugees (UNHCR), UNHCR Manual on the Case Law of the European Regional Courts, June 2015, 1st edition, p. 188. Retrieved at: https://www.refworld.org/docid/558803c44.html. See also ECtHR case law: Soering v. The United Kingdom, App no 14038/88, (ECtHR, 7 July 1989)*; Cruz Varas and Others v. Sweden,* App no 15576/89, A/201, (ECtHR, 20 March 1991)*; Vilvarajah and Others v. the United Kingdom,* 1991 App no 13163/87 (ECtHR, 30 October 1991); *Babar Ahmed and Others v. the United Kingdom,* Application no 24027/07 ECtHR 10 April 2012); *T.I. v. the United Kingdom*, App no 43844/98 (ECtHR 7 March 2000); *K.R.S. v. the United Kingdom*, App no. 32733/08 (ECtHR 2 December 2008); *M.S.S. v. Belgium and Greece*, App no 30696/09 (ECtHR 21 January 2011); *Abdolkhani and Karimnia v. Turkey*, App No. 30471/08 (ECtHR 22 September 2009); *Hirsi Jamaa and Others v. Italy*, App no 27765/09 (ECtHR 23 February 2012).

4.3.2 The EU in the Field of International Protection (Migration and Asylum) as an External Actor

The development of the CEAS was accompanied by the EU's enhanced role in its external activities. International protection in its external dimension expands beyond the geographical borders of the Member States. As a consequence of the limitation requesting persons to be outside the country of origin or habitual residence, asylum, arguably, only has a territorial application for Member States while for the EU an external dimension is also present.

The EU addressed the external dimension of asylum by developing certain policies outside the Member States' territory. Based on a Communication on the Policy Plan on Asylum, the second phase of the CEAS developed overarching objectives. [591] These objectives concerned the extension of the EU's asylum policies and procedures externally in other regions. External actions relate to Regional Protection Programs[592] (RPPs), resettlement[593] and cooperation with third countries in the area of migration and asylum.[594] The RPPs aimed at an 'integrated approach to asylum and migration

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[591] Para 2 European Union: European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Policy Plan on Asylum. An Integrated Approach to Protection Across the EU*, 17 June 2008, COM (2008) 360.

[592] ibid para 5.2.2.

It is reported that the Regional Development and Protection Programme is a three-year seven-donor initiative managed by Denmark to support Lebanon, Jordan and Iraq to plan, mitigate and maximise the effects of Syrian refugees forced displacement into their countries parallel to cooperate with national and international actors to create socio-economic development opportunities for the most vulnerable. Information provided by the European Union External Action, on 08.08.2016 Retrieved at: https://eeas.europa.eu/headquarters/headquarters-homepage/7895/rddp-regional-development-and-protection-programme-refugees-and-host-communities-lebanon-jordan_en

[593] ibid para 5.2.2.

[594] External solidarity is seen in the financial support provided for the period 2007-2013, a total amount of €384 million is available under the 'Thematic Programme of Cooperation with Third Countries in the Areas of Migration and Asylum'. Para 5.2. For the period 2007-2013, a total amount of €384 million is available under the Publication Office of the European Union,

issues' in countries outside the EU.[595] The efforts were initiated in 2003 by the European Commission in a Communication, upon a proposal requesting the EU to develop a policy for a protected entry system and a resettlement scheme. The proposal focused on supporting the regions where a large number of refugees and migrants wished to migrate to or request asylum from in the EU.[596]

The RPPs aimed at having an impact in finding global and sustainable solutions for migration and, as a result, they were incorporated as a key policy tool in the Global Approach to Migration and Mobility (GAMM) and the European Agenda on Migration.[597] Subsequently, this priority was reflected upon the EU's advancing role as an external actor by the external strategy in partnership with non-EU countries.[598]

The European Commission launched the RPPs in order to promote durable solutions in parallel to socioeconomic development for the host countries of Lebanon, Jordan and Iraq, which were affected by migration flows caused by the Syrian crisis. More RPPs developed in Morocco, Tunisia, Egypt, Algeria, and Libya.[599] The program aimed to

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'Thematic Programme of Cooperation with Third Countries in the Areas of Migration and Asylum'.

[595] Peers (2011) (n 570) 379-381.

[596] Communication from the Commission to the Council and the European Parliament, 'Towards more accessible, equitable and managed asylum systems', COM (2003) 315.

[597] European Parliament, ibid 1, 53.; 'Regional Development and Protection Programmes will be set up or deepened, starting in North Africa and the Horn of Africa, as well as by building on the existing one in the Middle East. EUR 30 million will be made available in 2015/2016 and should be complemented by additional contributions from Member States', European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions a European Agenda on Migration', Brussels, 13.05.2015 COM (2015) 240 final, 5.

[598] Roberto Cortinovis, 'The External Dimension of EU Asylum Policy: Gaining Momentum or Fading Away?' May 2015-Ismu Paper. Retrieved at: http://www.ismu.org/wp-content/uploads/2015/07/The-External-Dimension_Cortinovis_may2015_comp.pdf

[599] Other RPPs developed are: RPP in the Great Lakes Region (2004-Present), RPP in the Western Newly Independent States (2009-Present), RPP in the Horn of Africa (2011-Present), RPP in Eastern North Africa (2011-Present). For the Regional Development and Protection Programme (RDPP) in the Middle East the total EU contribution to the programme amounts to €12.3 million

enhance the capacity building in countries of transit and return and the resettlement and reintegration of migrants and refugees in cooperation with the UNHCR.[600]

Additional to the RPPs, the EU's external policies included readmission agreements with third countries for the safe return of non-EU nationals who did not have a right to remain in the Member States' territory were not beneficiaries of international protection.[601] The legal capacity of the EU to enter into readmission agreements with non-EU states is enhanced by its legal character in the Treaties. The EU's competence to negotiate and enter into agreements with countries outside the indicates it strengthened role as an international legal actor. Notably, when the EU concludes an international agreement, it is bound by its commitments under international law which adhere to the principle of *pacta sunt servanta*. The EU, as an entity, is, therefore, bound by the obligations of international agreements in accordance with international law.[602]

(total budget of the programme is €16 million). The remaining budget comes from the Ministries of Foreign Affairs of Denmark and the Netherlands, and the UK Home Office. European Resettlement Network, http://www.resettlement.eu/page/regional-protection-programmes

[600] Commission Communication to the Council and the European Parliament of 1 September 2005 on regional protection programmes, COM(2005) 388 final. The EU together with Denmark, Ireland, the Netherlands, the UK, Norway and the Czech Republic are the donors of the RDPP platform, the estimated cost of which, for 2014-2017, is 26.670.000, The main activities include market-based support for creating employment opportunities, micro-enterprise finance, skills development training, and vocational training, as well as appropriate social infrastructure development, including education, water and sanitation and improved energy supply. Furthermore, the program aims for the access to basic rights and appropriate legal assistance for vulnerable people and training to local and national authorities and civil society groups active in the field of asylum and refugees.

[601] There are currently 17 Agreements on Readmission which the EU has signed. Retrieved at: https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission_en.

Readmission of non-EU nationals to their countries of origin is provided for in the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive) and have as a legal basis Article 79(3) TFEU. The Return Directive is not part of the CEAS.

[602] Craig, de Búrca (2015), European Union Law (n 410) 355. Article 216 TFEU, under the title 'the Union's external action, International agreements', provides that 'The Union may conclude an

The development and completion of the CEAS and the engagement of the EU with non-EU countries is considered to expand solidarity outside the Union, arguably based on the Union's responsibility through its Agencies.[603] Koutrakos emphasizes that '[t]his "pacta sunt servanta" principle constitutes a principle of customary international law which is expressly laid down in Article 6 VCLT',[604] and that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'.[605] Vice versa, Article 216 (2) TFEU provides that the EU's institutions and the Member States are bound by the EU's international agreements.[606] International agreements concluded by the EU are sources of EU law[607] and binding upon the Member States and EU agencies once in force as their provisions form an integral part of EU law.[608]

Responsibility remains on the Member States for the implementation of the international agreements signed by the EU. Hypothetically, the EU in its external competence may be liable for a breach of an international agreement only for an

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agreement with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope'.

It is reported that the "catalyst" for the Article 216 TFEU was the Report of the Working Group on External Action because prior to Lisbon, the EC Treaty provided that international agreements were possible in limited instances. Paul Craig, *The Lisbon Treaty: law, politics, and treaty reform* (Oxford University Press 2010) 165.

[603] Page 11, European Union: European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Policy Plan on Asylum. An Integrated Approach to Protection Across the EU*, 17 June 2008.

[604] Panos Koutrakos, *EU international relations law* (Bloomsbury Publishing 2015) 209.

[605] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, 331.

[606] Article 216 para 2 TFEU.

[607] Koutrakos, (2015) (n 604) 209.

Also see, Piet Eeckhout, *EU external relations law* (Oxford University Press, 2011), 325-330.

[608] Craig, De Búrca (2015) (n 410) 356.

Agency's act acting on EU's behalf or for terms which are incompatible with international law or the European Treaties and/or the EU Charter.

The EU's responsibility in international law towards a vulnerable category of irregular migrants in the Mediterranean, requires analysis of the relationship between the EU and its Agencies. Before proceeding to that analysis, the interconnection of the competences in the field of asylum and migration for Member States and the EU will be explored.

4.3.3 Demarcation of the EU's Competences in Relation to International Protection

As we saw in section 4.2.5., with the introduction of the Treaty of Lisbon, the competences of the EU have expanded. The EU competence developed in either exclusive[609] or shared,[610] and could have a supporting, coordinating or supplementary role.[611] Article 5 TEU provides that 'the limits of Union competences are governed by the principle of conferral and by the principles of subsidiarity and proportionality.' The Union can only act *'within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.'* The remaining competences are upon the Member States. Following the Lisbon Treaty, the Protocol on the application of the principles of subsidiarity and proportionality, applies both to the EU institutions and Member States.

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[609] Article 2(1) TFEU, Article 3(1) TFEU, Article 3 (2) TFEU. Article 216 TFEU refers to the EU's external action, provided with regard to the International Agreement, Title V that the *Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.* In its second paragraph it provides that the agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.
[610] Article 2(2) TFEU, Article 4 TFEU, Article 5 TFEU, Title V TFEU.
[611] Craig, De Búrca (2015) (n 410) 73.

The AFSJ is constituted with respect to the fundamental rights and different legal systems and traditions of the Member States. The Area falls within the shared competence of the EU,[612] indicating, that the Member States can adopt legally binding acts only when the EU has not already exercised its competence. This also aligns with the primacy principle.

Accordingly, the primacy of EU law requires the Member States to abstain from any policies or the adoption of national laws that would conflict with already enacted EU measures. This applies regardless of the nature of competences, i.e., exclusive, or shared. The level to which the EU has extended its competences becomes a decisive factor for states in their enactment of a legislative act[613] or non-legal instrument,[614] like policies.

Decision-making within the spectrum of EU competences follows the hierarchy of legal norms in accordance with the Lisbon Treaty, i.e., the constituent Treaties and the EU Charter followed by the general principles of EU law, legislative acts,[615] delegated acts,[616] and implementing acts.[617] The general principles of EU law have been developed by the Court of Justice which later on incorporated these general principles.[618] It is argued that general principles of law, can be of both or either of substantive and

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[612] Article 4 (2) (j) TFEU.

[613] Legal acts of the EU are regulations, directives, and decisions. There is no hierarchy but there are main differences between them. Regulations are binding in their entirely and are directly applicable to Member States. Directives are binding as to the result to be achieved; Member States own discretion to their transposition into national systems. Decisions are binding in their entirely, Article 288 TFEU.

[614] Referring to recommendations and opinions. Although they are not binding are able to create results and thus are subjected to judicial process. Also referred to as 'soft EU law'.

[615] Legislative acts adopted by a legislative procedure. Article 289 TFEU.

[616] Power delegated to the E. Commission to produce legislative acts, Article 290 TFEU.

[617] Article 291 TFEU. 1. *Member States shall adopt measures of national law necessary to implement legally binding Union acts, 2-4…*. Craig, De Búrca (2015) (n 410) 104-121.

[618] ibid*.*

procedural nature, however this must be decided depending on the context that they arise.[619] This supports that general principles of law in the EU context concern the constitutional structure of the EU and its relationship with its Member States, which this thesis is more concerned with.[620]

In the context of the areas of asylum and migration, the Treaties provide obligations for Member States through implied responsibilities. For example, Article 67 TFEU provides that the Union 'shall constitute an AFSJ with respect for fundamental rights and the different legal systems and traditions of the Member States.' Further, it states that the Union 'shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration, and external border control, based on solidarity between the Member States, which is fair towards third-country nationals' – including stateless persons. The Union's obligation is to ensure respect for fundamental rights and international protection through its legislative acts and based on shared competence with the Member States, upon an obligation for implementation by the Member States. The AFSJ does not refer to the distinction between the EU's internal and external competence.

Regarding asylum, Article 78 TFEU provides for a common policy on asylum, subsidiary protection, and temporary protection to be developed by the Union, with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

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[619] Takis Tridimas, *The general principles of EU law* (Oxford University Press, 2nd ed, 2007) 4
[620] ibid.

The European Parliament and the Council shall adopt measures for the implementation of a Common European Asylum System in accordance with the ordinary legislative procedure[621].

The Treaty further provides that on the emergency scenario of sudden inflows of nationals of third countries, whereby the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned,after consulting the European Parliament.[622]

Article 78 makes an explicit reference to temporary protection, incorporating it within the right to asylum. For irregular migrants in the Mediterranean, who may not 'qualify' as refugees, the EU may offer asylum on a temporary basis subject to a proposal by the European Commission. The responsibility to comply with Article 78 TFEU lies with the commitment to solidarity both by the EU, through the European Commission, and the Member. The EU is bound by the Treaty of Lisbon to ensure compliance with the international law on protection through explicit reference to the 1951 Refugee Convention and its 1967 Protocol. Responsibility is spilled over to the Member States through their pre-existing international obligations stemming from the 1951 Refugee Convention and the 1967 Protocol and international customary law regarding *non-*

[621] Article 78 para. 2: *(a) a uniform status of asylum for nationals of third countries, valid throughout the Union; (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection; (c) a common system of temporary protection for displaced persons in the event of a massive inflow; (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection; (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection; (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.*

[622] ibid Para 3.

refoulement. This obligation is additional to the equivalent responsibilities deriving from the MS membership to the EU.

In relation to migration, Article 79 TFEU provides for a common immigration policy through efficient management of migration and fair treatment of third country nationals who legally reside in the Member States while it further refers to the prevention and combatting of illegal immigration and human trafficking for which the European Parliament and the Council may adopt measures, using the ordinary legislative procedure.[623] The Treaty further provides that the EU can conclude readmission agreements with third countries for third country-nationals who do not or no longer fulfil the criteria for entry, presence or residence in the Member States' territory. [624]

In addition, Article 80 TFEU underlines the responsibility of the Union towards a fair sharing when implementing policies on immigration and asylum,[625] for example, by signing international agreements. However, these measures are difficult to distinguish from measures taken with respect to the rights of irregular migrants in terms of *refoulement*.

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[623] The following areas are listed in para 2 of Article 79 Lisbon Treaty: *(a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification; (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States; (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation; (d) combating trafficking in persons, in particular women and children*.

[624] In the following para 4, it is provided that *The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.*

[625] Article 80 TFEU provides: *The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the acts of the Union adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.*

The phenomenon of irregular migration in the Mediterranean is distinctive in the EU because of its irregular character, within the terms of transnational crimes, namely trafficking in human beings or human smuggling. This is evident from the measures taken to secure the Union's borders and fight organized crime. Measures at the EU level include the combatting of trafficking of persons,[626] smuggling, and the carrier sanctions.[627] Other legislative acts relating to migration include readmission agreements,[628] the Return Fund,[629] policy on return.[630]

The preceding section made clear of the shared nature of responsibility of the EU and its Member States in the AFSJ. In became evident that in developing a CEAS both Member States and the EU must observe international human rights standards (or international protection standards) while the EU's institutions and Agencies also play a significant role. In Part 3 of this Study, we will further explore this relationship between

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[626] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA.

[627] Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985.

[628] ibid.

[629] Commission Implementing Decision of 20 September 2012 amending Decision 2008/458/EC laying down rules for the implementation of Decision No 575/2007/EC of the European Parliament and of the Council establishing the European Return Fund for the period 2008 to 2013 as part of the General programme Solidarity and Management of Migration Flows as regards Member States' management and control systems, the rules for administrative and financial management and the eligibility of expenditure on projects co-financed by the Fund (notified under document C(2012) 6408).

[630] EU Policy on Return includes the following: Commission Recommendations on making returns more effective when implementing the Directive 2008/115/EC, (EU) 2017/432, 7 March 2017. Council Conclusions on migrant Smuggling (6995/16) of March 2016; EU Action Plan on Return, (COM (2015) 453 Final), 9 September 2015; EU Action Plan against migrant smuggling (2015-2020) (COM (2015) 285 Final), 27 May 2015; European Commission's Communication on a more effective return policy in the European Union – a Renewed Action Plan (COM (2017) 200 final), 2 March 2017.

the EU and its Agencies and their competences. This analysis will help us understand this relationship as the basis for a responsibility shift from the Member States to the EU.

4.3.4 The principle of *non-refoulement* in the EU legal order[631]

Before proceeding to the next part, the principle of *non-refoulement* in the EU should be further analysed. The *non-refoulement* principle has already been mentioned in this thesis regarding the First Refugee Convention and the elements of vulnerability associated with it (3.1.4, 3.1.2) in the context of customary international law. A customary norm of international law, suggests that an organization or state is subject to it, even if one of them is not a signatory to an instrument, referring to the principle of *non-refoulement*.[632] That means that even when a state outside the EU is not a signatory to the 1951 Refugee Convention, or when an EU agency (i.e., the EBCG) is acting on behalf of the European Commission according to its mandate, the *non-refoulement* principle must be observed in their conduct and any other relevant proceedings and policies involved. Study Three will explore this point further when

[631] In literature the references to the principle of non-refoulement are countless. However, this section only focuses on what is relevant to the research, especially how the principle can be applied in the EU. However, within the general concept of the maritime migrants at sea, the only relevant case in that regard is *Hirsi Jamaa and Others v. Italy*, Application no 27765/09, (ECtHR 23 February 2012). The cases brought before ECtHR and CJEU concerned the CEAS, not the right of entry of irregular maritime migrnats. However, the following sources are on the non-refoulement principle: Guy S. Goodwin-Gill, & Jane McAdam, *The refugee in international law*. (Oxford University Press 2011) 201–283, and also, Hathaway, J. C. *The rights of refugees under international law* (Cambridge University Press 2016).

[632] ibid. The International Court of Justice decided that the rule of customary international law can arise from practices of States in accordance with a conventional rule, (para 73) and also that opitrio juris sivr necessitatis, requisite for the formation of new rules of customary international law, (para 37). *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* , I.C.J. Reports 1969, p.3, International Court of Justice (ICJ), 20 February 1969.

examining the responsibility of the EU agencies and the EU's role in international agreements with non-EU states in the field of migration.

However, more can be drawn from the EU legislation and caselaw on the obligations of the Member States, when implementing EU law.

The principle, as discussed earlier, is incorporated in the 1933 Refugee Convention, Artcile 33[633] and in the 1951 Refugee Convention.[634] The principle relates to the right to asylum stated in Article 14 of the UDHR,[635] Articles 18 and 19 of the EU Charter,[636]

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[633] Article 3 of the 1933 Refugee Convention defines non-refoulement as follows: Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authroised to reside there regularly, unless the said measures are dictated by reasons of national security or public order. Retrieved at: League of Nations, *Convention Relating to the International Status of Refugees*, 28 October 1933, League of Nations, Treaty Series Vol. CLIX No. 3663, available at: https://www.refworld.org/docid/3dd8cf374.html

[634] Article 33, para 1 "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". The principle of non-refoulement is subject to the exceptions of para 2 which concern, reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137,

The principle has, moreover, been reaffirmed in the 1967 United Nations Declaration on Territorial Asylum. Also see, UN High Commissioner for Refugees (UNHCR), *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994.

Also, Roberta Mungianu, *Frontex and non-refoulement: The international responsibility of the EU*. (Cambridge University Press 2016) 140–148.

[635] Article 14, UDHR states that 'Everyone has the right to seek and to enjoy in other countries asylum from persecution'

[636] Article 18, 'Right to Asylum', and Article 19 'Protection in the event of removal, expulsion and extradition'. Paragraph (2) of Article 19, refers to what is now known as the principle of non-refoulement and it reads that: 'No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'. European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

Articles 67, 78 and 79 of the Treaty of Functioning,[637] the legal acts of CEAS[638] and European Courts jurisprudence.[639]

The principle of *non-refoulement* has been utilized by the ECtHR in judgments concerning the prohibition of torture, inhuman or degrading treatment or punishment (Article 3 ECHR).[640] Article 15 of the ECHR does not allow any derogations from Article 3 even in times of emergency.[641] Mungianu, on her analysis on the principle of *non-refoulement* as customary international law, mentions that a distinction may be drawn between the *non-refoulement* as incorporated in the 1951 Refugee Convention and the prohibition of torture or degrading treatment or punishment.[642] Howevr, she later explains, that the prohibition of torture or degrading treatment or punishment, applies to every person and not merely refugees, as per Article 33 of the Refugee Convention. She concludes that the principle of *non-refoulement* entails the prohibition of indirect *refoulement* when a person is at risk of returning to a country where his life and freedom

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[637] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: https://www.refworld.org/docid/4b17a07e2.html
[638] Please See Section 4.3.1.2
[639] There is a long list of caselaw at the ECtHR on non-refoulement and violations of Article 3. Please see, https://www.refworld.org/topic,50ffbce576f,50ffbce5796,,0,ECHR,CASELAW,.html Also, on a search on HUDOC on non-refoulement, article 3, 212 results were found, Please see: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22non-refoulement,%20article%203%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}
And 219 results on non-refoulement at https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22non-refoulement%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}
[640] *ibid.*
[641] Para 2. "No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision", Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.html
[642] "The Principle of Non-Refoulement as Customary International Law", p.p.99-103, Roberta Mungianu, *Frontex and non-refoulement: The international responsibility of the EU*. (Cambridge University Press, 2016).

may be at risk.[643] To this end, Article 3 of the ECHR cannot be subject to exceptions, derogations or limitations even when there is a thread to national security.[644] Whether or not the principle of *non-refoulement,* as part of customary law international law, is part of the EU legal order, Mungianu's research showed that there is currently no caselaw dealing specifically with this in the EU legal order. Yet, she points that since the CJEU shows that customary international law is part of the EU legal order, it could be suggested that the principle of *non-refoulement* constitutes part of it.[645]

Regarding the relevant rulings of the CJEU, we have already mentioned the *Kadi and Al Barakaat* case, where it was seen that the EU is bound by the UN Charter.[646] Research on *non-refoulement* judgements of the CJEU provided limited results.[647] This imbalance in rulings has to do with the relationship between the two Courts but also, on the more autonomous interpretation of the EU Charter following Opinion 2/13.[648] However, the EU Charter is legally binding on the EU and contains rights such as the prohibition of

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[643] *ibid*. 99

[644] Mungianu, also refers to the prohibition of torture or degrading treatment or punishment, as the letter of Article 3 of the Convention Againt Torture and Article 7 of the International Convention on Civil and Political Rights. *ibid.* p. 98

[645] *ibid*. p. 110

[646] Please see section 4.1.4 and 4.1.7.

[647] https://euaa.europa.eu/asylum-report-2020/27-jurisprudence-court-justice-eu-cjeu
See, judgment of 14. 5. 2019 — joined cases c-391/16, c-77/17 and c-78/17 m and others (revocation of refugee status). The case concerned the revocation of refugee status. The Court, stressed that the compliance with the Directive, 2011/95/EU, should be interpreted in such a way as not to affect the Charter, para 69. Retrieved at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0391&from=EN
Interpetation of the Treaties by CJEU is provided for in other cases regarding asylum (CEAS) but not on non-refoulement. (Other preliminary rulings/caselaw relate to reception, family reunification, unaccompanied minors and Dublin II Regulation). These are concentrated into an EUAA document, please see https://euaa.europa.eu/asylum-report-2020/27-jurisprudence-court-justice-eu-cjeu

[648] P.427, Paul Craig, Gráinne de Búrca, EU Law: Text, Cases, Materials (2015 Oxford University Press), This Thesis will not analyse on the relationship of the two Courts, since the importance at this stage is to understand that either way, the EU Charter and the ECHR provide for the principle of non-refoulement through the absolute character of the provisions on the prohibition of torture or degrading treatment or punishement.

torture and inhuman or degrading treatment or punishment. It further entails the right not to be removed, expelled or extradited to a state where there is a serious risk that a person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment (corresponding to the ECHR. [649] Nonetheless, the principle of *non-refoulement* is part of the EU legal order (Article 78 TFEU) and, therefore, constitutes primary law.

In relation to the above, the CJEU, in the context of Dublin II cases, stated that Article 78 TFEU and Article 18 of the EU Charter provide that the right to asylum is to be guaranteed with due respect for the 1951 Refugee Convention and its related Protocol. The substance of the matter is that even if the EU is not a contracting party to the ECHR, it is bound by the Charter, which guarantees the right of asylum and *non-refoulement* in line with the 1951 Refugee Convention.[650] Also, it should be a reminder, that compliance with the EU Charter is necessary for the validity of the EU legal acts due to its legal value as equivalent to the Treaties.[651] Moreover, CJEU confirms that Article 3 ECHR is a general principle of EU law.[652] The scope of the EU Charter, in accordance with Article 51(1)

[649] Article 4 and 19, European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: https://www.refworld.org/docid/3ae6b3b70.html
[650] Judgment of the Court (Grand Chamber) of 21 December 2011. N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform. Retrieved at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0411
[651] Even though para 2 of Article 6 which refers to the accession of the EU to the ECHR, has not yet happened, the reference is to point to the legal value of the Charter. European Union, *Consolidated version of the Treaty on European Union*, 13 December 2007, 2008/C 115/01, available at: https://www.refworld.org/docid/4b179f222.html
[652] The case concerned the provisions of the Qualification Directive. Para 27 CJEU stated that: In that regard, while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR. By contrast, Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the

applies to Member States and EU institutions when implementing EU law.[653] Article 51 determines the scope of the Charter, which applies to the institutions and bodies of the Union, in compliance with the principle of subsidiarity while the term 'institutions' is enshrined in the EU treaties. This is significant since the bodies, offices,k and agencies refer to all the authorities set up by the EU treaties or by secondary legislation.[654] As asylum and migration are an area of shared competency, i.e. AFSJ, the EU Charter applies. This means that all their actions should effectively comply with the EU Charter. Furthermore, it is worth mentioning that Article 52(3) of the EU Charter stipulates that the meaning of the rights in the Charter correspond to those of the ECHR.[655] It provides that the rights of the Charter, and the TEU are to be exercised under the conditions and within the limits defined by the EU treaties.[656] The consistency between the EU Charter and the ECHR is ensured in Article 52 (3) of the EU Charter and it includes the case law of ECtHR.[657] This provision suggests that the CJEU should follow the ECtHR's jurisprudence providing at least the same level of protection.

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interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR. Retrieved at: https://curia.europa.eu/juris/document/document.jsf?docid=76788&doclang=EN

[653] Article 51 para 1 of the EU Charter, state that its are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. To this end, they shall respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

[654] Articles 15 TFEU (provisions having General Application),

[655] P.425, Paul Craig, Gráinne de Búrca, EU Law: Text, Cases, Materials (Oxford University Press 2015).

[656] Article 52 para 2, EU Charter,

[657] Aricle 52 para 3 states that "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection", *ibid*.

Article 53 of the Charter upholds the level of protection that is at least the same as that provided by international law.[658]

However, it should be noted that while the EU Charter mostly reaffirms rights which already existed in the EU legal order, it also includes some innovative rights that are not directly included in the ECHR that are important for the interpretation of the EU asylum acquis. Such rights include the right to dignity, the right to asylum and the prohibition of *non-refoulement*.[659] Human dignity is presented as inviolable which must be respected and protected. Hypothetically, this could strengthen the protection for irregular maritime migrants given that a relevant case is brought before the CJEU.[660] This could be the case where there is an alleged misconduct against irregular maritime migrants by the EU agencies. Let it be a reminder that any action undertaken by the Union and Member States when implementing EU law must be in compliance with the EU Charter. This applies to the EU agencies such as Frontex (now EBCG) and EASO (now EUAA) and their enhanced role in migration and asylum. Both have an obligation to abide by the Charter.

The principle of *non-refoulement* and the operations of Frontex (EBCG), including its responsibility towards irregular migrants is discussed in Study Three, sections 5.1.7. Preliminarily, however, I highlight the problematic that since there is no Court to point to the liability of the European Coast Guard border guards, albeit during an

[658] Title VII - general provisions governing the interpretation and application of the charter - Article 53 - Level of protection
[659] Articles 1, 18 an d 19 of the EU Charter,
[660] Article 268 and Article 340 para 2,TFEU, Also see, Fink, M. (2020). The action for damages as a fundamental rights remedy: Holding Frontex liable. *German Law Journal*, *21*(3), 532-548.

administrative procedure on complaints, the responsibility of that agency is currently limited unless other forms of responsibility could be identified.

4.3.5 The Legal Basis

The advanced expertise in certain EU fields requires the establishment of Agencies and Offices to assist the Commission in its supervising role regarding legislative acts. The general supervisory role of the Commission consists of powers to ensure the application of the Treaties and oversee the application of Union law by the CJEU. The rationale for the creation of the Agencies and Offices is to make the executive more effective in specialized technical areas which require advanced expertise and continuity, credibility, and visibility of publication.[661]

The EU agencies operating in the field of migration and asylum include Frontex and EASO, respectively, which are governed by two distinct regulations.[662] Frontex's legal basis is provided in Article 77 (2) (b), (d) and 79 (c) TFEU while EASO's in Articles 71[663] and 77 (1), (2) TFEU, which provide that the European Parliament and the Council acting in accordance with the ordinary legislative procedure may adopt measures relating: (i) to the checks to which persons crossing external borders are subject, (ii) to any measure necessary for the gradual establishment of an integrated management system for

[661] Craig, De Búrca, (2015) (n 475) 69-70.
[662] Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office; Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.
[663] Article 71 TFEU provides that: "*A standing committee shall be set up within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union. Without prejudice to Article 240, it shall facilitate coordination of the action of Member States' competent authorities. Representatives of the bodies, offices and agencies of the Union concerned may be involved in the proceedings of this committee. The European Parliament and national Parliaments shall be kept informed of the proceedings*".

external borders, (iii) to measures in relation to illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation.[664]

The relationship between the EU agencies and the Member States is of a shared competence. In the Preamble of the Frontex regulation it is stated that the responsibility for development of policy and legislation on external border control and return, including the development of a European integrated border management strategy, remains with the Union institutions, upon aclose coordination between the Agency and the institutions.[665] Moreover, it is stated that 'in the spirit of shared competence, the role of the Agency is to monitor regularly the management of the external borders'.[666]

The preamble of EASO regulation, provides that the Office 'enjoys legal, administrative and financial autonomy' and further clarifies that is 'a body of the Union having legal personality and exercising the implementing powers conferred'.[667] Arguably, the spillover effect of conferred powers by the Agencies to the EU, in terms of responsibility, requires a deeper analysis of the relationship between the EU and its Agencies.

The Agencies do not have the power to make rules and adjudicate, presumably leaving the overall responsibility for their actions to the Commission. It is, nevertheless, possible that newly created, or future created, agencies have functions beyond informational or coordinating, thus redirecting responsibility towards to the EU. However, so far, there are legal and political reasons which limit the delegation of powers to an EU agency.[668]

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[664] ibid
[665] Para 8 Preamble, Regulation (EU) 2016/1624.
[666] Preamble, para. 20, *ibid.*
[667] Para 8, Preamble Regulation (EU) 439/10.
[668] Craig, De Búrca, (2015) (n 475) 69-70.

The relevant doctrine for the delegation of powers to regulatory agencies is known as the Meroni doctrine or principle. The Meroni doctrine dictates that 'it is not possible to delegate power involving a wide margin of discretion because it would transfer responsibility by replacing the choices of the delegator to those of whom power was delegated'.[669] Following the Treaty of Lisbon, it could be argued that the Meroni principle may have become anachronistic within the EU. This is achieved by the Commission's legislative proposal for the transformation of the EASO to a European Union Agency for Asylum (EUAA)[670] within the field of CEAS following the Treaty of Lisbon. As maintained by the European Agenda on Migration, from a long-term perspective, the responsibility for transferring applications of asylum between Member States is to be conveyed on an EU level by transforming EASO to an EU decision-making Agency.[671] Member States will be responsible for the reception of asylum seekers and international protection beneficiaries by the EU agency. The Member States will not be responsible for the decisions concerning international protection.

The transfer of the beneficiaries of international protection to a Member State based on a distribution mechanism will relate to a distribution key.[672] It is envisaged that the

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[669] Craig, De Búrca, (2015) (n 475) 69. Referring to the Judgment of the Court of 13 June 1958. Case 9-56, Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community, ECLI:EU:C:1958:7.
The principle examines the extent to which EU institutions may delegate their tasks agencies.

[670] European Commission, "Communication from the Commission to the European Parliament and the Council towards a Reform of the European Asylum System and Enhancing Legal Avenues to Europe", Brussels, 6.4.2016, COM (2016) 197 final.
Update: A political agreement on the text, was reached on 29th June 2021 in Malta between the E. Commission and political leaders on the text of the Agency's new mandate. European Asylum Support Office, EASO/ED/2021/218, 29/6/21.

[671] *ibid.*, 8-9. Also, the proposal for an expansion of the competences of EASO towards a Common European Asylum Service, responsible for processing of asylum applications and determining responsibility across the EU, is mentioned by Carrera, Gross, Guild, (n 576) referring to the priorities for the new European Agenda on migration.

[672] It is reported that *responsibility would be primarily allocated on the basis of a distribution key reflecting the relative size, wealth and absorption capacities of the Member States. ,* p.8.

Procedures Directive will be transformed into a new Regulation establishing a single common asylum procedure in the EU.[673] The Qualification Directive is envisaged to be replaced by a Regulation, setting uniform rules on the procedures and the rights of the beneficiaries of international protection.[674] The new system on asylum aims to achieve a more harmonized EU approach with full respect of EU's obligations under international law and in terms of responsibility. International protection, i.e., refugee or subsidiary protection status, is to be granted by the new EU agency not for indefinite period but for as long as *non-refoulement* applies.[675] It is observed that the new envisaged system of international protection will resemble the Temporary Protection Directive. It could be argued that protection extends to a vulnerable category of migrants, considering the Mediterranean phenomenon, when the principle on *non-refoulement* is respected, not only due to individual persecution but individual or collective protection for other drivers of migration that cause human rights violations.

The approach regarding the agencies' responsibility acting on behalf of the EU in the field of the CEAS, and possibly in the field of security and border control, depends on an analysis of (i) the EU agencies' mandates and (ii) the merits of cases for acts, omissions, or breach of *non-refoulement*. The responsibility depends on a violation of the Member States' obligations which are currently limited in reception conditions, accommodation, and the sustainability of rights as enshrined in the EU Charter and the ECHR. Future developments within the CEAS may shift the Agencies' responsibility to the EU

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[673] *ibid*,10
[674] *ibid.*
[675] *ibid.* However, it is also envisaged (Article 1) that the Long-Term Directive will be amended to include persons who have been refugees for a period of 5 years. Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, OJ L 132, 19.5.2011. Retrieved at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0051

depending on the Agencies' competences, mandates, and rules of establishment. Relating to this system, it is noted that the exclusive powers conferred to an EU agency with the responsibility to assess the applications will eliminate (i) the divergent interpretations of the definitions, and (ii) the divergent the recognition rates in the Member States. This positive initiative by the European Commission contributes, partly, to solving the issue of irregular migration in the Mediterranean when on EU territory. The responsibility of the application of the right to international protection and related violations remains within the competences of the CJEU and ECtHR rulings.[676]

The European Commission's initiative to amend the CEAS in a way that conferred responsibility becomes possible, can be traced back to Goodwin-Gill's proposal who argued in favour of the establishment of a European Migration and Protection Agency.[677] In Goodwin-Gill's words, '… there is no legal reason why an EU institution should not be set up, competent to determine refugee status, and enabled to fulfill, collectively as it were, the individual obligations of Member States.'[678] The idea is a result of an argumentative analysis, based on the deficiencies of the current CEAS, including: (i) the CEAS's common criteria and interpretations which are not achieved and

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[676] Reference to the European jurisprudence on asylum, will follow. It has been identified that there is an active system for enforcing the 1951 Refugee Convention, by the CJEU, if the instruments of CEAS conform to the Refugee Convention's standards. Mathew, Harley, (2016) (n 4) 37.

[677] Guy Goodwin-Gill, 'The Mediterranean Papers: Athens, Naples, and Istanbul' (2016) International Journal of Refugee Law, 28(2), 276-309. The proposal was introduced by Prof. Goodwin-Gill on a Conference in Athens, March 2015, titled 'Regulating "Irregular" Migration: International Obligations and International Responsibilities'. The Mediterranean Papers consist of three papers presented between March and June 2015 in Athens, as already mentioned, and in the following Conferences: *Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Actio*, Naples, May 2015 and *Refugees: Challenges for Protection and Assistance in the 21st Century*, Istanbul, June 2015.

[678] Goodwin-Gill, (2016) (n 719), 286.

(ii) the Dublin Regulation which is neither efficient nor equitable in the regional sharing of responsibility.[679]

In this regard, it is argued that the Dublin mechanism did not provide for an effective sharing of responsibility between the Member States, while it further delayed the asylum process, disrupted family unity, failed to consider the rights of the child, and did not have an impact on secondary movements.[680] Goodwin-Gill's overall assessment of the CEAS, concludes that the legal acts produced by the EU, and the overall institution of asylum, 'disregards individual interests with a dehumanizing approach' which prevailed in the Member States' practices.[681]

Similarly, Hathaway argues in favour of a robust model of reform that consists of international corps decision makers to identify genuine refugees.[682] The author of the present thesis considers next that protection obligations would persist if the risk (of *refoulement*) exists. Additionally, the refugee country preferences would be taken into consideration supported by an algorithm fast system.

Hathaway's proposed system of protection would erase the differing Member States' asylum systems primarily because of the uniform decision-making concerning protection. The present author proposes that in cases where refugees are in no position

[679] Goodwin-Gill, (2016) (n 719), Commentary, p. 277. Hathaway implies that Dublin imposes unlimited and one-sided obligations on a given community based upon one criterion: the fact of arrival. Hathaway, J. C. (2019). (n 229) 9.
[680] Goodwin-Gill, G. S. (2016). (n 719) 284.
[681] ibid.
[682] Hathaway, (2019) (n 229), 7. The author envisages a system whereby the UN would allocate and move refugees in order to receive protection based on decisions of the UN.

to return to their home countries after five years of stay in the host Member State, they should be able to access resettlement and enjoy any related benefits.[683]

The proposal resembles the UN resettlement and the EU's relocation programs; however it tends to shift the responsibility exclusively to an international organization rather than states while at the same time leaves a considerable margin of discretion to states. This margin allows regional organizations to adjust their respective asylum systems. However, the proposal refers to refugees within the meaning of the 1951 Refugee Convention and not any other constraints or differences which arise from the EU legal framework or the Member States' divergent asylum systems. Despite that, the proposal system forms a good basis for expansion of the concept of protection not only to refugees within the meaning of the definition of the 1951 Refugee Convention but to other categories migrants in vulnerable situations.

To contextualize this proposal within a European perspective and the current European integration system, the creation of a European Migration and Protection Agency forms a sensible development because (i) there is a need for a unified implementation of the *acquis* in the field of asylum on equivalent terms as in international law, and (ii) there is a need for a new monitoring mechanism by the European Commission on the assistance of an expert Agency.

In his argument, Goodwin-Gill supports that the 'European refugee status is built on Member States' international obligations and is supplemented with the broad community benefits of EU law including freedom of movement.' His argument,

[683] *ibid*., p.9. The proposal comes as a five-step plan, to summarize it, (1) access to protection, (2) plank of a robust model for reform, (3) no constraints in the freedom of movement, (4) make asylum doable for poorer States, (5) new system as a true solution to refugee hood. Hathaway's argument is that with this plan, there will be no requirement to amend the Refugee Convention.

referenced below, is embraced by the present author as crucial since, (i) it shifts the responsibility for international protection from the Member States to the EU, (ii) it extends protection to migrants beyond asylum seekers, and (iii) it highlights the role of the EU as an international legal actor through its external competence. Accordingly, as Goodwin-Gill put it, the European Protection Agency could achieve re-organization of responsibilities if its complemented by an external competence.[684] By this way, the EU could engage positively and constructively with other States confronted with the phenomenon of people on the move, though always consistently with EU law, international legal obligations, and the ECHR.[685]

Both proposals concerning the transfer of the decision on protection to international organizations or to an international service as put forward by Goodwin-Gill and Hathaway respectively, create a sense of return to past practices that were in place prior to the adoption of the 1951 Refugee Convention. Particularly, the proposals resemble the Nansen International Office's agreement for refugees, in the aftermath of the Second World War, and the International Refugee Organization's task to distribute refugees.

Considering in terms of the EU today, the transfer of such competences from the Member States to the EU as an international organization could result in a spillover in the context of the operation and action of its Agencies.

[684] Goodwin-Gill, (2016) (n 719) Commentary, 277.

[685] ibid.

4.3.6 The Spillover Effect on Competences and Responsibility for EU Agencies

The proposed system amending the CEAS, as we explored in the previous section, leans towards recognising responsibility for the EU as an international legal actor in the context of irregular migration in the Mediterranean.

The external competence, as was identified earlier, concerns the resettlement and RPPs, the obligation to rescue at sea, and the possibility to use new legal routes towards the EU in parallel to the Member States' border controls. These policies are developed through the EU institutional acts. The EU's external competence (excluding RPPs and resettlement which have already been discussed earlier in section 4.2.9, will form the subject matter of the following Study.

The internal competence concerns the Member States' obligations to provide asylum to those in need and respects the rights of irregular migrants in terms of *non-refoulement* guided by the EU *acquis*. The responsibility concerning the activities of the EU agencies which place a burden on the EU, depend (i) on the EU's competences and (ii) upon a close examination of the merits of each potential violation of the EU *acquis*. If a new treaty amendment was to follow that would transfer the exclusive competence within the AFSJ to the EU, then the EU's responsibility in the area of irregular migration for any potential violations of human rights, becomes more likely.

The possibility for a treaty amendment, reiterating the EU's autonomy yet shifting competences in the AFSJ from shared to exclusive, is a remote scenario. Security and

securitization in Europe,[686] are regulated through a shared competence between the Member States and the EU, however, due to the sovereignty rights and the right to territorial protection, security issues cannot be exclusively conferred to the EU. Huysmans refers to securitization as a process of how migration has gradually been defined as a threat to a perceived collective identity (i.e. European identity) and how processes not only confined to law but everyday micro processes have contributed to the securitization of migration. Security, on the other hand, can be considered as a public good which is to be enjoyed by everyone (including migrants) and is not confined to border/external security. However, issues of security in the migration crisis, deals with external border controls at the frontiers of the EU.

The connection between migration and asylum to security and border controls was initially expressed in the Conclusions of the Tampere Program (1999–2004) with a reference to illegal immigration and a need to combat the perpetrators of transnational crimes.[687] However, as Chou argues, it was not intended for European integration to have a wide scope of security.[688] On the contrary, the European Community attempted to engage with third countries for better migration management and to achieve free movement.[689]

[686] Jef Huysmans, 'The European Union and the securitization of migration' 2002 *Journal of Common Market Studies*, *38*(5), 751-777. Also, Enela Topulli, 'Securitization of Migration and Human Rights in Europe' (2016) European Journal of Multidisciplinary Studies, *2*(1), 86-92.
[687] Para. 3, European Union: Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999.
[688] Chou, M. H. (2009) (n 520) 542. The author explains in relation to security and migration and asylum, that European external migration has been the outcome of national officials responding to pressures as a result of failed European policies and fluctuation in migratory flows. The legislative emphasis on borders which underlines the external migratory elements came as a result of the measures taken against terrorism following attacks on USA in September 2001, Madrid 2004 and London in 2005.
[689] *ibid* 542.

In the Hague Program that followed Tampere (2004–2009), the fight against global terrorism became one of the ten priorities within the AFSJ. At the same time, a connection between migration and security was established and expressed through provisions seeking to strengthen the fight against illegal immigration, migrant smuggling, and trafficking in human beings while emphasizing return policies within the EU.[690]

In the Stockholm Program (2010–2014), a comprehensive approach to return and readmission within an effective action against illegal immigration with the assistance of the European Commission, Frontex and the Member States was reaffirmed as a priority.[691]The external competence of the EU in the field of migration and asylum is exercised by Frontex[692] within the framework of security and border controls. The EU's external competences (through its Agencies) are not limited to reception, recognition of status, procedures, or even return and resettlement. If the new Agencies' mandates, acting on the EU's behalf, are definite in their terms regarding responsibility, then the necessity of the *Bosphorus* doctrine prevails. It can be foreseen that there will no longer be similar judgments to the line of cases of *M.S.S. vs Greece*[693]once the decision concerning the implementation of the Dublin Regulation or the decision on protection are to be reached by an EU agency on asylum.

Goodwin-Gill further envisaged the creation of a new European Court valid and effective throughout the Union as a Court of Protection.[694] Such a step may enhance European

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[690] European Union, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 13 December 2004, 2005/C 53/01, Par. 2-4.
[691] Para 6.1.6., European Union: Council of the European Union, 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens', 2 December 2009, 17024/09.
[692] Discussion on EBGC-Frontex follows in 5.1.7.
[693] See p.17, 56.
[694] Goodwin-Gill (2016) (n 268) 287.

integration and promote the application of the principles of solidarity, proportionality, and direct effect, in addition to effectively protecting the rights of irregular migrants in the Mediterranean.

The year 2019[695] has marked 20 years from the Tampere Conference, the Conclusions of which remain relevant today and have paved the road for the rest of the developments in the European Union. It is important to step back and assess whether those conclusions have materialized in a way that the EU's objectives have been respected during a time of the recent migration crisis of 2015–2020.

The Tampere conclusions have successfully framed the need for a comprehensive approach to migration, which essentially meant addressing the political, human rights and development issues in countries and regions of origin and transit.[696] The drivers of migration and persecution, which once again have become the matter of discussions in the International Dialogue on Migration, leading to the Global Compact on Migration, were identified in Tampere. These were identified through the conclusion that the EU needed to combat poverty in third countries. This was to be achieved by improving the living conditions and job opportunities, preventing conflicts, and consolidating democratic states by ensuring respect for human rights, not only in the internal policies of the Union also externally.[697]

The present author considers that Tampere has provided the platform which led to the development of the AFSJ and the amendment of the EU treaties, while the implications

[695] The year in reference is 2019. The author has attended the European Conference 'From Tampere 20 to Tampere 2.0', organized by the Odysseus Network, European Policy Centre, and European Migration Network Finland, on 24 and 25 October in Helsinki, Finland.
[696] European Union: Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999, para 11
[697] ibid.

of its Conclusions are significant for the purposes of this research in the context of the EU's competences internally and externally.

The following section explores the role of international law and its impact on the EU legal order in the context of responsibility.

4.3.7 The Role of International Law in the EU Legal Order

It has been identified that the EU's responsibility is limited by the overall relationship with its Member States and the competences of the EU as defined by its treaties. At the same time, the Member States are also signatories to international instruments which raises the following question in terms of responsibility: *What is the role of international law in relation to the EU's legal order?*

The international protection framework within the EU is defined by its *supranational* character and the policies developed within its *supranational* system. The European Commission and the Council's proposals for the adoption of legislative acts based on an ordinary procedure within the shared competences of the AFSJ, create a responsibility for both the Member States and EU agencies.

European integration is influenced by international law, the states' implementation of the UN international instruments to which they have acceded, and the values of the UN Charter. These international obligations are incorporated in the constitutions of states, upon which the EU treaties are based. This international framework is referred to explicitly in the EU legislative acts and stated in the preambles. In identifying the effect of international law on EU law, direct or otherwise, the following elements important, namely (i) the EU's personality, (ii) the EU's enhanced role within the UN, (iii) the EU's autonomous character.

The first element relates to recognizing the legal personality of the EU stemming from Article 47 TEU. The EU's legal personality enables the Union (i) to enter into international agreements and (ii) to have an enhanced role in the international legal system, within the United Nations.

Legal personality gives rise to potential responsibility for the EU as an international legal actor. At the same time, the EU Member States are bound by the rules and principles declared in international law as well as the EU's institutions and Agencies are similarly bound by international law and values.

International agreements, within the AFSJ, concerning agreements between the EU and third countries, for example, in cases of readmission, strengthen the EU's role as an international legal actor. Presently, the EU has full membership in international organizations in areas within its exclusive competence.[698] Although the areas of exclusive competence are explicitly provided in Article 3 TFEU, in Article 3 (2) it is stated that the Union has 'exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.' Consequently, the enhanced role of the EU as an international legal actor within the UN system influences the EU's legal system and the Member States' policymaking.

[698] Article 3 TFEU. Customs Union, Competition rules necessary for the functioning of the internal market, monetary policy for Euro area countries, conservation of marine biological resources under the common fisheries policy. A list of the agreements the EU has entered to can be found in the European Union, External Action, Treaties Office Database on the following link: http://ec.europa.eu/world/agreements/searchByOrganization.do?countryId=30122&orgName=European%20Union Also see Paul Craig, *The Lisbon Treaty: law, politics, and treaty reform* (Oxford University Press, 2010) 159.

Furthermore, the EU's international legal personality is further enhanced by its role as an observer in the UN General Assembly and other bodies.[699] The participation of the EU to the work of the UN is summarized in five points involving its competences to: 1) make interventions, 2) participate in the general debate of the UNGA,3) have its communications relating to the sessions and work of the UNGA, 4) present proposals or amendments orally as agreed with the Member States and, 5) have the right to reply regarding its positions.[700]

A defining feature of the direct application of international law in the EU is the autonomous character of the EU's legal order. The EU's autonomous character may limit the national parliaments' independence to a large extent to enact laws. However, the EU legal order's autonomy is based on the direct effect and direct application of principles, while the concept is further safeguarded by the CJEU.

The CJEU has acknowledged the binding nature of international law rules as long as international law does not affect the EU's autonomy as established by the Treaties. Relatively, Opinion 2/13 clarified that the EU's autonomy should be compatible with its Treaties so as not to undermine EU law. Similarly, the CJEU has the power to give preliminary rulings, binding on EU institutions. Notably, the CJEU in *Kadi* ruled that, the allocation of powers fixed by the Treaties, cannot affect the allocation of powers.The

[699] European Parliament, Directorate-General for External Policies, Policy Department, 2015. Wanda Troszczynska-Van Genderen, "*In-Depth Analysis, The Lisbon Treaty's provisions on CFSP/CSDP- State of Implementation"*, October 2015- PE570446. p. 4.
[700] United Nations General Assembly, A/RES/65/276 Participation of the European Union in the work of the United Nations Resolution adopted by the General Assembly on 3 May 2011 Sixty-fifth session. Retrieved at:
http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/65/276

Court, observed that by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction forms part of the very foundations of the Community.[701]

Furthermore, the EU is bound by international instruments even if it is not a signatory to them. In the cases of *Kadi* and *Yusuf*, the Court identified that the EU may not be a member of the United Nations and a signatory to the UN Charter but the latter is binding on the EU through its Member States which are signatories.

Regarding the application of international law in the EU legal order, Article 3 (5) TEU states that the Union shall strictly observe the development of international law, including respect for the principles of the United Nations Charter. Arguably, EU law is a product of international law with distinct characteristics in the international legal order. As stated by the CJEU regarding the concept of supremacy, 'the Community constitutes a new legal order in international law, for whose benefit the states have limited their sovereign rights, albeit within limited field'.[702] Accordingly, Article 5 TEU provides that the limits of the Union competences are governed by the principles of conferral, subsidiarity, and proportionality. The European integration, based on neofunctionalism as explained, allows us to understand the development of international law principles within the EU legal order. Therefore, it is argued that international law may not have a direct effect on EU law but has a direct influence on its development as a regional

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[701] Para 4 of the Judgment.

[702] Para 3, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Judgment, reference for a preliminary ruling, Case 26/62, ECLI:EU:C:1963:1, [1963] ECR 1, [1963] 1 CMLR 105, 5th February 1963, Court of Justice of the European Union [CJEU]; European Court of Justice [ECJ]
Retrieved at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61962CJ0026

supranational[703] entity and international legal actor. Autonomy (particularly evident through the 2/13 Opinion), seems to be prioritized over international law and human rights. This is a complex argument because as part of the EU's autonomy the CJEU, takes for granted that the EU legal order is already based on human rights and international law principles arguably creating a circularity. In terms of hierarchy in the international legal order the EU Treaties are silent. An attempt to demarcate any potential boundaries of an inchoate order between international and European legal order in the field of international protection, is beneficial for the responsibility question, if examined within the scope of legal norms. The hierarchy of legal norms within the EU is a significant key to the responsibility question. Once international law becomes an integral part of the EU's constitutional and legal order, responsibility in the context of protection becomes even more prominent for the EU.

The European Communities and the European Union have developed based on intergovernmental cooperation between states through the signing of the relevant treaties which are international agreements.[704] Explicit reference to the 1951 Refugee Convention is incorporated in the legal acts produced by the EU.

[703] The term *'supranational'* is mentioned only in the ECSC Treaty. The term was taken by political and legal commentators as the defining characteristic of the Community as a whole. See Bruno de Witte, 'EU law: Is it international law?' in Steve Peers, S., Asylum, I. A., Catharine Barnard, Steve Peers, European Union Law, (Oxford University Press, 2014) 177.

[704] Article 1 TEU states accordingly that: "By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called 'the Union' on which the Member States confer competences to attain objectives they have in common. This Treaty marks a new stage in the process of creating an ever-closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community". Retrieved at: https://eur-lex.europa.eu/legal-

The level of protection that can be achieved for the irregular migrants in the Mediterranean depends on the EU legislative acts and their implementation by the Member States. Political considerations form delimitations on the EU legal system. For example, the legislative acts through the ordinary method are, arguably, a product of political and economic compromises between the Member States' governments rather than explicit enforcement of international law in the European order. This is because the acts are based on a consensus between the Commission and the Council before their adoption by the European Parliament. A question that arises is how these limitations can be overcome. Amendments to the EU legal acts and the allocation of competences within the AFSJ may prove beneficial for the effective implementation of human rights. The relevant directives discussed earlier, leave considerable discretion to the Member States in their implementation and monitoring role of the European Commission but they aim to harmonize the results in the Member States.

While some policies aim to control and prevent 'illegal migration', there are high prejudice risks to the right to protection and *non-refoulement*. At the same time, confusion arises concerning the obligations and responsibilities of the legal actors involved. Most commonly, the language used in the EU policy documents in the area of migration relates to combatting illegal immigration based on respect for the principle of *non-refoulement*. In practice, that could prove impossible to define and apply. The CEAS has created discrepancies in the Member States, evident from the divergencies in the number of recognitions, arrivals, and entries in the Member States.

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content/EN/TXT/?uri=uriserv:OJ.C_.2008.115.01.0001.01.ENG&toc=OJ:C:2008:115:TOC#C_2008115EN.01001301

A change within the AFSJ, which could be the result of a future EU Treaty amendment, would allow more transfer of powers to the EU, transforming the existing shared competences to exclusive competence for the EU whilst retaining the EU's autonomy. Accordingly, it may reduce or even eliminate differences in outcomes when the Member States implement EU legal acts.

Also, it is possible that exclusivity in the area of migration and asylum, result in new legal pathways to be decided on an EU level, which presently fall within national authorities. As identified by the UN, 'the more regular channels are restricted, the more migration is diverted to irregular migration and often exploitative channels'.[705]

Arguably, exclusive competence would reinforce the regional cooperation frameworks while responsibility-sharing is likely to expand within the region similar to the principle of burden sharing. The reasoning is that the EU as an international organization with both regional and international dimensions could enter into international agreements with other similar organizations.[706] Consequently, the responsibility in sharing the number of refugees and migrants coming from vulnerable situations would be diffused throughout different regions of the world based on the international agreements which the EU has entered.

The exclusive right for the EU to enter into international agreements of a regional character, is present in the case of readmission agreements, although the key difference is that the EU acts as a representative of the Member States when concluding readmission agreements with third states. In the case of responsibility sharing, the idea is that the EU would enter into an international agreement with another organization.

[705] UN (2017), Issue Brief 2

[706] For example, the African Unity.

The EU's experience with the EU resettlement program as well as the Regional Protection Programs, in its external dimension, could serve as additional guidance to any such future development.

However, regionalism may play an important role in the management of migration and irregular flows, irregular routes, and protection of rights of refugees and irregular migrants. Regionalism[707] 'involves the pursuit or promotion of common goals, among a group of states that share identifiable patterns or behavior, sharing a common space on the globe'.[708] It is reported in relation to regionalism and refugee protection that, an arrangement between states in a particular geographical region of the globe may involve the EU or any other regional organization.

If these states confer rights to their regional organization, the common goals could be pursued in the spirit of solidarity based on equitable share. Even though it is reported that in the 1940s the concept of old regionalism caused obstacles in relation to multiculturalism and multilateralism, the new regionalism has been influenced more by a neo-liberal agenda.[709] From an international law perspective, the Global Compacts are proof that both states and regional organizations are key players in the implementation of policies. The reasoning is that the Compacts' implementation is based on the regional dimensions of the EU and other international organizations, an argument that could also be supported by neo-functionalism.

[707] Mathew, Harley, (2016) (n 4) 23.
[708] Political theorist Louise Fawcett in Exploring regional domains explains that regionalism is broader than the mere geographic reality of states sharing a common space on the globe. Mathew, Harley, (2016) (n 4) 14.
[709] *ibid*, 26.

Considering that the increased powers that would arise from the hypothetical exclusive EU competence would lead to a spillover effect concerning the responsibility of the EU (namely shifting responsibility from the Member States to the EU agencies based on their respective mandates), we could argue that the EU would develop along similar lines to other regional organizations thus embracing actions for the efficient and effective management of refugees and migration systems.

As we have examined in Methodology, the argument concerning the exclusive competence of the EU in the area of migration could further be supported by the international relations theory of the English School, in the sense that the responsibility of the EU as an international society is expanding outwards to an international system.

4.3.8 Concluding Remarks

This Study has recognized that the EU has a responsibility to provide international protection as it arises within its own legal order particularly from the shared competence AFSJ.

The present Study has identified two sources from which the EU's responsibility for international protection stems, both directly and indirectly, namely the EU Treaties, the EU Charter and international law. The first source relates to the obligations stemming directly from the Lisbon Treaty, Articles 67, 78 and 79 TFEU, and EU Charter, Articles 18 and 19, which are legally binding on the Member States, the EU institutions and bodies and correspond to the same rights as the ECHR, Article 53 (2). The second source is the indirect effect of international law, strengthened by the EU's legal identity (Article 47 TEU) and its effect on the EU legal acts in the fields of asylum and migration. Primarily, the EU as an international organization, has an obligation to apply the rules of customary

international law and specifically those related to international protection (asylum) and the principle of *non-refoulement*, within its legal order, (see 4.3.4). Further, in its external dimension (migration) the EU has an obligation to comply with international law when entering into international agreements as an international legal actor (see 4.3.2.).

The boundaries and limits of the EU's responsibility are defined by its overall functioning within the AFSJ, which is constituted with respect to the Member States' fundamental rights and different legal systems and traditions. On the one hand, the EU's responsibility is limited by its shared competence with the Member States based on the principles of subsidiarity and conferral. On the other hand, the limits on the EU's responsibility are expanded through the operation and functioning of its Agencies, which have a spillover effect that directly impacts the EU's responsibility within the AFSJ, supported by the neo-functionalism theory on integration, (see 4.3.6).

This Study has demonstrated that the EU's legal framework on international protection is equivalent, but not identical, to the 1951 Refugee Convention. The EU legal acts relating to international protection are adopted in parallel to the UN efforts to address temporary or other forms of protection. Several complexities have been further identified relating to the boundaries and limits of the EU's responsibility to international protection within the AFSJ. Such responsibility primarily burdens the EU through the principles of primacy and conferred powers in addition to the general principles of law interpreted by the Union Courts. Nonetheless, the EU's responsibility is subject to some limitations: (i) the overall relationship with its Member States and (ii) its competences as defined by the Treaties.

European integration has led to the creation of specialized Agencies which act on behalf of the EU and assist the European Commission in its supervisory role. As has become clear from this Study's analysis, the Agencies operate within the internal and external dimension of the EU; for example, EASO and Frontex operate mainly in cooperation with the Member States within the EU territory inland and at sea. In its external dimension, the EU has, since the Lisbon Treaty, developed an identity (Article 47 TEU) as an international legal actor and cultivated a need to stretch the boundaries of responsibility further as dictated by international law. We have thus examined the EU's responsibility which depends on the actions of the Agencies when operating on its behalf either within its internal or external competence. The EU agencies are fully bound by the hierarchy of legal norms stemming from the Lisbon Treaty – from the constituent Treaties and the EU Charter to the general principles of law, legislative acts, delegated acts and implementing acts. The Agencies are also bound by the EU's obligation as an international legal actor to respect international law which leads to the argument that the EU could be confronted by an action before the Union Courts for any violation of the principle of *non-refoulement*.

This Study further explored that the legal acts developed in the field of the CEAS resulted in divergencies across the Member States systems, eventually giving rise to a need to further develop an exclusive competence in international protection at the EU *supranational* level. Such a development could be achieved either indirectly, through the mandates of the EU agencies, or directly, through a treaty amendment by redefining the area of freedom as an exclusive competence area regulated by the EU.

Plans concerning the development of the agencies' mandates could cause a spillover effect or shift the responsibility from the Member States to the EU. This can be achieved

if the powers of EASO are enhanced to deciding applications of international protection, causing a spillover effect on the competences of national authorities. Responsibility for international protection will then be shifted exclusively to the EU agency within the EU while Member States' responsibility would be to follow the agency's decision. Adopting this approach, suggests that it would fall upon the EU to decide on the issue of *non-refoulement* by granting either a refugee or subsidiary status or, alternatively, to provide protection based on an individual or collective right to protection. At the same time, the Member States would restate their sovereignty powers with regards to security and justice.

Based on Goodwin-Gill's proposal for a new European Court of Protection, the author of this thesis concludes that this development would enhance European integration and promote the principles of solidarity, proportionality, and direct effect of EU law, which are derived from the values and principles of international law.

On a brief insight for irregular migration in the Mediterranean, this Study concludes that the system of international protection of the EU can be evolved into a fair and effective one for irregular migrants in the Mediterranean, through the development of the EU agencies. A creation of an EU Migration Agency could be seen in the future, on similar terms of EASO turning into an Agency, for those irregular migrants who may not so qualify for refugees under the definition of the 1951 Refugee Convention or the equivalent European *acquis*, under the exclusive control of the EU as an international organization, responsible for achieving European integration based on its own legal order.

The following Study examines the EU's external dimension through the nexus of *refoulement* and the laws of the sea regarding humanitarian assistance. Further, the

next Study explores the existence of the EU or Member States' potential criminal responsibility from a theoretical perspective. The hypothesis is that the EU agency Frontex may own a new form ofresponsibility, when violations of human rights or of *non-refoulement* occur, due to the standing corps and border guards conduct or effective control, on a case by case basis. The external dimension of the EU's security and border controls become relevant in this regard. The research question of this Study centres on whether the EU has any responsibility in view of its external policy on migration.

5. STUDY THREE: THE EU'S RESPONSIBILITY IN VIEW OF ITS EXTERNAL POLICY ON MIGRATION

Part 1 – UNDERSTANDING THE PHENOMENON OF IRREGULAR MIGRATION IN THE MEDITERRANEAN

5.1.1 Introduction

The EU's external migration policy may, under certain conditions, trigger its responsibility. This Part will argue that triggering the EU's responsibility through its external policy is possible and could occur indirectly in two ways: (i) by the conduct of the EU agencies as part of an EU policy on the externalization of migration or any other legal act and (ii) by the EU itself in its capacity as an international actor because of the adverse consequences emanating from its policies.

Specifically, it is argued that the EU agencies' conduct acting on behalf of the EU may cause certain violations of human rights, including international customary law, such as the principle of *non-refoulement*, as an indirect result of the EU's implementing policies. The EU's responsibility is also assumed to lie in its cooperation with non-EU (third) states when signing international agreements in the field of migration, security, and borders. Therefore, it is anticipated that the external competence of the Union, (i.e., to sign agreements with other states as an international actor),[710] entails a responsibility to effectively monitor these agreements and the policies developed thereafter, through the rule of law conditionalities, in addition to its international law obligations.

[710] For the purposes of this research, external competency of the Union refers to the competency of the EU to enter into agreements with third (non-EU) States. The EU owns such a competency, post Lisbon, due to its legal personality. Analysis is provided in Study Two – Part 2 of this research.

Acknowledgement of this responsibility would, presumably, limit irregular migration and reduce the fatalities at sea.

Identifying the actors' respective responsibility for the phenomenon of irregular migration in the Mediterranean is difficult. It primarily requires identifying the main domains of law that may produce legal obligations for states in relation to the irregular maritime phenomenon. In order to explore the extent of states' responsibility and whether there has been a shift or a spillover effect affecting the EU's responsibility, the main domains of law need to be identified. International refugee law and European law are two of the main domains; however, the irregular maritime phenomenon requires analysis of international maritime law and transnational crime, especially in the context of smuggling. These domains stem from international instruments ratified by states, such as the Smuggling Protocol and the international maritime law, (see sections 5.1.5 and 5.1.6). This Part further examines whether responsibility may have shifted towards the EU because of the development and the extended competences of the European Coast and Board Guard agency in border control and security. Specifically, the hypothesis suggesting a shift of responsibility towards the EU is supported, on the one hand, by the strengthened EU legal framework on border controls and security reflected in the new EBCG Regulation and, on the other, on the EU's financing of externalization policies via agreements signed with non-EU states in the field of migration.

The complexities associated with the EU's autonomy make it difficult to measure the polity's responsibility for human rights violations. That is why this research examines whether the EBCG's conduct, as a result of EU policy, could trigger individual responsibility for standing corps and border guards. If such responsibility were established, it would most likely fall within criminal law. Since individual criminal

responsibility is part of international criminal law, this research explores the similarities of international refugee law, mainly its core principle of *non-refoulement*, and international criminal law, especially aspects of crimes against humanity.

Nevertheless, this research identifies that there are elements of international criminal law that are not met by the response to irregular migration. However, responsibility could be triggered by the EBCG's conduct if it is examined using a new term proposed in academia, namely banal crimes. The term of banal crimes was firstly (and recently) defined by academics when arguing about the responsibility caused by the deplorable conditions of the refugee reception centres in Greece. Based on the high number of fatalities in the Mediterranean and the assumption that such a high number was caused unintentionally, EU policies on security and borders come under scrutiny while the individual responsibility of the EBCG's border guards and standing corps becomes relevant. As a new insight, the research identifies that a new category of crimes, namely banal crimes, which are not formally recognized, could trigger individual responsibility for EBCG's border guards and standing corps, as a result of EU policy, under certain conditions which resemble the elements of crimes against humanity.

This research also addresses the phenomenon of irregular migration with regards to states' obligations to apply international maritime law, including the principle of *non-refoulement* at sea. The thesis postulates that the international maritime obligations of the Member States may be shared in terms of responsibility with the EBCG Agency depending on their respective conduct. If this is proven, then the obligation of the EU in terms of responsibility could be shifted towards the European polity based on the EBCG corps' conduct.

This research identifies that the EU, in its capacity as an international actor, has a unique opportunity to promote states' international obligations regarding human rights and their sustainability as well as to have an impact on reducing the fatalities in the Mediterranean. This can be attempted through the EU acting in its international legal capacity as an actor with agreements and funding opportunities with non-EU states in the external dimension of migration and protection. In this regard, the international agreements in the field of migration are explored in connection with the rule of law conditionality, as an EU principle. Moreover, the external character of EU relations has allowed new insights in the control of borders and migration, which could directly or indirectly positively impact human rights.

In the EU's external conduct with non-EU states, there has been an attempt to link migration to trade and provide financial contribution to non-EU (third) states through the EU's Multiannual Financial Framework. With the option of conditionalities for human rights as binding clauses in the international agreements of the EU or EU funding, the EU could contribute to global goals for safe, orderly, and regular migration. Within the same framework, it can be argued that the migration-trade nexus could further benefit human rights if a monitoring mechanism for non-EU states is created concerning a breach of their human rights or other obligations along accompanying conditionalities in accordance with the EU agreements. In this regard, the external trade-migration nexus builds upon the assumption that there could be a shift from a shared to an exclusive competence area, consistent with trade obligations in accordance with the EU Treaties. This could be accompanied by an obligation for the EU to provide a mechanism promoting respect for the rule of law via the conditionalities imposed for human rights (including the ECHR).

This Part focuses on the EU's competence as an international actor and its impact on the international implementation of laws, which would benefit irregular migration in reducing numbers and preventing human rights violations by actors outside the EU. As a preliminary conclusion, it could be said that it remains a policy option for the EU to impose legal obligations to (third) non-EU states in the area of irregular migration, which would impact the number of fatalities in the Mediterranean.

5.1.2 Drivers of Irregular Maritime Migration and Migratory Routes – What we Know

Migration drivers, irregular routes, and fatalities in the Mediterranean, indicate a need to further explore the rights of irregular maritime migrants and the response of the actors involved to determine their potential responsibility deriving from new developments that would limit the irregular migration phenomenon. The central Mediterranean route remained the main path of irregular migrants in Europe during the migration crisis in the Mediterranean and the EU. However, compared to the global scale of displacement due to persecution, conflict and human rights violations, the EU hosted a relatively small share of the global number, which reached 59.5 million people in 2014.[711] That small percentage led the UN Special Rapporteur to state in a UN General Assembly report that it is not accurate to describe migration in the EU as a crisis.[712]

The high number of fatalities in the Mediterranean indicate potential legal gaps in international and European law in terms of protection or search and rescue but mainly point to the overall obligations and responsibilities of the actors involved concerning the rights of irregular maritime migrants in the Mediterranean. People who decide to

[711] UNCHR, 2015. , p.4.
[712] UNGA, 'Human rights of migrants: Note by the Secretary-General' (4 August 2016) A/71/285, Seventy-first session Item 69 (b) of the provisional agenda, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, para 15.

embark a boat and seek protection as a result of escaping conflict or other harsh circumstances, are entitled to some form of protection upon their rescue and rely upon a decision of states to allow their disembarkation, stay, or residence in the states' territories, or to safely proceed with dignified return procedures.

The main aspect that needs to be explored in terms of responsibility is the conduct of the EU (via its Agencies) and of the Member States. If conduct by EU actors is the result of EU policies, then those policies come under scrutiny. Tragedies like the well-known migrant shipwreck in Lampedusa could bring to the surface several questions regarding the right to be rescued, the potential right to disembark and choose a port, the responsibility for the coordination of an operation, and the relevant legal framework.

The phenomenon of irregular migration is examined in detail, starting with the irregular maritime routes for two reasons: (i) to identify the legal domains that are involved and (ii) to identify the extent of potential responsibility for the actors involved in each legal domain. This leads to a detailed description of the irregular maritime phenomenon and the legal domains of international maritime law and smuggling as part of transnational crime.

The drivers of irregular migration encapsulate the phenomenon in its intensity, while its magnitude in terms of geographical diversity is evidenced by the migration routes used by the mixed flows of migrants heading towards Europe. This geographical diversity has become a driving force for the EU to develop stronger cooperation with non-EU (third) states to manage irregular migration better, impose restrictions on borders and fight

organized crime. The geographical diversity is reflected through the three irregular maritime routes, namely the Eastern, Central Mediterranean, and Western routes.[713]

The diversity of the irregular maritime phenomenon creates extensive implications for the Member States' policies when fighting organized crime while securing the Union's external borders attempting to achieve a fair balance of their international legal obligations on human rights and protection. Further, the geographical diversity, the drivers of migration and the high number of fatalities in the Mediterranean during the migration crisis reinforce the argument that there are other categories of persons coming from vulnerable situations who may need protection other than those identified as refugees within the meaning of the 1951 Refugee Convention definition.

As previously stated, the number of irregular crossings and the number of fatalities may indicate potential fragmentation of international laws, gaps in the international or European legal frameworks, or states' inability or unwillingness to apply such policies that would fully respect the right to protection in terms asylum (*non-refoulement*) and human rights violations. However, there is more to the irregular maritime phenomenon related to the human need to migrate for better living conditions without unnecessary migratory or border restrictions.

Drivers of irregular migration include poverty, discrimination, lack of access to rights, including education and health, none or limited access to decent work, violence, gender inequality, the consequences of climate change and environmental degradation,

[713] Foundation Robert Schuman, the Research and Studies Centre on Europe, "The challenge of illegal Immigration in the Mediterranean", European Issue no 352 Retrieved at: https://www.robert-schuman.eu/en/european-issues/0352-the-challenge-of-illegal-immigration-in-the-mediterranean

separation from family, in addition to war and persecution, (also see 3.2.4).[714] Irregular migration drivers involve desperation and, in some instances, entail difficulties in obtaining legal travel documents or permission to travel.

The three routes of irregular maritime migration in the Mediterranean result from geopolitical circumstances in the neighbouring countries in their respective policies on migration. For example, as with the Syrian crisis, the Eastern Mediterranean route becomes popular due to the visa liberation regime between Syria and Turkey, which subsequently made Turkey a departure point, including a sea crossing point into Europe.[715] This route is reportedly the easiest, with Greece and Turkey being close to each other. Notably, the number of irregular crossings skyrocketed in 2015, reaching 50.000 in one month (July) and another 100,000 arriving the following month in the Aegean islands.[716] The number of crossings reached 750,000 in 2015. Fatalities in the Mediterranean were also high in 2015, with hundreds of migrants dying each day.[717] The highest number of fatalities (5,096) was recorded in 2016, turning the Mediterranean route into the world's deadliest irregular crossing.[718] However, it is noted that deaths at sea are not recorded unless the bodies are collected; therefore, it can be assumed that the number of fatalities is higher than what is being recorded. [719]

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[714] UNGA Situation of migrants in transit - Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/31/35, 27 January 2016 (n 123)
[715] ibid 97.
[716] ibid 97, 98.
[717]International Organization for Migration, 'IOM Counts 3,771 Migrant Fatalities in Mediterranean in 2015'. 05 January 2016 Retrieved at: <https://www.iom.int/news/iom-counts-3771-migrant-fatalities-mediterranean-2015>
[718] International Organization for Migration, Philippe Fargues, 'Four Decades of Cross-Mediterranean Undocumented Migration to Europe: A Review of the Evidence', 2017, 1.
[719] ibid 6.

Concerning the drivers of migration, during the peak of the migration crisis (2015–2016), more than 85% of the irregular migrants arriving in Greece were from countries experiencing war and conflict.[720] In Greece, most arrivals were from Syria, Afghanistan, Iraq, and Somalia. In Italy, irregular maritime migrants were from Eritrea, Somalia, and Sub-Saharan Africa. Migrants were driven to migrate through irregular routes experiencing hardships and serious humanitarian and protection challenges during their journey, such as abuse by smugglers and criminal gangs as well as obstacles caused by the tightening of the borders.[721]

The central Mediterranean route is one of the main paths for irregular migrants on a direction from Libya, Italy, Malta, and Tunisia towards Europe. It is noted that the central Mediterranean route was the first major gateway for irregular migrants during the last few years, while it is also interesting to underline that the route has been used for irregular crossings since the 1990s.[722]

Different routes affect different countries, whether EU Member States or other non-EU states, in terms of irregular arrivals. The Western route affects Spain, Portugal, Morocco, Senegal, and Sahara, while the Eastern route of the Mediterranean involves mixed migration movements originating from the Horn of Africa, i.e., from Yemen to Saudi

[720] UNHCR, 'The Sea route to Europe: The Mediterranean passage in the age of refugees', 1 July 2015, 3.
[721] ibid 3.
[722] Details on the Central Mediterranean route, its main departure points are explained in Peter Tinti, Tuesday Reitano, *Migrant, refugee, smuggler, saviour* (Oxford University Press, 2018) Chapter 4, 90-95. The authors also explain the situation in Libya, following Muammar Gaddafi's reign.

Arabia. The Southern route originates from the Eastern Corridor via Kenya and towards Africa, while the Northern route from Egypt, via Sinai and into Israel.[723]

The Eastern route mainly affects maritime arrivals in Greece, Cyprus, and Romania. The Eastern route is the route from Turkey into Europe via the Aegean, also known as the Aegean route. Migrants who use the latter route come mainly from Afghanistan, Bangladesh, Iraq, Iran, Palestine, India, and the Horn of Africa.[724] The Eastern route is a popular one among migrants and is in high demand, considering that in 2000-2015 three million migrants used that route to cross to Europe in an unauthorized manner. In recent years, the geopolitical circumstances caused this route's high demand. In response to the high numbers of unauthorized arrivals and the erection of a wall along the Evros river, Greek policies turned the Aegean Sea into the main entrance to the EU. Accordingly, irregular migrants use the route from the Sahel to Libya, Syria via Egypt, or Eritrea to Libya to reach Europe.[725]

The Western route reportedly was first used by the African countries of Mali, Morocco, Senegal and Algeria to reach Spain. [726] In that route, efforts were directed towards fighting smuggling networks crossing the Mediterranean.[727] Migrants who use the Western route are reportedly fleeing violence and conflict and come from poor economic conditions often struggle to survive. Consequently, these migrants may be

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[723] Regional Mixed Migration Research Series, explaining people on the move, 'Going West, contemporary mixed migration trends form the Horn of Africa to Libya and Europe', Regional Mixed Migration Secretariat, June 2014. Retrieved at: http://www.mixedmigration.org/resource/going-west/.
The research is very detailed on mixed migration from the Horn of Africa, and it explains the start of the journey from countries of the Horn of Africa, i.e., Eritrea, Ethiopia, South Central Somalia and Somaliland, in transit to Sudan and Libya and from there to the route of Israel.
[724] Tinti, Reitano (2018) (n 722) 95
[725] ibid.
[726] ibid.
[727] ibid.

fleeing because of political unrest like the one caused by the Arab Spring. Border measures, as well as maritime controls imposed by third countries, result in a constant change of the transit and departure points. For instance, the situation in Libya indicates the inconsistent character of the migratory routes. For example, departure points in Libya change according to the local situation related to security, such as checkpoints, ethnic fighting, and appalling conditions in detention centres.[728] As far as the Member States' border control measures are concerned, it is reported that the Eastern Mediterranean countries have absolute control of their borders, only crossed by migrants who comply with legal requirements. [729] The border control measures within and outside the EU impact the migratory phenomenon of irregular crossings in the Mediterranean in terms of fatalities.

As previously mentioned, the irregular maritime migratory phenomenon has become a source of an unprecedented high number of fatalities. It could be argued that the high number indicates the fragmentation of international laws, but also it could be the result of policies and practices in countries within and outside the EU. A research study on 'illegal' [730] immigration indicates that the three migratory routes had existed and had been used by migrants before 2000. However, the deaths at the external borders of the Union have been highlighted around 2011–2014.[731] Nonetheless, it is identified that

[728] Regional Mixed Migration Research Series, Ch. 6, Reaching Europe, The journey across the Mediterranean, ibid 77-85.
[729] Javier de Lucas, 'Deaths in the Mediterranean: Immigrants and Refugees, from rights-bearing infra-subjects to security threats' Institute de Drets Humans, University of Valencia 2015, 83-89.
[730] The word illegal is used within the meaning of irregular migration, a preferred term used by the EU today. However, the research in reference, which was published in 2015, uses the word illegal.
[731] The report mentions that in 2014 the number of victims rose and 90% of illegal migrants took the maritime route across the Mediterranean. From those identified, illegal migration has grown eight-fold in Italy, doubled in Greece and up to 50% to the Spanish borders. As to the word illegal, the previous footnote is explanatory. However, one large project under ongoing for all

several maritime search and rescue operations occurred after the shipwreck of Lampedusa[732] in October 2013, which prompted the EU to take steps to assist Member States' rescue maritime missions. Several fatal incidents were also reported in the same year of the Lampedusa tragedy, pointing towards a collective failure stemming from the lack of adequate policies on protection for irregular maritime migrants, such as in 2013 when 25 migrants suffocated inside a boat and were found dead after the boat docked in Lampedusa.[733] Another incident involved 72 people who had left Libya but after two weeks with no assistance had drifted back to Libya with only nine survivors. Other reported incidents include the deaths of 55 migrants cause by dehydration with one survivor, and another incident in 2012 involving 130 people coming from Tunisia whose boat sank 12 nautical miles from Lampedusa.

Fatal incidents also occurred in the Aegean, such as the tragic death of Alan Kurdi, the young toddler found drowned on the Greek shores, as well as many other incidents. These tragic events highlight that the right to life in terms of rescue and protection has

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the years which irregular migration is being recorded in the Mediterranean, called the Missing Migrants Project of the International Organization for Migration, all data in numbers and percentage on the migratory routes and records migrant's death by region, origin, cause of death. More information can be retrieved from the International Organization for Migration website at https://missingmigrants.iom.int/

[732] The *Lambedusa* boat disaster of 3rd October 2013, is reported to be one of the greatest disasters within the last few years of the irregular migration phenomenon. A total of 366 persons, mostly Eritreans died when the boat sank off the coast of *Lambedusa*, when the boat capsized. News headlines of the *Lambedusa* disaster were made around the world. See e.g., New York Times, 'Migrants Die as Burning Boat Capsizes Off Italy', 05 Oct 2013, accessed at <https://www.nytimes.com/2013/10/04/world/europe/scores-die-in-shipwreck-off-sicily.html>; Lizzy Davies, The Guardian, 'Lampedusa boat tragedy is 'slaughter of innocents' says Italian president', 3 Oct 2013, accessed at <https://www.theguardian.com/world/2013/oct/03/lampedusa-boat-tragedy-italy-migrants>; BBC News, 'Italy boat sinking: Hundreds feared dead off Lampedusa', accessed at <https://www.bbc.com/news/world-europe-24380247>; Hada Messia, Ben Wedeman, Laura Smith-Spark, 'Italy shipwreck: Scores dead after boat sinks off Lampedusa island', 3 October 2013 accessed at <http://edition.cnn.com/2013/10/03/world/europe/italy-migrants-sink/index.html>

[733] European Union Agency for Fundamental Rights, 'Fundamental rights at Europe's southern sea border', 27 March 2013, 31.

not been safeguarded for people in vulnerable situations who attempt to escape persecution or flee from vulnerable situations that violate human rights and put human subsistence at risk. The young toddler's picture shouts out to the world that humanity has failed and, at the very least, policies are not informed by human rights, nor do they effectively address the human dimension of migration. The data collected by the IOM's project titled *Missing Migrants* indicate the human tragedy unfolding during migrants' irregular journeys.[734] It paints the picture of the human and humanitarian tragedy through the thousands of fatalities and the absence of sustainable policies to regulate irregular flows.

A study by the European Union Agency for Fundamental Rights (FRA) concerning the deaths at sea, outlines that there are no official statistics on the number of migrants who have died or gone missing when crossing the Mediterranean to reach Europe.[735] Reportedly, fatalities occur away from the shore and rescue operations are not primarily instructed to find bodies, but rather to save remaining lives. This explains the reason that the number of fatalities is higher than what is reported.

The UN General Assembly stated with regards to border management that the latter's continued ineffectiveness and paradoxes and the lack of a coherent human rights-based framework for migration had caused suffering at all stages of migration, vividly demonstrated by the tragic deaths of migrants in transit.[736]

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[734] International Organization for Migration, 'Missing Migrants Project', (n 2 and 731).

[735] European Union Agency for Fundamental Rights, FRA, 'Fundamental rights at Europe's southern sea border', 2013 (n 733) 30

[736] UNGA, 'Human rights of migrants: Note by the Secretary-General' (4 August 2016) A/71/285, para 20.

Although in terms of human rights, it is easier to imply that the EU and the Member States owe an increased level of responsibility to protect irregular migrants who geographically are close to their maritime borders, it remains extremely challenging to effectively contribute to the implementation of human rights outside the EU. A challenge for the EU in its cooperation with non-EU countries is often the changing character of border measures taken by non-EU states or other actors operating outside the EU.

The phenomenon of irregular migration in the Mediterranean has a wider impact on (i) the policy responses of the EU and its Member States in search and rescue, (ii) the control of the EU's external borders in a defensive way in terms of security, (iii) the rising of transnational crime with the expansion of smuggling networks, (iv) the deaths in the Mediterranean, and (v) the abuse of migrants coming from vulnerable situations by (third) non-EU countries, for example Libya and the reported incidents of slavery.

The phenomenon of irregular migration in the Mediterranean unfolds through smuggling. While smuggling represents a very serious crime, at the same time, it entails the services of the facilitators who may be seen as saviours by irregular migrants and who provide the opportunity to request protection, once the criterion of being outside the country of origin or habitual residence, is satisfied. Smuggling, as seen through the human rights lens, does not in itself constitute a human rights violation, but according to the OHCHR it 'can be a relatively neutral provision of service that could enable a migrant to escape persecution or deprivation'.[737] It is also reported that facilitators are sometimes regarded as 'a trusted and vital source of protection' for travellers, including

[737] UNHCR, A/HRC/31/35, (n 123) para 56.

children on the move.[738] On the other hand, the OHCHR points out that migrants can be prey at the hands of criminal actors who have kidnapped and imprisoned migrants, as is the case with Libya.[739]

For Libya, it is reported that migrants who either live there or are in transit, face death, torture, physical violence, sexual and gender-based violence, kidnapping for ransom extortion, exploitation and human trafficking, basic survival issues, arbitrary detention, and inhumane detention conditions.[740] In addition, it is reported that the Libyan Law No.19/2019 on Combatting Irregular Migration criminalizes any irregular entry, stay or departure, with no distinction made between migrants, refugees, or victims of trafficking.[741] It is also noted that Libya is not a signatory to the 1951 Refugee Convention. Other examples of the operation of very well-organized smuggling networks include West Africa and trans-Sahara,[742] the Horn of Africa,[743] and Turkey.[744] Smuggling unfolds outside the EU, and it is a particularly perplexing illegal business. It derives from the conditions outside the EU but reflects the EU and Member States' migration border controls and security policies. The external dimension of the AFSJ, causes the EU to confront the issue of human rights and several other violations of criminal nature, through its external relations with (third) non-EU states.

Arguably, the phenomenon cannot be adequately addressed with simple policy measures that the EU may adopt within its legal order. However, the EU as an

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[738] ibid.
[739] ibid para 18.
[740] International Centre for Migration Policy Development, 'ICMPD Policy Brief - What are the protection concerns for migrants and refugees in Libya?' November 2017.
[741] ibid.
[742] Tuesday Reitano, 'People smuggling in West Africa', Chapter 9, in John Coyne, Madeleine Nyst, ASPI, STRATEGY: People smugglers globally, 2017, October 2017.
[743] Peter Tinti, 'People smuggling in the Horn of Africa', Chapter 8, in Coyne, Nyst ibid.
[744] Aysem Biriz Karaçay, People smuggling in Turkey, Chapter 6, in Coyne, Nyst (n 742).

international actor can enter into agreements with (third) non-EU states and develop an external policy via the authority provided by its Member States. To this end, the AFSJ, may have a limited capacity to regulate the external actions of the Union. That is possibly the greatest challenge in deciding the responsibility of the EU and its Member States in the external dimension of the Union as an international actor.

The next section explores the transnational crime of smuggling with particular emphasis on smuggling in the Mediterranean and the responsibility that may potentially arise for the actors involved.

5.1.3 The Extraterritoriality of Migrant Smuggling

The phenomenon of smuggling in the Mediterranean started in the early 1970s during an economic crisis when the Western European states-imposed visas for labour work.[745] The economic crisis then, was triggered by the increase in oil prices following the Arab Israeli war in 1973. European states faced increased unemployment rates and decided to terminate their bilateral agreements regulating the circulation of migrant workers from North Africa and Turkey.[746] One of the consequences of that situation was the commencement of the smuggling business in the Mediterranean. Statistics in relation to smuggling report that from 1998 until 2017, 2.5 million migrants had crossed the Mediterranean without a visa.[747] The journeys are from south to north and east to west on the three main routes described in the previous section.

However, as we observed previously, it was during the latest migration crisis that we witnessed an ever-high mortality rate at sea. Reportedly, from 2000 to 2017 (June),

[745] International Organization for Migration, Four Decades of Cross-Mediterranean Undocumented Migration to Europe: A Review of the Evidence', 2017, (n 718) p. 8.
[746] ibid Reference is for Belgium, France, Germany, and the Netherlands.
[747] ibid 9

33.761 migrants lost their lives in the Mediterranean Sea trying to reach Europe. The fatalities may be the result of EU and Member States' policies concerning border controls, which allowed smuggling to flourish again. The rise of the phenomenon of smuggling occurred during the economic crisis in Europe and while countries in the Middle East were torn by war and African states faced violations of human rights. Moreover, as previously observed, economic and human mobility is affected by the security and border measures imposed by the Member States. This builds up to the argument that the policies developed in the AFSJ may have been the cause of an increase in fatalities in the Mediterranean in parallel to the smuggling business. The latter starts outside the EU in countries where the Union acts in its capacity as an international actor through partnerships formed by international agreements.

The following section is an empirical dimension of the phenomenon of irregular maritime migration in the Mediterranean with the purpose to identify (i) the elements of the phenomenon in relation to the transnational crime of smuggling and the extent of responsibility for the actors involved, and (ii) the extent to which international maritime law apply in terms of responsibility to this phenomenon. A large part of the thesis explores real-life examples of the smuggling phenomenon in the context of irregular maritime migrants in the Mediterranean.

The empirical approach to the phenomenon aims to identify those elements that adhere to States' legal obligations, concerning international maritime law and international conventions and protocols for transnational crime. These legal elements would then have to be assessed in terms of responsibility within the European framework in relation to the actors involved within that regional legal framework; for example, the EU agency of the EBCG and the Member States' national coastguards.

Some of the actors involved, such as the regional EU agencies Eurosur and Europol, have, since their mandate, approached smuggling from its transnational dimension since their objectives focus on protecting the EU and Member States' borders. Therefore, the humanitarian element concerning migrants is not the primary responsibility of these agencies. The conduct and action taken by EU agencies purport to protect states by arresting the smugglers and ensuring that there are no threats to security caused by irregular migrants, posing a threat to the national security of states.

Particularly, Eurosur (European Border Surveillance) is a multipurpose system based on the cooperation between the Member States and Frontex, which focuses on border controls with the purpose to (i) have situational awareness and (ii) capability to react at the external borders of the EU.[748] Eurosur, aims to prevent cross-border crime and irregular migration and contribute to the protection of migrants' lives.[749] It is built on the faith that, 'high military technology combined with high level data of communication and the transfer of personal data' through interoperability would result in the tightening of controls and subsequently stop people from crossing to the EU.[750] Despite Eurosur and Europol's strict mandate framework on how to act in similar situations, the business or the transnational crime of smuggling flourished in the Mediterranean between 2014 to 2017. It is argued that smuggling is not yet identified as a national threat by states despite its transnational dimensions, including networks that make a profit through illegal channels and the multiple actors involved. Accordingly, Europol expressed the view that the one million migrants who reached the EU in 2015, profoundly impacted

[748] Elspeth Guild, Didier Bigo, 'The transformation of European border control', in Bernard Ryan, Valsamis Mitsilegas (eds), Extraterritorial Immigration Control (n 180)), 252-273, 260.
[749] EUROSUR, comprises all Schengen area countries and Bulgaria, Romania, and Croatia.
[750] Guild, Bigo, (2010), (n 748)

the criminal landscape with criminal networks adapting quickly into migrant smuggling.[751] Irregular migration then is perceived as a threat to the security of the EU's Member States, whilst facilitation services are seen as an evil form of crime. Notably, the facilitation services for migrants are offered by the criminal networks, which have made substantial profits from this business. Europol's approach concerning smuggling differs from its approach towards irregular migration.

Arguably, there is a different perspective concerning how irregular maritime migrants perceive smuggling. Smuggling as a complex phenomenon begins at the transit places and unfolds into the human drama like the one, we witnessed in the Mediterranean. Nevertheless, in some societies, smuggling has become a form of livelihood for the smugglers and a means of rescue for the smuggled. In the phenomenon of smuggling, there is a livelihood component evident from the case of Libya's smuggling services.[752] In a way, the smuggling of people in Libya offers a viable alternative to economic opportunities within a country that faces political and economic marginalization.

This problem of migrant smuggling is explored at a subsequent point and relates to the EU's cooperation with third countries and EU funding through trust funds, (see section 5.2.3). In this regard, the phenomenon gains attention outside the EU regarding the actors involved and their responsibility to fight smuggling while respecting *non-refoulement* or other forms of protection for those smuggled. With a firm opinion that criminal networks exploit the despair of vulnerable migrants and that migrant smuggling is a transnational criminal business, Europol identifies that there are criminal hotspots

[751] Europol Public Information, 'Migrant smuggling in the EU', February 2016.
[752] Floor El Kamouni-Janssen, 'Only God can stop the smugglers: understanding human smuggling networks in Libya', Cligendael, Netherlands Institute of International Relations, CRU Report, February 2017, 2.

outside the EU along the main land routes, which count more than 230 locations[753] additional to the criminal hotspots for intra-EU movements. [754] In Europol's view, the migration crisis is encouraged by migrant smuggling networks that continue exploiting vulnerable migrants as part of labour and sexual exploitation, fraud schemes and other types of crimes.[755] It is then made clear that migrants coming from vulnerable situations are at a high risk of being exploited by land smugglers before they reach the shores of a transit country and cross the Mediterranean.[756] Members of migrant smuggling networks work autonomously with lower-level contacts which operate as part of the network for a limited time although they are exchanged regularly.[757] Thus, the nature of the smuggling networks is flexible and adaptable to changing demands. Smuggling networks include individuals who provide services outside of the network.[758]

Migrant-smuggling networks, which push or facilitate maritime migrants into irregular migration, come from different continents under different capacities, often on behalf of several organizations and, as argued, while they depend on several grey zones.[759] Accordingly, there are several roles in the facilitation of migrant smuggling, like those who offer accommodation to migrants knowing that they intend to travel irregularly by sea, the life jackets sellers who also know the purpose of the life jackets, the security guards who coerce migrants to embark boats, and the role of other non-State actors.[760]

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[753] Europol's report states that the main criminal hotspots for migrant smuggling outside the EU are Amman, Algiers, Beirut, Benghazi, Cairo, Casablanca, Istanbul, Izmir, Misrata, Oran and Tripoli. ibid, 6.
[754] Europol's report states that the main intra-EU movements include Athens, Berlin, Budapest, Calais, Copenhagen, Frankfurt, Hamburg, Hoek van Holland, London, Madrid, Milan, Munich, Paris, Passau, Rome, Stockholm, Tornio, Thessaloniki, Vienna, Warsaw and Zeebrugge. ibid.7.
[755] ibid.
[756] ibid 13.
[757] ibid 10.
[758] ibid.
[759] Tinti, Reitano, (2018) (n 722).
[760] ibid*,* 39.

The latter category is further separated into two subcategories (i) the logisticians and (ii) the specialists.[761] The first subcategory of the logisticians forms the main group of actors, including guides, drivers, skippers, spotters, and messengers enforcing security. The specialists mostly form a non-permanent team, such as money launderers, financiers, counterfeiters, and corrupters. The specialists are listed in a place and sell their services to criminal industries not limited to smuggling. On the other hand, logisticians are the centre of every successful smuggling operation and are involved in the transportation of migrants.

The demand for irregular boat journeys creates an opportunity for a large illegal market' or 'contributes to the expansion of a large illegal market. The transaction unfolds with migrants paying the brokers for accommodation and security in cash.[762] It has been identified that between 2013 and 2016, the number of migrants and asylum seekers smuggled into Europe increased by 1.500%, marking what has been characterized as the largest illegal market opportunity in recent history.[763] Accordingly, while the smuggling networks require time to develop as transnational networks, they are constantly revitalized; when a 'corrupt' contact is detected, the smugglers relocate before the authorities can take any action.[764] The transnational dimension of human smuggling makes it, as we will explore with reference to the UN Convention Against Transnational

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[761] ibid, 58. Logisticians form the main group of actors: guides, drivers, skippers, spotters, messengers enforcing security. Specialists form mostly a non-permanent team, such as money launderers, financiers, counterfeiters, corrupters. The specialists are listed in a place and sell their services to criminal industries, not only to smuggling but to other crimes. On the other hand, logisticians are the center of every successful smuggling operation, and they are involved in transportation.

[762] ibid 60.

[763] ibid 40. The authors also report smuggling within the European Continent and the perplexities of the system of smuggling with the high risk of life which frequently, result in fatalities. For example, in 2015 in Austria, migrants' bodies were found in a decomposing state on a six-hour journey from Hungary to Austria in a refrigerated meat lorry. ibid 61

[764] ibid 65.

Organized Crime and related protocols, one of the most common transnational organized crimes particularly in the context of migration Human smuggling is a transnational crime,[765] as will be explored with reference to the related UN Convention and Protocol. As a transnational crime, human smuggling is profitable for those involved in the facilitation of smuggling and those who exploit and make profits at the expense of migrants Sometimes, the financial smuggling system is facilitated by a more informal system of money transfer known as *hawala.*[766] *Hawala* reflects an honor system, made possible with the reliance upon several sources. With *hawala*, the clients' names are rarely recorded. Instead, alphanumerical codes or passwords are used to verify the clients' identities. There is also no trace of *hawala* transactions within the formal system of financial transactions. In the authors opinion, *hawala* is the perfect system for laundering finances related to criminal activities. The 'successful' journey of those who arrived is communicated via diaspora on the ground.[767] The General Assembly of the UN reports that the amount which migrants are expected to pay the smugglers varies according to the service offered while, importantly, it is usually determined by information received by migrants through diaspora connections.[768]

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[765] Transnational crime covers crimes that are transnational and covers offences committed in more than one State and planned, organized or controlled in another. The United Nations Convention on Transnational Crime does not provide for a definition on transnational crime in order to allow the applicability of the Convention to new types of crime that emerge. However, the Convention provide for a definition as to 'organized criminal group', article 2(a). The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, is the main international instrument in the fight against transnational organized crime. It entered into force on 29 September 2003. The Convention is further supplemented by three Protocols: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. Information retrieved at: https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html

[766] ibid 68, 70-71.

[767] The authors make an explicit reference to what happens in Athens, Greece on Acharnon street, basically referring to a developing industry. ibid 67.

[768] United Nations, Human Rights Council, A/HRC/31/35 (n 123), para 16.

The United Nations Office on Drugs and Crime, confirms that because the services offered by the smuggling networks are illegal and include document fraud, the vulnerability of those involved is increased.[769] Reportedly, many migrants are abused or die on the way to their destination, while many vulnerable people such as pregnant women and unaccompanied minors may be among those who pay the highest price to the smugglers.[770] Accordingly, migrants with little financial means may not pay for the whole 'package' but instead for each part of the journey separately thus depending on smugglers who may not be linked to each other.[771] Therefore, the risk of vulnerability and exposure to abuse is increased for the migrants.[772] An example of such a journey is the one from East, North and West Africa to Europe, which combines long desert routes and sea crossings.[773] The fatalities on this route are not easily calculated in the Sahara desert nor in the Mediterranean. Accordingly, the journey from West Africa to Europe is not direct, and many migrants are forced to temporarily stay in North Africa and gain money to continue with their journey.

The above characteristics are significant particularly in the context of international maritime law and the situation of 'persons in distress' which will be explored in section 5.1.5. In addition to the situation in non-EU countries regarding smuggling, prior to the unauthorized departure of boats in the Mediterranean, the United Nations noted that corruption is observed in relation to the border controls officials. In 2016, the UN General Assembly reported that corruption emerges as a key element in the experience

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[769] United Nations Office on Drugs and Crime, (UNODC), 'Smuggling of migrants: the harsh search for a better life',
Retrieved on 8/3/2015 accessed at <https://www.unodc.org/toc/en/crimes/migrant-smuggling.html>
[770] ibid.
[771] ibid.
[772] ibid.
[773] ibid.

of migrants in transit, including along smuggling routes. It explains that corruption emerges from the involvement of border officials, police, soldiers and consulate and embassy officials in the movement of migrants. This involvement could be from providing documentation, or turning a blind eye to migrants and even as organizers or facilitators in collusion with criminal actors. When migrants are in transit, exacerbated risks of corruption are present from their prolong journeys which is an enormous obstacle to the realization of human rights.[774]

Reaching the shores of any state within the main routes of irregular maritime migration is a challenge for those who fall within the specific category of migrants coming from vulnerable situations while embarking a boat becomes another challenge. The vulnerability of migrants is exacerbated by the risk of losing their lives at sea.

In most cases, different types of boats, usually not seaworthy, are used to cross the sea. For example, frequently used boats are often overcrowded and include inflatable or wooden old fishing boats or even small inflatable rowboats.[775] The type of boat used in each irregular sea journey is determined by the means available, the distance to be covered and the need to avoid border controls.[776] The practical aspects of smuggling, provided here in some detail, add to the migrants' vulnerability and exploitation. For example, in the central Mediterranean route, dinghies and wooden fibreglass boats around five-six meters long are used can hold more than 200 people.[777] It is reported that, typically, migrants do not have lifejackets, except for those travelling to Greece,

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[774] United Nations, Human Rights Council, A/HRC/31/35 (n 123) Para 14.
[775] European Union Agency for Fundamental Rights, 2013, 25. Also, UNODC document on Smuggling of migrants: the harsh search for a better life, (n 769).
[776] ibid.
[777] ibid.

Morocco and the Canary Islands.[778] The different routes have distinct characteristics since they are used by several nationalities and subsequently are facilitated by different actors with varying degrees of criminality.[779]

At sea, communication is difficult, and migrants rely on their cell phones to call for help most of the times. Food and water arrangement differ, while the migrants' fear and anxiety are amplified because of bad weather and sea conditions, engine failure or fear of being lost.[780] Ghost ships that appeared on the Mediterranean route are programmed to operate on autopilot at the final stages of the journey and after the facilitators or smugglers' escape, leaving migrants to find their way to the shore on their own.[781]

What becomes apparent from the referred reports is that although there are three main routes at sea, there is a transferring network that pre-existed the recent mass movements from the Middle East and Africa into Europe. Nevertheless, the increasing need of people in vulnerable situation to move/cross over to Europe' has strengthened the criminal networks involving several actors, and which are difficult to trace even after the arrest of the smuggler or the facilitator.

5.1.3.1 The Impact of Extraterritorial and Intra-EU Smuggling

As we have explored in the previous sections, the criminal business of smuggling is a multi-layered and complex phenomenon which has an impact not only on the receiving states but also on countries outside the EU. Further, the impact of smuggling is multifaceted since it relates to the economy, political situation, and crime. The strengthening of the criminal network is directly linked to the economic and political

[778] ibid 27.
[779] ibid 90.
[780] ibid 27.
[781] ibid 87-88.

situation of the transit countries. For example, Libya, which is in a key position in terms of irregular migration, had a long-standing open policy to migrants. Notably, Libya had a five-billion-dollar deal with Italy in return for measures to control migration towards Europe.[782]

For the criminal networks involved, smuggling is seen, as a cross border trading while migrants are perceived as commodities.[783] The influx of Syrians experienced by Libya, opened the 'free-for-all' smuggling market.[784] In another report, it is argued that people smuggling in post-revolution Libya is part of militia control and the industrialization of smuggling. [785] Some militias, especially on the coast, run smuggling operations directly, using their own militiamen as labourers to secure places (warehouses) for migrants before their departure to the embarkation points.

So far, it has been demonstrated that smuggling is the result of policies outside the EU, the distinct characteristics of which depend on the ability of the states involved to exercise control or preventive measures, as is the case of Libya. The lack of the ability to control smuggling has triggered a political response to the phenomenon. The massive unauthorized influx of migrants caused a relatively negative response by the Member States, resulting in a hostile environment. Accordingly, in 2015, 57,000 asylum seekers who crossed over into Hungary irregularly, trying to make their way from Greece to Germany, were faced by the Hungarian Government's decision to spend €72 million for

[782] Janssen, - F.El Kamouni. 'Only God can stop the smugglers. *Understanding human smuggling networks in Libya', 2017*. (n 930), 6.
[783] ibid 8.
[784] ibid.
[785] Mark Micallef, 'People smuggling in post-revolution Libya,' Section 7, in Coyne, Nyst (n 742) 40.

the erection of a four-meter-tall and 175-kilometre-long fence along its border with Serbia. Croatia followed with the construction of another 350-kilometre fence.[786]

These negative and anti-migrant responses resulting in the erection of fences, had an impact on the Schengen zone while a few Member States imposed the temporary reintroduction of the internal border controls.[787] There is a prerogative for the Member States to introduce border controls in the context of foreseeable events. The Schengen Borders Code allows the Member States to temporarily reintroduce border controls at the internal borders if a serious threat to public policy or internal security has been established.[788] In addition, the Member States have the right to derogate from their obligations under EU asylum law in cases of emergencies. This derogation should not be at the expense of human rights obligations, such as the *non-refoulement* principle. Accordingly, Article 72 TFEU provides that the provisions relating to the AFSJ 'shall not affect the exercise of responsibilities incumbent upon its Member States with regard to the maintenance of law and order and the safeguarding of internal security'. Actions taken by the Member States in pursuance of emergencies, i.e., national security and

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[786] ibid 86.

[787] Today (November 2020), the reintroduction of border controls at internal borders by some Member States, remain, as per the following catalogue retrieved at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf

[788] Article 25 of the Schengen's Border Code, under the title 'Procedures for cases requiring urgent action" provides that' (1) Where considerations of public policy or internal security in a Member State demand urgent action to be taken, the Member State concerned may exceptionally and immediately reintroduce border control at internal borders.

2. The Member State reintroducing border control at internal borders shall notify the other Member States and the Commission accordingly, without delay, and shall supply the information referred to in Article 24(1) and the reasons that justify the use of this procedure. Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) *OJ L 105, 13.4.2006, 1–32.*

public order, were rejected by the CJEU.[789] In a recent judgement, the CJEU held that where there are security provisions provided in secondary law and which could address the Member States' security interests, then the use of Article 72 TFEU cannot be relied upon.

In addition, the CJEU noted that each Member State cannot determine the element of security in a case of emergency without the control of the EU institutions. The Member States are still bound by the objectives of the EU acquis on asylum and cannot derogate from their obligations concerning protection.[790] Accordingly, in the case of emergency measure used by the Member States under Article 72 TFEU, these must be proportionate to the legal framework of international protection and the EU Charter of Fundamental Rights. The burden of proof rests upon the Member States to present specific evidence in each individual case that the measure taken was proportionate to the objective to be achieved.[791] Therefore, the excessive border controls, which impact the asylum rights of irregular migrants, could violate the EU asylum *acquis* while they breach states' international obligations. Through its judgements, the CJEU has placed a

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[789] Joined C-715/17, C-718/17 and C-719/19, European Commission v Republic of Poland and Others, ECLI:EU:C:2020:257.

[790] 'It follows from this that, while Member States essentially retain the freedom to determine the requirements of public policy in accordance with their national needs, …., those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union (see, by analogy, judgment in *Gaydarov*, C-430/10, EU:C:2011:749, paragraph 32 and the case-law cited)', para 48 Case C-554/13: Judgment of the Court (Third Chamber) of 11 June 2015 (request for a preliminary ruling from the Raad van State — the Netherlands) — Z. Zh. v Staatssecretaris voor Veiligheid en Justitie, Staatssecretaris voor Veiligheid en Justitie v I. O. (Reference for a preliminary ruling — AFSJ — Directive 2008/115/EC — Return of illegally staying third-country nationals — Article 7(4) — Concept of 'risk to public policy' — Circumstances in which Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days) *OJ C 270, 17.8.2015, 3–3.* Retrieved at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=164962&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7672593>

[791] ECRE, 'Derogating from EU asylum law in the name of "emergencies": the legal limits under EU law', Legal Note#6, 2020.
Retrieved at: https://www.ecre.org/wp-content/uploads/2020/06/LN_6-final.pdf

responsibility upon the Member States to respect international obligations particularly in the context of Article 72 TFEU.

As has become evident from the above analysis, the phenomenon of irregular migration is multidimensional and must be explored from different legal domains. Irregular migration entails not only a legal dimension but most importantly a human dimension in the sense that it revolves around the human person implicating not only the aspect of humanitarian assistance (aid) but rather the duties and obligations owed to people in vulnerable situations. This combination produces variable responses in terms of policies developed, narratives and responses from states and EU agencies. It has an external and an internal character and affects irregular migrants, national politics, and all actors involved. It is a far more complex phenomenon that extends to all sides of the Mediterranean, internally within the EU and externally. Sometimes, it provokes military responses by international forces, further perplexing the assignment of responsibility for the actors involved. Military measures related to security fall within the foreign and security policy area, an exclusive competence area for the EU, indicating the complexity concerning the (extent of) responsibility for each actor involved in the halting of the migrants' irregular maritime journey.

In 2016, a NATO mission was deployed in the Mediterranean, specifically in the Aegean, aiming to disrupt the smuggling networks. NATOs mission included early warning and surveillance activities and operational information sharing with Frontex[792] and the Greek

[792] Frontex agency was created in 2004 and reportedly most of its missions were for migrants coming from Africa and across the Mediterranean Sea. Its legal basis is the EU Community and eh agency's activities are complemented by ad hoc centres, e.g., Germany for land borders, Greece and Spain for maritime borders, Italy for airports, Finland for Risk analysis, Austria for training, and the UK for control and surveillance technologies. Sarah Wolff, 'Border management in the Mediterranean: internal, external and ethical challenges' (2008) Cambridge review of international affairs, 21(2), 253-271, 257.

and Turkish coast guards.[793] Although the mission was not to push back migrants, it was confirmed that to disrupt the smuggling networks would require rescuing persons who would be subsequently returned to Turkey.[794] This mission was complemented by the EU-Turkey €6 billion deal, discussed previously, (see section 3.2.5.). The agreement included a law enforcement action with patrol along the coasts of both countries and an arrangement for an equal number of resettlement places in Europe for those whose asylum claim was processed in Turkey.[795]

What happens before the irregular migrants reach the Mediterranean potentially entails a responsibility for non-EU states which have not managed to combat criminal networks. However, understanding the processes involved prior to the migrants' arrival is a rather complex matter. To that effect, the author of the present thesis argues in favour of an external approach by the EU, as an international organization with emphasis on agreements with non-EU countries. The argument builds upon the idea of the non-violation of states' obligations with a focus on human rights and the responsibility of the EU in accordance with Article 3(5) TEU. Accordingly, the EU's responsibilities as an international actor and its relations to the wider world, point towards the protection of human rights as a way of having a positive impact on the global arena. Therefore, several

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[793] European Union, 'Factsheets on Migration – the European Union's response: EU Operations in the Mediterranean Sea', 16 Sep 2016 Retrieved at: <https://reliefweb.int/report/world/factsheets-migration-european-unions-response-eu-operations-mediterranean-sea>
[794] Reuters, 'NATO overcomes Greek-Turkish tension to set terms of Aegean mission', 25/2/2016. Retrieved at: https://www.reuters.com/article/us-europe-migrants-nato/nato-overcomes-greek-turkish-tension-to-set-terms-of-aegean-mission-idUSKCN0VY0M7.
The mission came into existence upon an announcement on February 8, 2016, by the German Chancellor Angela Merkel and Turkish Prime Minister Ahmet Davutoglu, that they would seek NATO's help with the migration crisis, calling on the alliance to monitor the flow of smuggler ships destined for Europe. Retrieved at: https://www.foreignaffairs.com/articles/europe/2016-02-21/natos-mediterranean-mission
[795] Tinti, Reitano, (2018) (n 722) 99.

domains, i.e., transnational crime, international maritime law, the international and European framework on refugee protection, and the recent developments within the UN relating to the Global Compact on Migration, are examined in relation to other aspects of irregular migration, such as the phenomenon's meaning, start, and content. Further, it is explored how one domain can enter another, yet they all remain separate because there is no single international instrument that addresses the complexity of the phenomenon itself. Subsequently, the aim is to identify states and EU policies, which go beyond the relevant legal provisions, and identify the actors' responsibility in parallel to the rights of irregular maritime migrants.

This section has analysed smuggling and the conditions prior to the migrants' unauthorized embarkation. Next, the international legal framework on smuggling, in explored with regards to the obligations of states. The international legal framework on smuggling by land, sea, and air may assist the examination concerning the actors' responsibility and any potential link to *non-refoulement* and international protection.

5.1.3.2 The International Framework of Smuggling

The Protocol against the Smuggling of Migrants by Land, Sea and Air,[796] (the Smuggling Protocol), is a supplementing protocol to the United Nations Convention against Transnational Crime,[797] (also known as Palermo Convention) adopted by the UN General Assembly in 2000. The UN Convention against Transnational Crime is an initiative by the International Maritime Organization (IMO), which ran parallel to the UN system to

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[796] UNGA, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, (Adopted 15 November 2000).

[797] UNGA Convention against Transnational Organized Crime: resolution (Adopted 8 January 2001) UN/Doc/ A/RES/55/25.

combat transnational crime.[798] It started with Italy's proposal for a draft Convention to combat illegal migration by sea during the 76th session of the Legal Committee of the International Maritime Organization.[799] The Smuggling Protocol came into force on 28th January 2004 and was the first instrument to address all aspects of migrant smuggling. The preamble refers to the states parties' declaration concerning the effective action to prevent and combat the smuggling of migrants by land, sea and air requires a comprehensive international approach, including cooperation, the exchange of information and other appropriate measures, including socio-economic measures, at the national, regional and international levels.[800]

The smuggling of migrants is defined in the Protocol as the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.[801]

The Smuggling Protocol excludes the migrants from any criminal liability but criminalizes certain acts, when committed intentionally in order to obtain, directly or indirectly, a financial or other material benefit for the smuggling of migrants.[802] In addition, the Protocol criminalizes acts 'committed for the purpose of enabling the smuggling of

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798 Tom Obokata, 'The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air', 147-162, in Ryan, Mitsilegas (n 180).

799 ibid, Obokata reports that Austria also suggested the adoption of a new Treaty to deal with migrant smuggling to the UN Secretary General, while Argentina proposed the drafting of a new Convention against trafficking of minors. According to the author, these combined efforts eventually led to the creation of an Ad Hoc Committee by the UN General Assembly to elaborate upon the international instrument against transnational crime and the trafficking/smuggling of migrants. 151-152.

800 UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000 (Smuggling Protocol), Preamble.

801 ibid Article 3 (a).

802 ibid Article 5 'Criminal Liability of Migrants'.

migrants' or 'producing a fraudulent travel or identity document' as well as 'procuring, providing or possessing such a document' in order to 'enabl[e] a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State […] or any other illegal means.'[803]

For the safety and humane treatment of the persons on board a vessel,[804] the Protocol's safeguard clauses in Article 9 provide that safety and humane treatment of the persons on board should be ensured; the security of the vessel or its cargo should not be endangered; there should be no prejudice to the commercial or legal interests of the flag State or any other interested State; that any measure taken with regard to the vessel is environmentally sound, should also be ensured.[805]

In the context of smuggling, a vessel is subject to the flag principle, the detailed measures of which are provided in Article 8 of the Smuggling Protocol, which further provides for the exceptions to this principle, particularly when people's lives are in immediate danger.[806]

The *travaux preparatoires* reveal that the early draft of Article 16 (1), explicitly included these two principles, namely (i) non-discrimination and (ii) *non-refoulement*.[807] It is reported that in the *travaux preparatoires* of the Smuggling Protocol, the protection of migrants was raised as one of the key issues, in an intervention of the Office of the High

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[803] ibid Article 6 'Criminalization'.
[804] ibid According to the use of terms, Article 3 (d) a vessel means any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a government and used, for the time being, only on government non-commercial service. Smuggling Protocol.
[805] ibid Article 9 'Safeguard Clauses'.
[806] ibid Article 8
[807] ibid page.165.

Commissioner of Human Rights, the Office of the High Commissioner for Refugees and the International Organization for Migration.[808] However, the Protocol does not make an explicit reference to the principle of *non-refoulement,* but it addresses the core of the principle indirectly through its protection and assistance measures as it highlights the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.[809]

The Protocol contains provisions on the return of the smuggled migrants,[810] subject to any other treaty and bilateral or multilateral agreement; [811] therefore, it can be suggested that it is also subject to the 1951 Refugee Convention and its related Protocol. Consequently, the principle of *non-refoulement* applies extraterritorially based on the reasoning that smuggled migrants cannot be returned to a place where they will face persecution, torture, inhuman or degrading treatment or punishment.

There are several definitional requirements for smuggling. These include the central element to the definition, that the smuggler must have obtained a financial or other material benefits. Another important requirement is that there must be consent on the part of the smuggled person. In the context of irregular maritime migration, it is presumed that migrants' consent is provided, however, they become vulnerable during their journey and are most susceptible to exploitation. Consequently, their consent becomes debatable and increases their need for protection due to vulnerability.

[808] It is further reported that the final text which was based on the proposals by Azerbaijan, Belgium, Italy, Mexico, and Norway the protection of the rights of migrants was included in Article 2 as one of the purposes of the Smuggling Protocol. Obokata (n 798) 164.
[809] Article 16, 'Protection and assistance measures'(n 800).
[810] ibid Article 18 'Return of smuggled migrants'.
[811] ibid Article 18, para 5.

Migrants may feel they have little choice regarding their journey but to seek assistance from smugglers. During the discussions on the Global Compact on Migration, the IOM in its thematic paper on Smuggling, explicitly stated that 'migrants who use smugglers include not only workers seeking better employment opportunities, but also asylum seekers fleeing persecution, people fleeing poverty and individuals in need of assistance and safety who may not fall into effectively accessible existing protection categories.'[812] The latter finding is what underlines the need for better protection, new pathways and more, in terms of policy and responsibility for humanitarian assistance and protection on behalf of all the actors involved.

International discussions on the Global Compact for Migration emphasized, in relation to smuggling, that whilst the consent of the smuggled persons is a prerequisite for smuggling and one of the main elements which distinguish it from trafficking, migrants often find themselves misled, intimidated or forced into an exploitative situation.[813] In this regard, the IOM notes that migrants may be forced to work for extremely low wages to pay the smuggler and continue their journey at the mercy of other criminal networks. This increases migrants' vulnerability as they are exposed to abuse, including, in some instance, abduction, torture, sexual assault, and extortion.[814]

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[812] International Organization for Migration, 'Countering Migrant Smuggling', Global Compact Thematic Paper, 2017

[813] ibid; Obokata (n 978) identifies four key differences between smuggling and trafficking. In brief, (i) trafficking has the element of coercion and/or deception, whereas smuggling is a voluntary act on the part of the smuggled, (ii) the services of the smugglers end when people reach their destination while trafficking entails the subsequent exploitation of people, (iii) international movement is required for smuggling, whereas trafficking can take place both internally and externally and (iv) entry into a State can be both legal or illegal for trafficking, while smuggling is characterized by illegal entry. *Supra*, p. 153. Also see, James Hathaway, The human rights quagmire of human trafficking. 2008 Virginia Journal of International Law 49 (1). on the initial proposal of the Smuggling Protocol which it was proposed to create a combined offense of illegal trafficking and transport of migrants, pp. 26 and 57-58.

[814] ibid.

International efforts to address migrant smuggling are related to the New York Declaration,[815] the 2030 Agenda on Sustainable Development,[816] the International Agenda for Migration Management[817] and the Sutherland Report.[818] Other regional initiatives on smuggling include the Bali Process on People Smuggling -Trafficking in Persons and Related Transnational Crime, the European Union-Horn of Africa Migration Route Initiative, and the African Union-Horn of Africa Initiative on Human Trafficking and Smuggling of Migrants (the Khartoum Process), the Rabat Process, the Valletta Action Plan, and the Brazil Declaration and Plan of Action.[819]

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[815] New York Declaration, 2016, (n 159) para 23, 33, 35, 36.

[816] Target 10.7: Facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies. UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1, available at: https://www.refworld.org/docid/57b6e3e44.html

[817] The International Agenda for Migration and Management is designed to assist governments in developing effective measures for the management of migration. *"It offered a non-binding yet comprehensive set of common understandings and effective practices, and a reference system for dialogue, cooperation and capacity building at the national, regional and global level, developed in a process of comprehensive consultations among states and other stakeholders from all regions. The IAMM was one of the first international outcomes to have recognized the complexities described above and to have set forth a range of recommendations to combat human smuggling"*. IOM thematic paper on Counter Smuggling, 2017,

[818] Report of Peter Sutherland, (former Special Representative of the Secretary General on Migration). Recommendations on combating human smuggling, include the improvement in cooperation (while recognizing that much unauthorized migration happens in complicity with State actors or where State capacity is weak); expand legal pathways to offer alternatives to current dangerous migration routes and, thereby, to undercut criminal smuggling networks; and equip migrants with proof of legal identity which would further reduce the risks of migrants being exploited by criminal smugglers. UNGA, Report of the Special Representative of the Secretary General on Migration, A/71/728, 3 February 2017.

[819] New York Declaration, 2016, para 16, (n 287). Regional Treaties, Agreements, Declarations and Related, *Bali Declaration on People Smuggling, Trafficking in Persons, and Related Transnational Crime*, 23 March 2016; Global Forum on Migration and Development, EU-Horn of Africa Migration Route Initiative (Khartoum Process), available at: https://gfmd.org/pfp/ppd/5682;
Also see Khartoum Process, available at: https://www.khartoumprocess.net/; Rabat Process Euro-African Dialogue on Migration and Development, available at: https://www.rabat-process.org/en/about/rabat-process/reference-countries; Valletta Action Plan, 2015, https://www.consilium.europa.eu/media/21839/action_plan_en.pdf; Regional Refugee Instruments & Related, *Brazil Declaration and Plan of Action*, 3 December 2014, available at: https://www.refworld.org/docid/5487065b4.html

The UNGA in 2016 identified that the only way to reduce smuggling effectively is to offer more accessible, regular, safe, and affordable mobility solutions with all the identity and security checks that efficient visa procedures can provide.[820] The General Assembly, in its report on the human rights of migrants, concluded that states' responses to the migration crisis have been ad hoc, short-sighted and inadequate, and that they have resulted in friction between states, 'creating an atmosphere of chaos that instils fear to the citizens of the destination countries and feeds all the stereotypes, myths, threats and fantasies that nationalist populist movements exploit with great success'.[821]

The smuggling of migrants and their consent cannot be presumed as being equivalent to a willingness to violate international and national immigration laws. People's desperation, functions as the driving force of their perilous journey.[822] One cannot but wonder whether the irregular migrants' lack of knowledge about the criminal networks and the real risks involved in their journey leads to their 'consent' in favour of the smugglers' facilitation. It is argued that even when people estimate the risk, it remains insignificant when compared to other immediate threats.[823] It appears that it is only when people's boat journey begins that the full extent of danger is comprehended but without having the option to return.

The responsibility of the states signatories to the Smuggling Protocol is to protect the smuggled persons and not criminalize their unauthorized journey. In addition, State parties need to take effective measures to combat smuggling and fight criminal

[820] UNGA, 'Human rights of migrants: Note by the Secretary-General' (4 August 2016) A/71/285, Para 15.
[821] ibid para 16.
[822] Jacob Townsend, Christel Oomen, 'Before the boat- Understanding the migrant journey, EU asylum: towards 2020 project', Migration Policy Institute, May 2015.
[823] ibid 5.

networks. In relation to that, any international organization, including the EU, should adopt policy measures to enable the implementation of international instruments. Therefore, in exploring transnational laws related to smuggling, it becomes clear that all other forms of forbidding and preventing smuggled irregular maritime migrants from entering a State and requesting protection are not permitted. If proven detrimental for the irregular maritime migrants, any such policies may bring liability for such actions.[824]

The Protocol does not address the obligation to protect irregular maritime migrants; it only addresses their non-criminality or legal accountability for their consented action, i.e., entrusting and paying the smuggler for their service. Nevertheless, the UN has recently identified that the smuggling of irregular maritime migrants is the cause of the non-entry policies of states, since states do not depict international solidarity in relation to their international obligations. This does not suggest that all people who decide to use the services of the smuggling networks should be excused and allowed to freely violate the border and the migration laws of states since not all people enjoy that right as it is not absolute and does not fall within the right to leave any country. The right to leave any country entails that a person follows the laws, rules and regulations of travelling and migration. Consequently, this further indicates a complex phenomenon, when states are unwilling to offer visa opportunities for travel. Therefore, people are stuck within oppressive regimes, or their lives are being threatened either by war or serious violations of human rights. Even though transnational law provides for respect of the principle of *non-refoulement* extraterritorially, and more explicitly not to be returned to a place where the person would be subjected to torture or his or her life

[824] Please see Section 5.1.7 on liability of EBCG in accordance with EU law and the reference to the work of Fink, M.

would be threatened, it remains for the international maritime law to clarify the extent of Member States' responsibility. This Member States' responsibility is to be clarified in terms of rescue and disembarkation when *non-refoulement* applies at sea or when irregular migrants coming from vulnerable situations are in danger at sea.

The phenomenon within the framework of maritime laws needs to be explored further with reference to the measures adopted by the EU on smuggling.

5.1.4 The EU Agency's Responsibility in the Area of Freedom, Security and Justice

From Frontex to EBCG, there has been criticism regarding the guards' responsibility and their practices. A brief reference to the EU's action on borders helps identify the integration theory which highlights the shift of responsibility to the EU. The following empirical analysis of Frontex's competences concerning irregular migration, directly linked to border control, also helps analyse, why there was a further need to transfer more competences from the Member States to the EU agency.

Human rights and the fair implementation of international law were mostly ignored in the first mandate of Frontex, the competence of which was based more exclusively on border security. This differentiated mandate is why Frontex's actions, in relation to human rights, were not applauded in 2006 when the European Ombudsperson launched an investigation, the subject of which will be discussed subsequently. In terms of irregular (illegal) migration, its role was perceived to protect the borders and keep irregular migrants outside the EU. However, on behalf of Frontex, possible violations did not result in any legal accountability but rather in an administrative complaint filed with the European Ombudsperson. The reasons underlying the necessity for a more integrated approach to Frontex's border management had more to do with the EU's

political role in the migration crisis than with the question of responsibility and the EU's call for effective and efficient management of irregular migration by the Member States.

It may be of no coincidence that the new EBCG Regulation was negotiated during the EU migration crisis because it changed the level of legal responsibility for the EBCG, not only due to its competences and legal personality as an EU agency but from the mere fact that its employees would no longer be under the command of their Member State. This change was not brought intentionally but primarily arose from the Member States' challenges which required action based on a fair balance between the rights of irregular migrants in the Mediterranean and effective measures to fight the transnational crimes of smuggling and terrorism. The EU's support towards the Member States may result from gaps created in international law that do not address the phenomenon's unique characteristics. A deeper understanding of the developments that could, arguably, cause a shift in responsibility, or the extent to which this has already occured, is explored through a chronological analysis of the development of the EU's external action on migration. Since 2006, the operational cooperation at the EU's external borders[825] was part of the *supranational*[826] process within the JHA as a component of the common

[825] External borders are explained in the Schengen Code and mean, the Member States' land borders, including a river and lake borders, sea borders and their airports, river ports, seaports and lake ports, if they are not internal borders. Accordingly, internal borders are (a) the common land borders, including river and lake borders of the Member States, (b) the airports of the Member States for internal flights, (c) sea, river and lake ports of the Member States for regular ferry connections. Article 2 (definitions), European Union: Council of the European Union, Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), 15 March 2006, OJ L. 105/1-105/32; 13.4.206, (EC) No 562/2006, available at: https://www.refworld.org/docid/47fdfb0525.html

[826] Roberta Mungianu, 'Frontex: Towards a common policy on external border control', (2013) European Journal of Migration and Law, 15(4), 359-385. The author explains reference to *supranationalization* as a mode of governance characterized by the competence of the EU to legislate in a specific policy area and the powers of the EU institutions to exercise power o policy areas within the territory of Member States because of conferral of power from Member State to the EU within those policy areas. 359-360.

policy on external borders.[827] At the time, it was identified that the 'sovereign clauses' of the Member States on the surveillance and control of their external borders prevented the EU from fully exercising its powers within the common policy of external control.[828]

The EU's competence concerning external control and borders experienced a shift with the introduction of the Lisbon Treaty and the obligation to establish a common policy for the external borders based on the principle of solidarity.[829] In addition, the Treaty set the goal for the gradual introduction of an integrated management system for external borders.[830] Frontex's objective was to coordinate and assist the Member States in their activities and its membership was voluntary.[831] It is reported that when the concept of integrated border management (IBM) was formed, it could not be limited within just one framework; therefore, it spread across a number of areas, from criminal law to expulsions, and policing to internal security.[832] In order to achieve its objectives, Frontex[833] stepped in and joined operations with the Member States. These operations were coordinated by the EU based on a political decision by the Member States involved in each operation. This was achieved in the area of JHA. It was border control that related to crime because irregular maritime migration was then framed within illegal migration. The grounds for responsibility remained unaltered and in line with the *Bosphorus* doctrine as analysed earlier (sections 4.1.2 and 4.1.3).

[827] ibid.
[828] ibid.
[829] Article 67 (2) TFEU.
[830] Article 77 para (c) TFEU.
[831] Wolff (2008) (n 792), 260.
[832] Mungianu, (2013) (n 826) The author is referring to the writings of Hobbing, P. when describing the early formation of the IBM concept. Hobbing, P. (2005). Integrated Border Management at the EU Level. CEPS Working Documents No. 227, 1 August 2005.
[833] Frontex is a contraction in French 'frontières extérieures'.

Although Frontex was initially more of a coordinator of border enforcement between the Member States and the EU, it quickly developed into a powerful actor with a key role in and external policy.[834] Prior to the migration crisis, Frontex had undertaken a number of joint maritime operations, including HERA I, II and III, which reportedly succeeded in reducing irregular migration by sea in Spain's Canary Islands.

Frontex signed a cooperation agreement with FRA in 2010 aiming to integrate fundamental rights in its activities and joint operations by training border guards and staff. However, Frontex was highly criticized for preventing migrants from availing themselves of their rights and applying for protection in the EU.[835] Moreover, the initial conduct of Frontex was highly criticized by the European Ombudsperson in an enquiry initiated by that institution in 2012 concerning violations of the Charter of Fundamental Rights of the European Union.[836] As a result, the Ombudsperson called upon Frontex to establish a complaint mechanism for individuals who consider that their rights had been violated.[837]

The Ombudsperson's main concern involved Frontex's responsibility for potential infringements of fundamental rights occurring during its operations. Further to that, the initiative underlined that Frontex (i) must respect the rights at stake, i.e., physical

[834] Human Rights Watch, 'The EU's Dirty Hands, Frontex involvement in Ill Treatment of migrants and detainees in Greece', 2011.
[835] ibid 12.
[836] Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex.
Retrieved at: https://www.ombudsman.europa.eu/en/case/en/4820
[837] The Ombudspersons assessment of the 2012 Report stated that Article 26a (1) of the Regulation provides that Frontex should take two essential measures in order to comply with its obligation to promote and respect fundamental rights: *First*, it should (a) draw up, (b) develop and (c) implement the Fundamental Rights Strategy. *Second*, it should put in place an effective mechanism to monitor respect for fundamental rights in all its activities. In the assessment that follows, the Ombudsman will examine Frontex's position against the background of this obligation. In so doing, he will first address the Strategy, in conjunction with the Action Plan and the Codes of Conduct. ibid.

integrity and dignity, asylum, and international protection, *non-refoulement*, effective remedy, and the protection of personal data, among others and (ii) apply the relevant case law of the CJEU and the ECtHR.[838]

Reports on Frontex's operations during Operation Triton strongly condemned its conduct towards irregular migrants in the Mediterranean.[839] In a 2015 report by the Forensic Oceanography, Frontex was criticized for its operational planning of the Triton Operation, suggesting that Frontex 'deliberately discarded … its own internal assessment [which] predict[ed] increased deaths at sea'.[840] The Member States and Frontex prioritized combating the illegal crossings resulting in deterrence over saving human lives.[841] In the 2015 incident in the Central Mediterranean route, an increasing number of migrants were left to drift for several hours or even days before their rescue, mainly due to a lack of funding from Italy, while the Italian Maritime Rescue and Coordination Centre in charge of the SAR operation called upon merchant ships transiting in the area to assist with the rescues. The incident, cost the lives of more than

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[838] Frontex's Strategy was also criticized on the point that Member States remain primarily responsible *for the implementation of the relevant international, EU or national legislation however, this does not relieve Frontex of its responsibilities* as the coordinator *and it remains fully accountable for all actions and decisions under its mandate*. Para 49*,* ibid. However, it should be noted that Frontex gradually developed cooperation with EASO, UNHCR and other relevant organizations which participated in the Consultative Forum.

[839] Due to a lesser scale of operation, as Triton was in comparison to Mare Nostrum, Frontex was fully aware of the excessive burden and that merchant ships were unfit to carry out large scale and particularly dangerous operations involving migrants. Charles Heller, Lorenzo Pezzani, 2015. 'Death by Rescue, The Legal Effects of the EU's policies of non-assistance at sea'. Accessed at: <https://forensic-architecture.org/investigation/death-by-rescue-the-lethal-effects-of-non-assistance-at-sea>

[840] ibid.

[841] The argument on deterrence over human lives is based on (i) The Risk analysis carried by Frontex at the time, and (ii) on the statement of the UN Rapporteur François Crépeau who in 2014 denounced the rationale o the rights of migrants.

thirty persons due to the unsuitability of a merchant ship to be used for the rescue mission instead of proceeding with a coordinated rescue plan. [842]

Accordingly, the report concluded that the EU's decision not to dispatch assets near the Libyan coast and provide SAR assistance to migrants in distress at sea had left merchant ships in a difficult position. [843] This resulted from EU policymakers cutting back their assistance at sea in favour of deterrence.[844] The report states that statistical data for the period tragically confirms the predictions of human rights organizations that ending Mare Nostrum did not lead to fewer crossings in the Mediterranean but instead to more deaths at sea and thus to a higher mortality rate.[845] Following the new challenges faced by the Italian Rescue Coordinating Centres and Frontex, in its Triton operation, the President of the European Commission stated in 2015 that ending Mare Nostrum was a serious mistake that cost human lives.[846] The report concludes that these deaths amounted to 'killing by omission'.[847] Killing by omission is a serious accusation against Frontex, which, under the circumstances, was 'forced' to change its mandate and competences. Nonetheless, and before analysing the new regulation and how Frontex became an EU agency with legal personality, it should be mentioned that such a serious accusation against Frontex indicates that the high number of deaths caused during irregular maritime migration is of such intensity that could amount to another form of

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[842] ibid.
[843] ibid.
[844] ibid.
[845] ibid.
[846] Speech by President Jean-Claude Juncker at the debate in the European Parliament on the conclusions of the Special European Council on 23 April 2015, on 'Tackling the migration crisis'. Retrieved at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_15_4896
[847] Heller, Pezzani, (2015) (n 839).

crimes, with an impact on the involved actors' responsibility. The enhanced responsibility of the EBCG guards and border agents is analysed in this Section.

This section demonstrated that at a time of crisis, the Member States were faced with increased challenges in relation to irregular maritime migration that, inevitably, a need developed concerning the Member States' competences in border protection and security. As the main body responsible for border control and security, Frontex stepped in but without a human rights mandate or a monitoring mechanism in place. Any new division of competences would necessarily need to consider different factors, such as border security and human rights, so that a more structured and strengthened agency could develop.

The European Coast and Border Guard Agency of the European Union[848] was established by EU Regulation 2016/1624,[849] which replaced the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. As an agency, it has the same legal personality with its predecessor.[850] It has fully integrated (i) Regulation (EU) 1052/2013 of 22 October 2013, establishing the European Border Surveillance System (Eurosur),[851] and Regulation (EU)

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[848] The term EBCG will be used in this thesis to mark the changing character of FRONTEX after the adoption of the Regulation 2016/1624. Prior to that the name FRONTEX will be used to mark the time before it became an EU agency with legal personality.
[849] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, *OJ L 251, 16.9.2016, p. 1–76.*
[850] Para 51 states that the Agency is independent as regards technical and operation matters and have legal, administrative, and financial autonomy. It should be a Union body having legal personality and exercising the implementing powers conferred upon it by the Regulation. ibid*.*
[851] The Regulation 1052/2013 provides for "a common framework for the exchange of information and for the cooperation between Member States and Frontex in order to improve situational awareness and to increase reaction capability at the external borders of the Member States of the Union ('external borders') for the purpose of detecting, preventing and combating

656/2014 of the European Parliament and the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders.[852]

The EBCG's legal personality as a Union body exercising its implementing powers through the relevant regulation, is significant regarding the shifting responsibility from the Member States to the EU concerning violations of fundamental rights in the context of asylum and migration. Notably, and as previously discussed, regulations do not allow Member States' discretion concerning their implementation. Therefore, the Member States' competences are limited or conferred to the EU – in this case, towards the EU agency operating on an EU mandate – regarding the management of integrated border controls within the AFSJ.

Thus, the Union's objective in external border management is to develop and implement a European integrated border management at the national and Union level, to efficiently manage the crossing of the external borders and address migratory challenges and potential future threats. At the same time, it seeks to ensure a high level of internal security within the Union, with full respect for fundamental rights and in a manner that safeguards the free movement of persons within the Union. [853] Accordingly, the European IBM is based on a four-tier access control model and requires closer cooperation between the EU and non-EU countries in border control, external borders,

illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants (EUROSUR)". *Retrieved at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2013.295.01.0011.01.ENG&toc=OJ:L:2013:295:FULL*

[852] The Regulation 656/2014 in the context of operational cooperation coordinated by Frontex introduced changes to the mandate of the agency, namely in terms of what concerns sea operations coordinated by Frontex. Retrieved at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex:32014R0656

[853] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399, [2016] OJ L 251, para 2.

risk analysis as well as measures taken within the Schengen area and returns.[854] It is noted that these are areas in which the EU has already produced legal acts.

Although it is assumed that the responsibility has shifted towards the EU by the new Regulation on the EBCG, part of the responsibility remains with the Member States. This is because the EBCG Regulation states that European integrated border management should be implemented as a shared responsibility between the border agency and the national authorities responsible for border management, including coast guards, to the extent that they carry out maritime border surveillance operations and any other border control tasks.[855] The EBCG remains responsible for coordinating Member States' actions, when required, whilst supporting the application of Union measures. How the Agency's mandate was strengthened is relevant to the assignment of responsibility during the implementation of European and international laws. The changing level of responsibility brought about by the new regulation is further explored with reference to its new provisions.

The 2016 Regulation has a new mandate aiming to overcome the limitations[856] of the former EU border agency and involves the following: (i) its own operational staff and (ii) operations on its own initiative prior to a request by a Member State. The new regulation provides for a vulnerability assessment to assess the capacity and readiness of the Member States to face challenges at their external borders.[857] The Agency can

[854] ibid para 3.
[855] ibid para 6, It should be noted that the EBCG was agreed in record time of five months and was launched on 6/10/2016.
[856] With regards to limitations and the operations of FRONTEX, prior to the strengthening of its mandate, the answer sent by FRONTEX Executive Director, Fabrice Leggeri on the 12th of February 2016, (ref.2894/12.02.2016) to the European Commissioner for Migration, Home Affairs and Citizenship, Mr Dimitris Avraamopoulos, letter of 09/06/2015, (ref. Ares (2015)2397724) is indicative.
[857] Regulation 2016/1624, para 21 (n 124).

deploy liaison officers from its own staff to the Member States to assist in the vulnerability assessment report to the executive director. [858] In addition, as stated in the Regulation where there is a specific and disproportionate challenge at the external borders, the Agency should, at the request of a Member State or on its own initiative, organise and coordinate rapid border interventions and deploy both European Border and Coast Guard teams from a rapid reaction pool and technical equipment.[859]

The Agency's mandate is strengthened with regard to its relationship with third (non-EU) states. Accordingly, the Agency is mandated to facilitate and encourage technical and operational cooperation between Member States and third countries in the framework of the external relations policy of the Union, further to coordinate operational cooperation between Member States and third countries in the field of management of the external borders.[860]

This will occur with the deployment of liaison officers to third countries in order to cooperate with the authorities of third countries on return on such matters as the acquisition of travel documents. This is to be in accordance with Union law and with respect to fundamental rights and the principle of *non-refoulement*. [861]

Regarding the EBCG's legal responsibility for breach of fundamental rights, the Regulation provides that decisions taken by the Agency pursuant to Article 8 of Regulation (EC) No 1049/2001 on public access to European Parliament, Council and

[858] ibid Article 74.

[859] ibid para 24; The use of this provision can be observed during March 2020, when rapid teams were deployed at Evros in Greece.

[860] Para 46, Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

[861] ibid.

Commission documents, may give rise to a complaint being lodged with the European Ombudsman or to action before the CJEU.

The above indicates that the EBCG's mandate is strengthened for externalization of migration purposes. Although there are a few guarantees on fundamental rights, especially after the European Ombudsman' suggestions, the focus is on border management. The level of legal responsibility for a breach of fundamental rights remains low since it only concerns complaints lodged before the European Ombudsman. Further, as it is already explored, an action before the CJEU would not hold the EU institutions, and probably nor Agencies, accountable for any breach since it would violate the EU's autonomy.

Considering the ARIO, the *lex specialis* is an issue of concern that limits the responsibility of the EU because of its special relationship with its Member States. However, the shifting responsibility of the EU, because of the EBCG competences, restricts or even abolishes, the previously established relationship of shared competences with their Member States. Notably, the shift occurs through the development of border policies and the adoption of relevant measures in the AFSJ.

The work of Melanie Fink clarifies to a great extent the responsibility of Frontex in relation to human rights under the ECHR and the EU (considering pubic liability law).[862] In her monograph, she explains the complexities arising from the joint operations of Frontex and the Member States and clarifies Frontex's responsibility under the ECHR and its liability under EU law. Before, putting Fink's findings in context concerning the

[862] Melanie Fink, *Frontex and human rights: responsibility in'multi-actor situations' under the ECHR and EU public liability law*. (Oxford University Press 2018); Melanie Fink, *Frontex and human rights: responsibility in'multi-actor situations' under the ECHR and EU public liability law* (Doctoral dissertation, Leiden University 2017); Melanie Fink, 'The action for damages as a fundamental rights remedy: Holding Frontex liable', (2020) *German Law Journal*, *21*(3), 532-548.

spillover of responsibility to the EU agency's border guards and standing corps, which is relevant for this thesis, it is important to aknowledge Fink's statement suggesting that the new Regulation concerning the EBCG (discussed in the following section) did not transform Frontex into a supranational European border authority despite that Regulation's emphasis on border management as a shared responsibility.[863] Fink identifies two responsibility regimes that could apply to Frontex's joint operations: (i) its legal responsibility under the ECHR, by anyone who is a victim and (ii) its liability under EU law for breaches of fundamental rights guaranteed by the EU Charter, as it applies to the conduct of EU bodies and Member States when implementing EU law.[864] She then identifies two direct remedies available to individuals against acts of the EU bodies: (i) legality review under Article 263 and 265 TFEU and (ii) action for damages under Article 340 TFEU and Article 41 (3) EU Charter for compensation for damages.[865] However, the demarcation of each actor's responsinility in joint Frontex operations with the Member States is difficult to decide because of the agreed Operational Plan which is tailored in accordance with the situation at hand (on land, at sea, at the borders, ect).[866] Although the parts of the Operational Plan are not publicly available, it is worth noting that they are legally binding on Frontex, the host state, and the participating states.[867] All joint operations involve some impact on fundamental rights when irregular migration is concerned, especially *non-refoulement*, collective expulsion, and the use of force, all of which are linked to human dignity. It is reported that under certain circumstances when violations of fundamental rights occur and are reported to Frontex, it triggers an

[863] Fink, (2018) ibid 5.
[864] ibid 13 and 75-77, 369.
[865] ibid 13-14.
[866] ibid 51,60,63,69,73.
[867] ibid 75.

obligation for the latter to suspend or terminate an operation or withdraw its financial support.[868]

Fink identifies that in the absence of a fundamental rights liability regime, two preconditions apply: (i) attribution and breach, which both give rise to the responsibility of Member States under the ECHR in relation to primary and associated responsibility, which differs under EU law whereby (ii) for liability to arise, there should be a sufficiently serious breach of fundamental rights and a causal link to the damage suffered by the victim.[869]

She concludes that Frontex as well as Member States have possibilities to influence the course of actions in joint operations and that failure to do so, may trigger their responsibility under ECHR (of the host State) and under EU law (host State and FRONTEX). As far as the associated responsibility is concerned only States that have a large involvement can engage to such responsibility.[870]

In *T-282/21, S.S. and S.T. v European Border and Coast Guard Agency (FRONTEX),* the General Court found that FRONTEX had defined its position within the meaning of Article 265 TFEU, upon an invitation to suspend or terminate FRONTEX activities in the Aegean Sea, even though the action was dismissed as inadmissible.[871] Accordingly, the Court assessed that an invitation to act within the meaning of Article 265 is an essential procedural requirement the effects of which are, first, to set in motion the two-month period within which the institution is required to define its position and, second, to delimit any action that might be brought should the institution fail to define its

[868] ibid 372.
[869] ibid 373-374.
[870] ibid 386.
[871] General Court, T-282/21, S.S. and S.T. v. European Border and Coast Guard Agency (Frontex), 7.4.2022.

position.[872] Article 265 TFEU on the infringement of the Treaties, provides that if any institution, body, office or agency of the EU fails to act, the Member States and the other EU institutions may bring an action before the CJEU.[873] The Court further submitted that any natural or legal person may bring an action before the CJEU where an institution, body, office or agency of the EU has failed to address to that person any act other than a recommendation or an opinion.[874]

Frontex's legal accountability for fundamental rights violations remains a major concern. Although it is easier to assume responsibility for the states involved in the operations of Frontex, it remains highly unlikely that, with the current mechanisms available, Frontex could be found liable for violations of fundamental rights due to several factors. These include the joint operations involving many actors, the decision as to which actor had effective control or conduct in an incident, and to whom it could be attributed, according to the ECHR and EU law.

The following section examines the new competences of the EBCG according to its new Regulation and how this could shift the responsibility towards it.

5.1.5 Irregular Migration in the Context of Maritime Laws

While irregular crossings in the Mediterranean could primarily draw attention to (i) the rights of migrants coming from vulnerable situations within the international and European refugee and protection framework and (ii) the responsibility of states to offer such protection, the fact that it takes place at sea extends the need to understand the discipline of international maritime law. International maritime law consists of several

[872] ibid para 21, T-282/21.
[873] ibid para 18, T-282/21.
[874] ibid para 19, T-282/21.

international instruments[875] with which the UN states have undertaken several maritime obligations relevant to the phenomenon of irregular migration at sea, such as search and rescue obligations.

The international framework concerning the duty to render assistance to those in distress at sea is stated in Article 98 of the United Nations Convention on the Law of the Sea, (UNCLOS) and Chapter V, Regulation 33 of the IMO, the International Convention for the Safety of Life at Sea, (SOLAS). Accordingly, the shipmaster has an obligation to render assistance to those in distress at sea without regard to their nationality, status or the circumstances in which they are found. In Article 98 of UNCLOS, subject to the flag principle, the shipmasters must 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 them.[876] Moreover, UNCLOS place an obligation on states to establish the operation of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements, to cooperate with neighbouring States for this purpose.[877] The same obligation is stated in the SOLAS Convention[878] and the International Convention on the Search and Rescue (SAR Convention).[879] Moreover, SOLAS provide that

[875] UN Convention on the Law of the Sea (Adopted 10 December 1982 and entered into force 16 November 1992) (UNCLOS); International Convention for the Safety of Life at Sea (Adopted 1 November 1974 and entered into force 25 May 1980) (SOLAS); 1979 International Convention on Maritime Search and Rescue, (Adopted 27 April 1979 and entered into force 22 June 1985).
[876] Article 98, UN General Assembly, Convention on the Law of the Sea, 10 December 1982.
[877] ibid Article 98, para 2.
[878] Regulation 7, SOLAS, provides for Contracting Governments to provide Search and Rescue services and make available the information relating to them. Passenger ships must have a prepared plan on board for cooperation with SAR authorities.
[879] Ch. 2.1.1 Parties shall ensure that necessary arrangements are made for the provision of adequate search and rescue services for persons in distress at sea round their coasts; 2.1.8 Parties should arrange that their search and rescue services are able to give prompt response to distress calls; 2.1.9 On receiving information that a person is in distress at sea in an area within

shipmasters are obliged to respond to distress messages from any source. Ships can be requisitioned by the master of a ship in distress or the search and rescue authorities.[880] The SOLAS is subject to the flag application. [881]

All the above indicate states' responsibility to cover their maritime area of control. To this end, it is noted that intercepting measures by states are subject to the principle of sovereignty. Accordingly, interception rights upon a vessel or a ship differ by its position. The contiguous zone, which is the area between the 12 to 24 nautical miles from the baseline of the coastal state, is an area subject to the principle of the freedom of high seas, including the right to navigation, overflight, and the right to conduct military exercises. Article 33 UNCLOS allows the coastal State a level of control that is necessary to exercise over the contiguous zone for purposes of immigration laws and, subsequently, for purposes of border control.[882] The *de facto* control is subject to the *non-refoulement* principle, even when one State (the territorial) permits another State to exercise some form of control, as in the case of the irregular migrants in the Mediterranean. This could be the case of the coastal state with the collaboration of an EU agency (EBCG). What becomes relevant in this situation in terms of responsibility, is the level of the exercise of effective control. The latter is important to identify the rights

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which a Party provides for the overall co-ordination of search and rescue operations, the responsible authorities of that Party shall take urgent steps to provide the most appropriate assistance available; 2.1.10 Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found. International Maritime Organization (IMO), International Convention on Maritime Search and Rescue, 27 April 1979, 1403, UNTS.

[880] Regulation 33 – Distress situations: Obligations and Procedures. International Maritime Organization (IMO), International Convention for the Safety of Life at Sea, 1 November 1974, 1184 UNTS 3

[881] Article II, SOLAS (n 875)

[882] Article 33 UNCLOS (n 875). Also, Anja Klug, Tim Howe, 'The concept of state jurisdiction and the applicability of the *non-refoulement* principle to extraterritorial interception measures. In Extraterritorial Immigration Control' (65-99), in Ryan, Mitsilegas (n 180) 93.

of irregular maritime migrants while in the territorial zone. Arguably, the technicalities of an incident that is reported to national coordination, constitute the decisive elements of rights and responsibilities.

Goodwin-Gill and McAdam have argued that in the contiguous zone (as in the territorial which will be discussed subsequently), denying entrance to a ship from that zone to the territorial waters does not amount to a breach of the principle of *non-refoulement*.[883] The same authors support this argument based on the comments of the draft convention, linking expulsion to the country of persecution, particularly that *non-refoulement* did not imply an obligation to admit a person to the country where he seeks entry. Such an explanation, makes it possible to return a refugee-ship, to the high seas without constituting a violation.[884]

The above argument stems from the fact that returning a ship to the high seas is not the same as returning it to the country of departure so as to amount to *non-refoulement* (place of return), if it is likely that there would be a threat of torture or a threat to life if returned. However, the argument cannot be considered to be limitless or apply to the situation of irregular maritime migrants in the Mediterranean for two reasons: firstly, the smuggled irregular migrants are not passengers of ships but, as described previously, of overcrowded unseaworthy, or dinghy boats, which immediately send out a signal of alert; secondly, under these conditions, the denial of disembarkation, which obliges migrants to continue their journey to another country, places them in high risk of losing

[883] Guy Goodwin-Gill, Jane McAdam, *The refugee in international law* (Oxford University Press, 3rd ed, 2007) 277.
[884] Article 28 (first article 24) UN Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Statelessness and Related Problems, Comments of the Committee on the Draft Convention, 10 February 1950, E/AC.32/L.32/Add.1.

their lives. This could explain the high number of fatalities in the Mediterranean. While the shipmaster's practice does not exactly amount to *refoulement,* as the refusal to allow disembarkation does not directly violate the principle of *non-refoulement*, it nevertheless triggers responsibility because of the right to be rescued and offered protection.

On the more technical aspects (which sometimes represent a decisive element on the rights of irregular maritime migrants), it is identified that in the territorial sea, i.e., 12 nautical miles off the coastline, the State exercises *de jure* and *de facto* control because of its sovereignty. In exercising their sovereignty rights, concerning who enters their territory, states have developed interception measures which are mechanisms that directly or indirectly prevent people on the migratory movement to enter their border areas.[885]

Within their territorial zone, 'ships of all States enjoy the right of innocent passage'.[886] The meaning of passage of navigation in the territorial sea is related to the following purposes provided in UNCLOS: '*(a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility'*.[887] The limitation of the right to passage is that it 'must be continuous and expeditious', although it does include stopping and anchoring, but '(i) only in so far as the same are incidental to ordinary navigation or (ii) are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress'.[888] The distress

[885] ibid 69.
[886] Article 17 UNCLOS (n 875).
[887] ibid Para (i) and (ii).
[888] ibid para 2.

criterion on the innocent passage at a State's territorial waters requires an analysis of the phenomenon of irregular migration in the Mediterranean and its link to *non-refoulement*.

Article 19 of UNCLOS has a significant meaning because it provides the exceptions to the right of innocent passage even when it links it to (i) the Convention and (ii) international law. Two of the twelve criteria (exceptions) to the right of innocent passage may contradict the *non-refoulement* principle. The first concerns any violation of the principles of international law embodied in the Charter of the United Nations; and the second involves loading or unloading of any commodity, currency, or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.[889] The question arises as to whether these limitations apply to vessels that carry asylum seekers or potential refugees, or other persons in need of protection. It has been argued that there is an important distinction to be drawn between the vessels that are deliberately engaged in irregular migration activities and vessels carrying migrants but which, due to circumstances, signal a distress call.[890] It has also been argued that while it is clear that ships engaged in illegal immigration activities cannot avail themselves of the right of innocent passage, the position of vessels carrying asylum seekers remains unclear.[891]

Notably, Goodwin-Gill and McAdam argue that the limitations of Article 19(2)(g) are exhaustive in rendering the passage non-innocent. However, they note that Article 25,

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[889] Article 19(2) (a) and (g), UNCLOS.

[890] Richard Barnes, (2010) 'The international law of the sea and migration control', 100-146, in Ryan, Mitsilegas, (n 180) 122.

[891] ibid 125.

on the rights of protection of the coastal State, is declaratory of international customary law.[892]

Article 25 specifically states, that the coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent but furthermore, that the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject. Moreover, it provides that the coastal State may, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential, lot the protection of its security, including weapons exercises, provided that there is no among foreign ships. [893]

The above authors argue that although the territorial limits of a State are the limits at sea, it does not follow that entry within the territorial sea amounts to entry in the territorial state, to trigger the international rules in relation to distress or immunity for illegal entry.[894] However, they also support that a vessel that may carry refugees or asylum seekers is removed from the category of innocent passage, even though the status of the passenger may entitle them to claim immunity from penalties.[895] Accordingly, the identity of those on board does not alone entail a right of entry when other immigration rules apply.

Similarly, Trevisanut explains that the right to entry varies in accordance with the situation where (i) the coastal state has no jurisdiction on the passing vessel unless it

[892] Goodwin-Gill, McAdam, (n 631) 273.
[893] Article 25 UNCLOS
[894] Goodwin-Gill, McAdam (2007) (n 631) 273.
[895] ibid 274.

considers the presence of undocumented refugees as a breach of the conditions enjoying the right of innocent passage and (ii) the vessel is manifestly violating domestic immigration law because it is carrying irregular migrants.[896] The same author argues that a State may implicitly acknowledge that the vessel has entered its territory, and it is, therefore, subject to its jurisdiction. On the other hand, the same author argues that if the operations are aimed at refusing entry, then the individuals concerned are not yet under the jurisdiction of the State in concern. These are called the policies of *non-entrée*, which Trevisanut argues, do not completely avoid the principle of *non-refoulement*, while it is identified that, as far as the territorial sea is concerned, two scenarios may violate that principle: (i) the refusal of entry into the territorial sea and (ii) the denial of access to the port of disembarkation.[897]

Pallis argues that any interdiction and re-direction of a vessel may amount to a breach of an obligation to determine the status of refugees.[898] To this end, Barnes notes that even if one does accept the existence of an obligation to determine the status of protection, it cannot be decided at sea but would require to bring the vessel to the port.[899]

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[896] Seline Trevisanut, 'The principle of *non-refoulement* at sea and the effectiveness of asylum protection' (2008) Max Planck Yearbook of United Nations Law, 12, 205-246, 220.

[897] ibid 222. On another note, Hathaway J, points out in relation to the policies of non-entrée, that such results like in the case of Australia, end up in the refusal to examine the applications for asylum by the Australian refugee status determination system. The author also argues that there is no international legal difference between opting not to consider the refugee status of a persons present in international zones or excised territory and refusing to consider the refugee status of persons clearly acknowledged to be on the state's territory. James Hathaway, 'Why refugee law still matters' (2007) Melbourne Journal of International Law, 8, 89.

[898] Mark Pallis, 'Obligations of states towards asylum seekers at sea: interactions and conflicts between legal regimes', (2002) International Journal of Refugee Law, 14(2_and_3), 329-364, 354.

[899] Barnes (2010) (n 890) 127.

The author of the present thesis agrees with Hathaway's argument concerning any refusal of entry for assumed refugees or asylum seekers, and further adds that this should be applied to persons experiencing vulnerable conditions or come from vulnerable situations. Further, in relation to Hathaway's point concerning the denial of access to the port of disembarkation, I would add that under certain conditions, this may violate the principle of *non-refoulement*. Such conditions relate to an assessment of the condition of the irregular migrants and the boat itself. These arguments can be contextualized within a human rights approach suggesting that rescue and protection constitute a humanitarian need for survival.

However, the obligation to apply the principle of *non-refoulement* by the states or Agencies, working either for the rescue of migrants or fighting illegal immigration, does not seem compatible with the provisions of safe passage or the right of entry.

The literature explored above indicates that according to all relevant international maritime law, there is no absolute right of entry or disembarkation for irregular migrants at sea. There is an obligation to rescue and reply to a distress call; however, there is no actual breach of the principle of *non-refoulement* if entry and disembarkation are denied. Therefore, up to this point, it is identified that there is no responsibility for the actors involved other than aiding at sea.Legal responsibility could be possible if *non-entrée* actions could lead to loss of life.

Interestingly, in 2016, the IMO issued interim measures for combating unsafe practices associated with the trafficking, smuggling or transport of migrants at sea to ensure that states comply with their international obligations provided for in the international

maritime law.[900] However, these remain recommendations that mainly prompt states to cooperate with each other and apply international maritime law. They do not give rise to responsibility for the protection of irregular maritime migrants.

Regarding human rights at the international borders, in a set of guidelines, the OHCHR recommended that states must agree on what constitutes a situation of distress, the nearest place of safety and safe ports in order to strengthen the protection of all migrants' human rights, while stressing the right to life and *non-refoulement*.[901] In addition, it was recommended that private shipmasters should adhere to their obligation to render assistance, rescue migrants in distress, and disembark rescued persons at the nearest place of safety in accordance with the international law of the sea, international human rights law and other relevant standards.[902]

It also urged states to remove 'disincentives for private shipmasters to rescue migrants in distress at sea' and further to compensate those who 'incur financial losses for rescuing migrants'.[903]

Similarly, as before, there is no clear responsibility for the protection of irregular maritime migrants, although their right to be rescued forms part of the shipmaster's responsibility. No other penalties are mentioned in relation to failure to rescue in these international instruments. These instruments have mainly a declaratory character

[900] International Maritime Organization, Interim measures for combating unsafe practices associated with the trafficking, smuggling or transport of migrants at sea, MSC.1/Circ.896/Rev.2, 26 May 2016.
[901] UN Office of the High Commissioner for Human Rights (OHCHR), Recommended Principles and Guidelines on Human Rights at International Borders, 2014, para 13.
[902] ibid Guideline 4 para 4.
[903] ibid.

prompting states or shipmasters to respect certain laws and do not constitute instruments drafted specifically for phenomena like the one in the Mediterranean.

However, having in mind the impact of international law on EU law, a question arises whether the EU could have adopted a new regional framework on maritime laws that fully respect states' international obligations arising from instruments they have signed and ratified. Undoubtedly, such a scenario could not impact the EU since it concerns international laws of the sea, and the EU is not a State with its own territorial sea and contiguous zone, among others. Therefore, the EUs has more of an advisory role concerning the obligations of its Member States in relation to international maritime law. However, the EU has a responsibility to ensure that its Agencies' operations, based on mandates and codes of conduct, do not violate international maritime law, particularly in relation to *non-refoulement* and its extraterritorial application at sea as well as rescue and the obligation to provide protection when needed. Among the obligations that stem from the states' international responsibilities, important provisions relate to the flag principle and intercepting measures, which, arguably, could trigger a State's *de jure* jurisdiction, if the right to entry is withheld.

The freedom of the high seas is a core principle of international law, and it includes the freedom of navigation and overflight for all states.[904] States must respect international norms and international customary law and must require their ships to operate under the flag principle.[905] Irregular migrants in the Mediterranean, especially those on the Eastern route, do not travel under the principle of the flag. Arguably, states can establish a *de jure* jurisdiction over such vessels through intercepting measures. However, what

[904] Article 89 UNCLOS.
[905] Article 92 UNCLOS.

is important about the phenomenon of irregular migration in the Mediterranean, as witnessed during the last few years, is the response to distress.

It has become clear that in practice, rescue operations may coincide or face certain challenges when it comes to immigration rules. Specifically, the right of entry within the UDHR is not absolute when applied to the regulations of national immigration authorities. Nevertheless, it entails the responsibility of the coordination centres to carry an effective rescue. The states' effective rescue operations are subject to the SOLAS and SAR Conventions and are subject to a fair balance between those rights and immigration control and security matters.

Nevertheless, the UNCLOS foresees that rescue operations are to be carried out by the states' effective rescue coordination centres. Instruments such as SOLAS and SAR Conventions are supplementary in balancing these rights with immigration control and security matters so that states can meet their obligations. Nonetheless, as with the 1951 Refugee Convention and its 1967 related Protocol and the omission of retaining the 'out of the country' criterion, the international maritime law omit to regulate the right of entry to irregular maritime migrants. This applies when a State responds to a distress call within a rescue operation, but there is also no absolute right of disembarkation. States can claim *de jure* jurisdiction upon interception, not upon rescue since the obligation is placed solely on the shipmaster while it is subject to the flag principle. Consequently, it is argued that the gaps of those two instruments in relation to the phenomenon of irregular maritime migration affect the migrants' rights.

The Executive Committee of the UNHCR in 1977 addressed migration at sea as a humanitarian obligation of all coastal states and the need to allow vessels in distress to

seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board who wish to seek asylum.[906] In 1996, the Executive Committee reaffirmed the nature of the principle of *non-refoulement* and elevated it to that of peremptory customary law. The Committee declared the following:

> Distressed at the widespread violations of the principle of *non-refoulement* and of the rights of refugees, in some cases resulting in loss of refugee lives, and seriously disturbed at reports indicating that large numbers of refugees and asylum-seekers have been refouled and expelled in highly dangerous situations; recalls that the principle of *non-refoulement* is not subject to derogation.[907]

Furthermore, the Executive Committee reaffirm[ed] the fundamental importance of the *principle of non-refoulement*, which prohibits expulsion and return of refugees, in any manner whatsoever, to the frontiers of territories … for believing that they would be in danger of being subjected to torture, as set forth in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[908]

The observation that maritime laws do not regulate the right of entry or disembarkation, leads to the conclusion that none of the existing instruments were drafted in a way that could foresee the irregular migration phenomenon. This is not to suggest that the phenomenon of irregular migration at sea is a new phenomenon; rather, the opposite. However, irregular migration has recently taken the form of human rights obligations

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[906] Executive Committee, Conclusion No. 15 (XXX) 1979, para. (c). Retrieved at: https://www.unhcr.org/excom/exconc/3ae68c960/refugees-asylum-country.html
Also see, Trevisanut, (2008) (n 1029), 210.
[907] Executive Committee, Conclusion No.79 (XLVII), 1996, para. (i). Retrieved at: https://www.unhcr.org/excom/exconc/3ae68c430/general-conclusion-international-protection.html para (i).
[908] ibid para (j).

against combatting transnational crime,[909] in addition to the security factor and its effect on the Member States and the EU's migration policies.

The Executive Committee's recommendations, although promising some decades ago, for calling states' positive response in the spirit of solidarity, have not taken a more legally binding nature since other factors were considered much more important for states, i.e., security and the threat of terrorism. Although covered in theory by the Executive Committee's recommendations', the gaps in the international instruments in question, are delimited by the response of states to two threats: security and terrorism.

The security factor dominated states' current policy actions in the sphere of migration and asylum and emerged following the 9/11 attacks. Subsequently, the UN Security Council adopted a resolution that linked the terrorist attacks to the responsibility of states to take appropriate measures in relation to checks on refugees and asylum seekers.[910] Accordingly, it placed the responsibility upon states before granting a refugee status to ensure that the asylum-seeker had not planned, facilitated or participated in the commission of terrorist acts.[911] The resolution further explained that states should ensure that the refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts and that politically motivated claims are not recognized as grounds for refusing requests for extradition of alleged terrorists.[912] Therefore, the institution of asylum was for the first time directly linked to the security of states. The right of entry and the consent of states regarding disembarkation, was, arguably, greatly affected by these two factors. During the EU migration crisis,

[909] ibid para. (j).
[910] UNSC Res 1373, (28 September 2001) UN Doc S/RES/1373, 9
[911] ibid para. 3 (f), UN Security Council Resolution.
[912] ibid para. 3 (g), UN Security Council Resolution.

transnational crime (not limited to smuggling) and terrorism was linked to irregular maritime migration. However, since the EU has not enacted any secondary legislation that addresses the disembarkation and entry points, there is no further responsibility for the EU. The Member States owe obligations that stem from international maritime law instruments to which they are signatories in relation to rescue operations subject to certain conditions, like the flag principle or the right to innocent passage.

On the one hand, the EU has no obligation to produce equivalent maritime laws for its Member States, but, on the other, as an international organization, it could take note of the principles that underlie international maritime law and provide mandates and codes of conduct for its participating Agencies in rescue operations and border surveillance missions. It has been identified that although the *non-refoulement* principle applies at sea, the same is true for the right of a State to deny entry and disembarkation of a vessel or boat of refugees. This does not amount to a breach of the principle of *non-refoulement* since it does not necessarily divert it back to where it departed if it is directed to the high Seas. Moreover, it has been identified that no one has an absolute right of innocent passage since irregular migration is defined as illegal under the transnational Protocol of Smuggling.

Next, the EU's response and policy making regarding the externalization of migration will be explored. The EU's externalization of migration is a way of dealing with a problem that is rooted outside the EU and eventually results in agreements or policies like the 'non-entrée', seeking to maintain irregular migration outside the EU. In parallel, the EU is exploring measures to tackle or address the root causes of irregular migration using its legal capacity and personality to enter into agreements with third countries and

influence the externalization of migration.[913] Concerns are expressed in relation to who is responsible for migrants' protection, when the EU responds with policies that forbid or do not facilitate migration in order to request protection from non-EU countries.

The EU has a few tools for achieving the externalization of migration, namely (i) the international agreements between the EU and third countries, (ii) the use of its Agencies in the field of irregular migration and (iii) the EU funding to third countries for purposes which relate to irregular migration and transnational crime. These efforts are leaning towards an implied responsibility for the EU, if with its policies or international agreements between the EU and a third country or the conduct of an Agency, there is a violation of international or EU law. The implied responsibility for the EU is supported by the theory of neo-functionalism as identified and explored in section 4.2.2.2 of this thesis. Briefly, the argument on implied responsibility for the EU can be based on the theory of neo-functionalism as a spillover of powers from the Member States to the EU. This is also true in times of crises. Therefore, the next section explores the EU's response and policymaking concerning the externalization of migration.

5.1.6 The Development of the EU's Policies Towards the Externalization of Migration

Controlling irregular migration has traditionally been the task of the Member States. This control has gradually shifted, or has been shared to a high degree, with the EU through the development and operation of its EU agencies. The externalization of migration was the result of EU policies stemming from the Council of Ministers' decisions during the EU migration crisis. The externalization of migration refers to the EU's attempts to manage irregular migration outside the Member States' territories

[913] See 5.1.6

based on a strengthened role and capacity. The phenomenon of irregular maritime migration prompts the EU and Member States to act externally with decisions and measures that would indirectly impact their national systems. This section explores how the EU strengthened its competences.

As previously examined, rescue and disembarkation in a place of safety involves several actors, operations by Member States' coordination centres, or other operations undertaken by Member States and Frontex (now the EBCG). Upon rescue, problems arise in relation to the disembarkation of irregular migrants, due to the lack of regulation of the right to entry for vessels in distress; however, Frontex has taken a role which previously was exclusively the responsibility of states. That role has eventually been strengthened not only in terms of its mandate but also through the inclusion of its budgetary tasks into the EU's Multiannual Framework and within the EU's cooperation with third states (explored further in section 5.2.2.). However, this development, depends on states' rescue obligation. It was this rescue obligation followed by several national operations that prompted states to essentially allow for a shift in their (national) powers towards the EU and its Agencies, the practical procedures to the right of rescue, disembarkation, and notably, even responsibility, to a certain extent. In relation to responsibility, it is assumed that in the future, the implementation of Frontex's enhanced mandate will shift responsibility from the states to the EU. However, the extent of this responsibility would depend on the conduct of the Agency. Therefore, responsibility could be triggered based on examination of the merits of an incident and a potential violation of human rights law. Examining this shift of responsibility helps us identify the extent to which responsibility can be held and its impact on the

phenomenon of irregular maritime migration as well as whether there has been a shift regarding the law and policies of irregular maritime migrants' rights.

The IMO following amendments to SOLAS and SAR, which came into force in 2016, imposed an additional obligation upon the Member States to coordinate and cooperate for the rescue and the prompt and safe disembarkation of persons in distress.[914] As previously stated, the international maritime law framework is binding upon the Member States and there are no legal acts of a European maritime framework. This leaves the AFSJ, within which migration develops, as an area of legislative or regulatory acts concerning asylum seekers and irregular migrants' protection at sea. The ECtHR's caselaw which, provides essential guidance for the Member States about the applicability of the *non-refoulement* principle at sea as well as the right of entry. This indicates the impact of international maritime law upon the European legal order.

The most relevant ECtHR's case to this day is *Hirsi.*[915] Other cases with specific reference to the right of entry do not address this issue in the context of sea entry, even though they may relate to the Member States' practices that amount to pushbacks risking the violation *non-refoulement*. Notably, the ECtHR only recently addressed the issue of the right to entry but in the context of land. [916] Although the case refers to land push backs, the author considers that it shares some similarities with irregular maritime migrants in the Mediterranean but at the same time differs from the irregular migrants on land in

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[914] SOLAS Convention, V/7 and SAR, see 5.1.5

[915] *Hirsi Jamaa and Others v. Italy*, Application no 27765/09, (ECtHR 23 February 2012).

[916] *N.D. and N.T. v. Spain* [GC], App nos. 8675/15 and 8697/17, (ECtHR 13 February 2020), paras. 242-243. Upon crossing the border, the applicants were immediately arrested and returned to Morocco without going through an identification procedure or an opportunity to receive assistance from lawyers, interpreters, or medical personnel. The judgment is the first time the Court has considered a migrant's unauthorized entry to be relevant in this way, holding that the applicants were not entitled to protection from mass expulsion because of how they entered Spain.

N.D. and N.T. v. Spain. The migrants in the latter case had other options of entering Spain regularly without violating any migration laws of a Member State, specifically, the Schengen Border Code,[917] in order to apply the Asylum Procedures Directive. However, the judgement raised concerns and was considered to providing a 'green light' for land pushbacks and returns of irregular migrants for not being given the right to apply for asylum.[918] This could have been considered as a violation of *non-refoulement* but the Court's reasoning indicates otherwise.

The Court considered that the irregular migrants had a choice of legal routes but which they chose not to use.The Court relied on its principle of individual assessment and, having examined the overall circumstances assessed whether cogent reasons affected the availability of legal means of entry in line with its established guarantees in expulsion cases. It is also worth noting that Spain had asylum procedures at the border, which the irregular migrant chose not to comply with.[919]

Notwithstanding this fact, the same considerations concerning applicants who had attempted to enter a state´s territory by sea were equally relevant to forcible removals from a state's territory in the context of an attempt to cross a national border by land.

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[917] Article 14, Refusal of Entry, Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0399

[918] ECRE, Across borders: the impact of N.D. and N.T. v Spain in Europe, June 2021; Also, Clara Bosch March, 'Land pushbacks at the Moroccan-Spanish border: from illegal State practice to endorsement by the European Court of Human Rights. A turn of events "made in Spain"' Louvain-La-Neuve.

[919] 'The Court also held, unanimously, that there had been no violation of Article 13 taken in conjunction with Article 4 of Protocol No. 4, on the grounds that the lack of an individualised removal procedure had been a consequence of the applicants' own conduct and that the applicants' complaint regarding the risks they were liable to face in the destination country had been dismissed at the outset of the procedure'. ibid.

To this end, the ECtHR adopted the same interpretation of the term ‘expulsion’, which refers to any forcible removal of an alien from a state’s territory, irrespective of the lawfulness of the person’s stay, the length spent in the territory, the location of apprehension, the irregular migrants’ status as a migrant or an asylum seeker or the irregular migrants’ conduct crossing the border. The term has the same meaning as in the context of Article 3 of the Convention. The irregular migrants’ claim of collective expulsion of aliens[920] by violation of Article 4 of Protocol 4 ECHR was unanimously rejected by the ECtHR.[921]

In contrast to the ruling above, in Hirsi, the transfer of the applicants (Somali and Eritrean nationals) to Libya, did amount to expulsion, since there were no procedures at the border that would guarantee fundamental rights of ECHR, EU Charter and the implementation of CEAS. Furthermore, no other guarantees were complied with, such as interpretation or individual interviews. The author points that another significant element of Hirsi is the place of return, as the time there were no guarantees that if returned to Libya, their rights as not to be subjected to torture or other degrading treatment or punishment, would be upheld.[922]

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[920] ‘Collective expulsion’ is to be understood as ‘any measure compelling aliens, as a group, to leave the country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group’ (Khlaifia and Others v. Italy [GC], 2016, para 237; Georgia v. Russia (I) [GC], 2014, para 167; Andric v. Sweden (dec.), 1999; Čonka v. Belgium, 2002, para 59; Sultani v. France, 2007, para 81; and the Commission decisions Becker v. Denmark, 1975; K.G. v. Germany, 1977; O. and Others v. Luxembourg, 1978; Alibaks and Others v. the Netherlands,1988; Tahiri v. Sweden, 1995); ECtHR, Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights, Prohibition of collective expulsions of aliens,
Accessed at: https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf

[921] ibid.

[922] On the situation in Libya, please see 5.1.6, 5.1.8.

Hirsi involved the violation of the ECHR's standards by the Italian State; particularly, the Italian border control operation of 'pushback' on the high seas, coupled with the absence of an individual, fair, and effective procedure to screen asylum seekers, amounted to a serious breach of the prohibition of collective expulsion of aliens and, consequently, of the principle of *non-refoulement*. Ships on the high seas are non-territory of the high seas.[923] The judgement is clear and definite on the right to exception from *non-refoulement*, which the Court found no exception while pushbacks amounted to collective expulsion[924] finding a positive obligation to provide the applicants with practical and effective access to an asylum procedure in Italy. In the opinion of Justice Blackmun, 'Refugees attempting to escape Africa do not claim a right of admission to Europe, but to cradle the human rights idealism, cease closing its doors to people in despair which have fled from arbitrariness and brutality.'[925] Therefore, it can be argued that *Hirsi,* does not point towards externalization of migration policies; rather, for the Court*,* irregular maritime migration relies on a European cooperation mechanism, primarily based on the principle of solidarity between the Member States.

Before the peak in crossings and fatalities in the Mediterranean, the Council in its 2014 conclusions decided on a shared responsibility for the management of borders. The Council Conclusions indicated the desire to share responsibility with the EU. This effect was likely caused by the burden placed upon the Member States neighboring the Mediterranean, as the first countries to receive irregular maritime migrants and assumed greatest financial and legal responsibility. Notably, the Council conclusions

[923] *Hirsi* (n 590)
[924] ibid, Collectivity is an important element in the context of banal crimes and international criminal law.
[925] ibid.

made reference to (i) a risk analysis to specify the need of the host Member State(s) and Frontex including the operational area, the assets, resources and modules needed in order to strengthen Frontex joint operation (ii) any additional operational assets necessary for the Agency by the Member States, and (iii) the budgetary resources for the deployment of a Frontex coordinated operation should be made available by the Commission and the budgetary authority within the existing EU funds.[926] These are the first indicators of a shifting or shared competence between the Member States and Frontex. Eventually, this attempt was reinforced and strengthened the following five years, marking an even greater degree of responsibility during the continuation of the maritime phenomenon in the Mediterranean. Italy launched several maritime operations with the assistance of the EU and other Member States within a spirit of solidarity. Italy has been at the frontline of states that have received irregular migrants at sea and had launched the *Mare Nostrum* operation following the *Lampedusa* disaster in 2013. *Mare Nostrum* was the first coordinated effort to save lives at sea through naval and air operations.[927]

The IOM notes that *Mare Nostrum* saved 150.000 irregular migrants at the time of its operation.[928] The Operation ended when Frontex started the Operation *Triton.* This was

[926] ibid.
[927] Council of the European Union, Joint Communication to the European Parliament, the European Council and the Council, Migration on the Central Mediterranean route, managing flows, saving lives, 5684/1/17 REV1, 20 February 2017. P.5.
[928] IOM, Missing Migrants, 'IOM applauds Italy's Life-Saving Mare Nostrum Operation'; 'Not a Migrant Pull Factor', Retrieved at: https://missingmigrants.iom.int/iom-applauds-italy's-life-saving-mare-nostrum-operation- "not-migrant-pull-factor"

a political measure decided by the JHA Ministers as well as Frontex who reinforced the management of the external borders.[929]

Initially, several strengthened actions shifted over to Frontex, like the inclusion of operational tools for the identification of migrants, the provision of information, and the screening of vulnerable cases or persons in need of medical attention in order to cater for their needs upon disembarkation. In addition, the strengthening of Frontex's financial resources within the Multi-Annual Financial Framework,[930] based on the comprehensive risk analysis carried out by Frontex, encompasses all the EU air, land and sea borders, in order to allow a flexible re-deployment of assets to respond to emerging threats and challenges. [931]

As previously stated, Italy, with the assistance of the EU, ran two operations in 2014 and 2015, namely the European Union Naval Force – Mediterranean (EURAVFOR MED Operation *Sophia*) and Operation Triton. In Operation Sophia*,* 25 Member States participated by deploying personnel and other assets, such as surface vessels and air vessels. Operation Sophia saved 32.000 lives at sea and, notably, in 2016 it was reinforced with two supporting tasks, (i) to train the Libyan coastguard and navy and (ii) implement the UN embargo on the high seas off the coast to Libya.[932]

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[929] More specifically, the Ministers decided that in the central Mediterranean, the new joint Operation Triton needs to be deployed without delay. While the operation is being deployed, full coordination with the emergency measures taken by Italy will be ensured, in view of their prompt phasing out. The Frontex-coordinated joint operation, which must be compliant with the Frontex mandate, aims to confirm the EU commitment to the surveillance of the common external borders under full civilian control. Council of the European Union, Council conclusions on ''Taking action to better manage migratory flows'', Justice and Home Affairs Council meeting Luxembourg, 10 October 2014. Retrieved at:
https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/145053.pdf
[930] To be discussed in the following section.
[931] ibid.
[932] ibid 5.

At this point, it becomes evident that the national competence of the Member States to rescue, disembark or offer protection and first aid to irregular maritime migrants shifted towards the EU agency of Frontex. Later, this power was enacted into a legislative act, particularly a regulation, strengthening the mandate of Frontex and providing discretionary powers to the Agency. What remains significant is that it was the Member States' decision to shift their powers towards the EU agency at a time of crisis. The Council of Ministers' political decision, prompted the integration theory of functionalism transforming the competence into a shared one and possibly extending responsibility to the EU. However, by that time, Frontex's mandate was not amended to its current form, and the shift was only in terms of competence rather than legal responsibility. In terms of responsibility, the Council conclusions indicated the desire, or even necessity, to shift towards the joint operations from the Member States to the EU. The Member States, at this point, arguably transferred their powers once again for better control, coordination, and assistance to Frontex, which, as we will see subsequently, it later developed into an EU agency with a reinforced mandate.

The decision to train and cooperate with the Libyan coastguard, as mentioned earlier, indicates the involvement of the EU as an actor in international law, through its Agency and the funding of operations. In such a case, for example, responsibility starts being established based on the lack of measuring indicators and of an enforcement mechanism. Continuing our analysis concerning the gradual shift of any responsibility towards the EU, Operation *Triton* must be discussed.

Frontex launched Operation *Triton,* focusing on border protection and search and rescue operations which expanded into cross-border crime, including smuggling. It operated under the Italian authorities' command with the participation of 28 Member States

through the deployment of their border guards or by offering technical equipment.[933] A key action for the EU was to ensure funding for training programs of the Libyan Coast Guard through an immediate EUR 1 million, additional to the Seahorse program and the grant of EUR 2,2 million under the Regional Development and Protection Program in North Africa, among others.[934]

In their response to the ongoing irregular migration and smuggling, the Member States agreed on a cooperation with Libya. Considering that Libya plays a principal role in the fight against smuggling, the Member States decided to strengthen its capacity by enhancing its capabilities and equipment.[935] Since the European Commission managed the training, it can be supported that the EU also cooperated with the Libyan authorities to tackle smuggling networks and prevent irregular migration from Libya to Europe.[936]

In terms of managing the irregular migration flows towards the EU, it must be mentioned that the EU's externalization of migration began with the cooperation with Libya and later expanded to other regions. At the time, a principal aim of the EU, was the participation of African countries other than Libya in the Seahorse Mediterranean Network.[937] However, one of the EU's key actions involved cooperation with the Libyan

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[933] ibid 6.

[934] Other key actions concerned to ensure that sustainable sources of funding cover various training needs in a complementary manner in the future; assist the Libyan authorities in establishing a Maritime Rescue Coordination Centre and to improve operation cooperation with Member States; and support the provision to the Libyan Coast Guard of additional patrolling assets and ensure their maintenance. ibid 8.

[935] ibid. It is reported that the Seahorse Mediterranean Network program lead by Spain with the participation of Italy, Malta, France, Greece, Cyprus, Portugal, and Spain, was a training for the Libyan Coast Guard. The programs were managed by the European Commission.

[936] On a recent article published by the Guardian, it is reported that a leaked EU report reveals that it cannot monitor the Libyan coastguard, or to facilitate in the fight against smuggling or to prevent any widespread human rights violations, deaths, unexplained disappearances. However, the EU has renewed the multimillion-euro deal between the EU, Italy, and Libya for the training of the Libyan coastguard. Boffey, D., 'Migrants detained in Libya for profit, leaked EU report reveals', The Guardian, 20.11.2019.

[937] Reference to Tunisia, Algeria, and Egypt. ibid 9.

authorities to ensure that the conditions at the migrant centres were improving along with the cooperation provided by the IOM and the UNHCR.[938] As a result, the EU Capacity Building Mission (EUCAP) Sahel Mali was launched in 2015, followed by the EUCAP Sahel Niger in 2015. Both EUCAPs aimed at supporting the countries' authorities in addressing irregular migration and fighting (or halting) trafficking and smuggling through a Partnership framework.[939] Moreover, the European Migration Liaison Officers[940] and the European Border and Coast Guard Agency (EBGC – Frontex renamed) were deployed. The EU Trust Fund for Africa proved helpful in reducing the numbers of irregular migrants within Africa. [941] The EU's externalization of migration within the AFSJ, shifts from the value of freedom towards security in Common Security and Defense Policy when the EU deploys missions and projects in Africa, under the EU Border Assistance Mission.

Article 2 (4) TFEU provides that 'the Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defense

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[938] Other measures included the support the resilience of local communities to host migrants, to support cooperation with international organizations like UNHCR for resettlement, to support IOM and its assisted voluntary return programs. ibid 9.

[939] ibid 12-13.

[940] Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 amending Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers' network, *OJ L 141, 27.5.2011, 13–16.*

[941] It is reported that EUR 200 million for the year 2017 were mobilized under the Trust Fund for Africa. The EU trust Fund for Africa, later expanded to Sahel and Lake Chad, the Horn of Africa, and North Africa. Accordingly, the EU Trust Fund for Africa is worth over €4.5 billion, with over 89% of the contributions coming from the EU, and around 11% from EU Member States and other donors. It benefits 26 African countries among the most fragile and affected by instability, forced displacement and irregular migration. European Commission, EUTF FOR AFRICA: The EU Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa, 2019 Retrieved at:
<https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/facsheet_eutf_short_22.10.pdf>

policy'.[942] The Union's common foreign and security policy is conducted by the High Representative of the Union for Foreign Affairs and Security Policy.[943]

The EU's externalization policies took place in Turkey even before the EU-Turkey deal, in order to manage the uncontrolled flows from Turkey to the EU – mainly in Greece – by providing humanitarian assistance. In 2015, the European Commission, on a Decision on the actions of the Union and of the Member States through a coordination mechanism, established a Refugee Facility Centre in Turkey. The aim turned towards assisting Turkey to deal with the inflow of refugees as a result of the Syrian crisis.[944] The EU set up a Steering Committee (two representatives from the European Commission and one representative from each Member State), to permanently monitor the implementation of the facility.[945]

It is evident that the uncontrolled flows of irregular migration crossing the sea to reach the EU, prompted the EU and the Member States that were mostly affected to provide assistance through the development of measures within regions outside the EU thus marking the beginning of the (i) the externalization of migration, (ii) the shifting responsibility in the same competence area, by the policies developed within the CFSP,

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[942] Title I, Categories and areas of Unions competence, TFEU,

[943] Article 18, para 1-4 TEU. Also, Article 27 para 3 TEU.

[944] Commission Decision of 24 November 2015 on the coordination of the actions of the Union and of the Member States through a coordination mechanism — the Refugee Facility for Turkey, *OJ C 407, 8.12.2015, 8–13.*

[945] The Commission Decision of 24 November 2015, was amended in 2016, 2017 ad 2018 by the following acts: Commission Decision of 10 February 2016 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 of 24 November 2015 C/2016/855, *OJ C 60, 16.2.2016, p. 3–6;* Commission Decision of 18 April 2017 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 of 24 November 2015, C/2017/2293, *OJ C 122, 19.4.2017, p. 4–5. and* Commission Decision of 14 March 2018 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 as regards the contribution to the Facility for Refugees in Turkey, C/2018/1500, *OJ C 106, 21.3.2018, 4–6.)*

and through a strengthened Frontex - EBCG mandate and (iii) the legal personality of the EU which allowed cooperation with third (non-EU) states.

The EU's externalization of migration resulted from political decisions prompted by the Council of Ministers' decisions. From what we have examined thus far, it can be argued that Member States facing the irregular migration itself or its consequences have given the EU the green light to expand its competence in the area of migration, thus shifting responsibility towards the Union regarding irregular maritime migrants at the doorsteps of the Member States amidst terrorist threats and security threats within a climate of securitization. At this point, the EU funding of the Libyan coastguard and the capacity-building in other African regions turned the EU into an actor who collaborates with third states in order to manage migration externally under the umbrella of policies concerning irregular migrations' root causes.

The theory of neo-functionalism provides an explanation as to how these policies, stemming from the Member States' powers, are returning to the *supranational* level, i.e., the EU. This is obvious during crises that arise out of the Member States' policies leading them to adopt emergency policy measures to deal with their legal obligations. Nevertheless, the externalization of migration does not hold the EU accountable for its actions before the ECtHR.

The next section proceeds with a more in-depth analysis of the EU's actions within the externalization of migration and the protection of the Member States' borders by exploring the strengthened mandate of its Agency, Frontex. Consequently, the following sections focuses on the potential shift of responsibility from the Member States to the EU from a broader perspective.

5.1.7 Responsibility Under the new Mandate of the EBCG[946]

The Tampere Conclusions had not foreseen the creation of EU agencies within the migration framework of border controls. Mainly the competences in the AFSJ lay with the Member States; thus, in the case of border controls, responsibility was held by the sovereign Member States. The latter's need for a more integrated approach that would allow them to shift or share their responsibility in complex issues, such as irregular migration, become more evident at times of crisis. Thus, during a crisis, responsibility-sharing becomes even more of a necessity in order to search for better solutions and management. This is mostly realized through the European Commission's action when drafting legal acts, and through negotiation with the Member States for a fairer and correct implementation of EU law.

In Tampere, the European Council called for closer co-operation and mutual technical assistance between the Member States' border control services, such as exchange programs and technology transfer, especially on maritime borders.[947] The significance of the effective control of the Union's future external borders by specialized trained

[946] The legal basis for the EBCG is Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard (OJ L 295, 14.11.2019, p. 1) which reiforced the mandate and increased its competences and introduced the standing corps. Previous regulation was Regulation (EU) 2016/1624. Also, other relevant instruments to the 2019/1896 Regulation are: Regulation (EU) No 1052/2013 establishing the European Border Surveillance System (EUROSUR), Regulation (EU) 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex also introduced changes to the mandate of the agency, namely in terms of what concerns sea operations coordinated by Frontex. This Regulation was fully integrated and referred to Regulation (EU) 2019/1896. Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) and Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, also referred to in Regulation (EU) 2019/1896. Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624. Retrieved at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R1896

[947] Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999, 16 October 1999, (Tampere Conclusions) para 24.

professionals, was highlighted.[948] To better understand the competence shift and the potential effect on responsibility in external borders, the subsequent paragraphs examine the Tampere Conclusions and the new EBCG regulation.[949]

The objective of Union policy, as referred to in the new Regulation, is to develop, implement and improve European integrated border management at national and Union level. The aim is to manage the crossing of the external borders efficiently by addressing migratory challenges, potential future threats at borders, address serious crime and ensure a high level of internal security, in full respect for fundamental rights and in a manner that safeguards the free movement of persons within the Union.[950]

In comparison with the previous 2016 Regulation, the new EU legislative proposal on the regulation of the EBCG, arguably shifts the responsibility towards the EU.[951] The Regulation 2019/1896,[952] expanded the EBCG's activities and procedures. The large list of key roles for EBCG, does not leave considerable margin for the Member States to act on their own within the areas of policy and operations. It gives concentrated powers to the EU with the Member States playing a secondary role. Particularly, the Agency's new key roles, concern the establishment of a 'technical and operational strategy as part of the implementation of the multiannual strategic policy cycle for European integrated

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[948] ibid, Para 2.

[949] Preamble para 3, 'The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union has been renamed the European Border and Coast Guard Agency (the 'Agency'), commonly referred to as Frontex, and its tasks have been expanded with full continuity in all its activities and procedures', Regulation (EU) 2019/1896, ibid.

[950] Para 1, Regulation (EU) 2019/1896, ibid.

[951] European Parliament legislative resolution of 17 April 2019 on the proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council (COM (2018)0631 – C8-0406/2018 – 2018/0330A(COD))

[952] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

border management for purposes of managing the effective functioning of control at the external borders'. Moreover, the Agency would carry risk analysis and vulnerability assessments and further provide increased technical and operational assistance to Member States and third countries by joint operations and rapid border interventions. The Agency is also entrusted with ensuring the practical execution of measures in a situation requiring urgent action at the external borders and to provide technical and operational assistance in support of search and rescue operations for persons in distress at sea. Also, the Agency organizes, coordinates and conducts return operations and return interventions.[953] Most importantly, it could also return irregular migrants to the point of departure or to their countries.

These competences, as can be recalled, belonged to the Member States; however, since the adoption of the regulation the EU has taken up the primary role of managing the external borders, handling vulnerable migrants at sea and land, and, at the same time, making rapid interventions to prevent irregular migrants from crossing borders. Gradually, the spillover of competence power appears to have shifted. The question that arises is whether the impact of this competence shift extends to cover increased responsibility of EBCG and its personnel?

The Agency, under its mandate, is reinforced with 10.000 operational staff marking a new relationship of employment with the Member States.[954] The operational staff in question are the standing corps who are entrusted with several tasks of political and operational nature. For instance, the Agency is to monitor the crossing of the external borders efficiently (operational), address migratory challenges and potential future threats at the external borders (political), ensure a high level of internal security within

[953] ibid para 3, and Article 5.
[954] ibid para 5.

the Union (operational and political), safeguard the functioning of the Schengen area and to respect the overarching principle of solidarity (operational and political).[955] As these actions fall within the EU's externalization of migration policies, the EU would support the Agency in its competences through funding and management programs in cooperation with third countries.

The limiting role of the Member States in the new Regulation is explicitly stated in para 12 in that, the European integrated border management will be implemented as a shared responsibility of the Agency with the national authorities and will be responsible for (i) border management, maritime border surveillance and return and (ii) the issuing of return decisions.[956] This signifies a reduction in Member State's competences by practically transferring to the Agency the tasks that Member States' authorities had previously exercised.

The Agency's role involves reinforcing, assessing, and coordinating the actions of the Member States on the implementation of the measures. It also incorporates the European Border Surveillance System (Eurosur) into the European Coast and Border Guard framework, to improve its functioning.[957] Moreover, the cooperation with third countries is strengthened upon the Agency's wider scope for action and the possibilities for joint operations with neighbouring countries.

The European integrated border management concerns the national and international coordination and cooperation among all relevant authorities and agencies involved in

[955] ibid para 9.
[956] ibid para 12.
[957] Para 29 provides that Member States should establish national coordination centres to improve the exchange of information and cooperation between Member States and with the Agency with respect to border surveillance and the carrying out of border checks. It is essential for the proper functioning of EUROSUR that all national authorities with a responsibility for external border surveillance under national law cooperate via national coordination centres. Regulation (EU) 2019/1896, ibid.

border security and trade facilitation to establish effective, efficient and coordinated border management at the external EU borders in order to reach the objective of open, yet well-controlled and secure, borders.[958] The European integrated border management consists of border control and smuggling, trafficking, terrorism, procedures for the identification of vulnerable persons and those in need of international protection. Additionally, it involves search and rescue operations for persons in distress and analysing the risks of internal and external security and information exchange between the Member States and the Agency, among others.[959]

The detailed functioning of the EBCG is provided in Chapter II of the Regulation and consists of 33 tasks. Undoubtedly, the Agency's competences are enhanced, as opposed to those of the Member States, thus acting on a strengthened mandate upon an Operational Plan. The latter can come under scrutiny concerning accountability when violations of fundamental rights or *non-refoulement* arise.

For instance, an EBCG violation of fundamental rights and principles would not amount to a violation on behalf of a Member State. There is a separate mandate for the EBCG, but it is not bound by the legal acts of the EU in the AFSJ. The legal acts in question, which mainly concern asylum and Member States' obligation to implement the CEAS, does not extend to borders. The borders within the EU concern the Schengen area, as we have seen, but do not extend to the external borders or the cooperation of the EU with third states. This applies both in the context of the EBCG operation and international agreements with third states.

[958] European Commission, Migration and Home Affairs. Retrieved at: https://ec.europa.eu/home-affairs/content/european-integrated-border-management_en

[959] Article 3, Regulation (EU) 2019/1896, para (a) – (l) (n 946).

The EU institutions are responsible for developing policies and laws regarding the external border control and return, including the development of a multiannual strategic policy for European integrated border management.[960] The EBCG has an increased accountability and liability for its extended tasks and competence, which should be balanced with strengthened fundamental rights safeguards and, particularly in terms of the exercise of executive powers by the statutory staff. It is accountable to the European Parliament and the Council.[961] As fas as the shared responsibility with the Member States for the implementation of European integrated border management is concerned, the primary responsibility lies with the Member States.[962]

Consequently, it could be argued that since the EU acts on behalf of the whole Union and its Member States in managing irregular migration externally, the responsibility shifts towards its bodies and agencies absolving the Member States of their responsibilities, except those that arise from their bilateral agreements.

It is also put forward those specific acts and agreements by the EU with third (non-EU) states concerning the policy and security of migration, creates the possibility for a new responsibility within another area of exclusive competence, namely the CFSP. This possibility opens if irregular migration is dealt with as a serious threat to the external borders of the Union.

Mungianu has argued that international responsibility is possible for the EU, if the option of protection has been deprived of those in need by Frontex's joint operations.[963] It is

[960] ibid para 15 Preamble.
[961] ibid Article 6, Accountability.
[962] ibid Article 7, Shared responsibility.
[963] Roberta Mungianu, *Frontex and non-refoulement: The international responsibility of the EU*. (Cambridge University Press 2016) 57.

then argued that, on the one hand, the existing competence model identifies responsibility where competence is present but, on the other, the exercise of law-enforcement power falls within the Member States' competence and is not exercised by the EU.[964]

Goodwin-Gill puts forward more arguments in favour of a margin on the EU's responsibility. Accordingly, he argued that there are gaps in the mandate of protection by Frontex which the Member States should assume under general international and human rights law. The argument is that the responsibility should not be attributed to the Member States and border guards who implement EU law but to the EU itself.[965] Contrary to that argument, the attribution of responsibility when a Member State's border guard breaches international and human rights law when implementing EU legislation lies with the Member State, even though the border guard was implementing EU legislation.[966]

Accordingly, the international responsibility of the EU, in relation to the previous Frontex Regulation, leaned towards responsibility for any violation of the border guard on a European Border Guard Team deployed at the request of Frontex to the Member State

[964] ibid.

[965] Guy Goodwin-Gill, 'The right to seek asylum: Interception at sea and the principle of *non-refoulement*' (2011) International Journal of Refugee Law, 23(3), 443-457, 456

[966] Mungianu (2016) (n 963) 58. The author refers to the work of Kuijper and Paasivirta on International responsibility, p.54 and E. Cannizzaro on Postscript to Chapter 21 and the work of M. Evans and P. Koutrakos for the International Responsibility of the European Union: European and International Perspectives, (2013), 300.

because of Article 4 of the ILC Articles of State Responsibility,[967]on the conduct of the organs of a State.[968]

It can be recalled that according to Article 7 of the ARIO, the conduct of a State that is placed at the disposal of an international organization shall be considered under international law an act of the latter organization. Therefore, it can be argued that the new regulation, which places border corps under the mandate of the EBCG acting on the commands of the Agency implementing EU law, leaves considerable space for shifting responsibility towards the EU.

In this regard, the work of Mungianu reflects, to an extent, the analysis above. She sees that under the ARIO the EU could become solely responsible for a breach of an international obligation committed by one of its Member States when implementing EU law. However, this applies to a situation where the same international obligation binds both the Member States and the EU.[969] Nevertheless, she points out, that when the EU is the sole party to an international agreement with other non-EU states, the EU could be solely responsible for the actions of its Member States. In this regard, the author agrees with Mungianu, that each situation is different and that responsibility depends on the manner in which the internationally wrongful act has been committed.[970] Mungianu identifies that *lex specialis* could put aside the application of the ARIO because it expressly mentions the specialized rules of attribution existing between the

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[967] Article 4 for the Conduct of organs of the states provides that: "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State". International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, l.
[968] Mungianu, R. (2016). (n 963) 61.
[969] ibid 80-81.
[970] ibid.

EU and its Member States and the normative control which comes from the functional attribution of the EU organs. However, she concludes that it is unclear whether this could create a legal space allowing for the development of the *lex specialis* rule towards the EU's responsibility.[971] Moreover, she questions whether the ARIO is consistent with the exceptional circumstances in which the responsibility of Member States for acts of IOs should be recognised. Although the ARIO favours the possibility of bringing claims against the EU, a joint responsibility of the EU with its Member States under the EU's normative control could be an odd outcome since this would mean that the Member States act as an EU organ. I agree with the conclusion that the ARIO does not contain any rule that could be easily applied to situations of normative control due to *lex specialis* (EU – Member States) and that this hypothesis could undermine the separate legal personality of the EU.[972]

As we have seen, the picture is more clear under international rules. But how about within the European context? Are these amendements enough to trigger responsibility for the EBCG on some clearer terms?

An interesting analysis is provided by Fink concerning the action for damages as a fundamental rights remedy.[973]Fink concludes that the action for damages available to victims of violations of fundamental rights against Member States but not against Frontex could close the accountability gap regarding the latter; the CJEU would have to lower the threshold for EU liability where fundamental rights are concerned.[974] That means that a friendly liability approach needs to be adopted by the CJEU. Accordingly,

[971] ibid 105-109.
[972] ibid.
[973] Fink (2020) (n 862).
[974] ibid 532, 547-548.

first, the CJEU would have to broaden the conduct for which Frontex could be liable by applying the sufficiently serious breach requirement and, second, reflect on the conditions that give rise to liability for positive obligations.[975]

To decide on the positive obligations, the foreseeability of the illegality and the possibilities or limitations that an actor faces, as well as the consequences of the measures decided, should be analogous; otherwise, it should give rise to a breach of positive obligation.[976] However, it is reported that the CJEU is reluctant to ease the conditions of liability.[977] To this end, she identifies that due to lack of an accountability mechanism, the action for damages remains an important gap filler for liability.

Although, the above conclusions and Fink's analysis has contributed significantly to this research, it does not deal with the shift in responsibility due to the EBCG's mandate explored in the thesis. It is expected that the joint operations of the EBCG would have more of an exclusive character since it permits limited discretion with some specific competences for the Member States. Standing corps and border guards would be under the mandate of the Agency Management, which can intervene with rapid interventions with limited or no intervention through the actors with whom it shares its competence. The operational Plan, should state the permissible conduct in more specific terms rather than a mere reference to the upholding of fundamental rights. That would raise the level of responsibility and the chances of expanding Frontex's liability by the CJEU.

[975] Fundamental rights are generally understood to encompass obligations of a negative and positive nature. ECtHR held that a duty to intervene arises when the authorities knew or ought to have known of a real and immediate rise to the rights of one or more specific individuals, or in other words, where an interference is foreseeable. The CJEU analyzes the different aspects of the ECtHR's knowledge and reasonableness tests in the context of the sufficiently serious breach requirement and causation. Fink (2020) (n 862).

[976] ibid 544-545.

[977] ibid 547.

However, this is not sufficient for reducing fundamental rights violations involving the principle of *non-refoulement*, the right to life, the right not to be subjected to torture or other human or degrafing treatment or punishment, in addition to the right to asylum and the right to leave any country.

This author argues that a new type of responsibility, or other parallels, e.g. international criminal law should be examined, with regard to failed policies, rather than concentrate only on difficult legal arguments that would not genuinely help reduce fatalities in the Mediterranean. It is also important for this research to explore the effective contribution of the EU as an international actor in its external action.

However, as identified in section 4.1.3., the autonomy of the EU restricts any attribution of responsibility to the EU. Nonetheless, the question of responsibility resurfaces after the adoption of the new Regulation of the EBCG. The issue that arises can be explained as follows: If the EU cannot be attributed any responsibility but at the same time responsibility has shifted from the Member States towards the Union through its Agency- EBCG- will the border guards themselves be held responsible over their conduct? Could this type of responsibility be directed towards individual responsibility? If the answer is positive, what kind of individual responsibility could the border guards owe in relation to irregular maritime migrants in the Mediterranean?

The new regulation of EBCG does not attribute responsibility for any violation of fundamental rights and the principle of *non-refoulement* to the border corps of the EU agency. I argue that if the conduct of EBCG personnel, acting on the Agency's mandate, result in violations that are widespread and have caused fatalities, or torture, an individual criminal responsibility may be possible. In the next section, I explore the new definition of 'banal crimes' as expressed by Kalpouzos and Mann which is significant in the context of this thesis as it potentially gives a new dimension of crimes that may give

rise to (individual criminal) responsibility under certain conditions. [978] 'Banal crimes is not a statutory legal term but has developed within the literature to denote a new type of crime which may be applicable in the case of standing corps or border guards of EBCG.

5.1.8 International Law Reasoning and New Forms of Crimes

The article on *banal crimes* by Kalpouzos and Mann, previously mentioned, argues that the acts of Frontex agents and Greece may lead to individual responsibility for crimes against humanity under the Rome Statute of the International Criminal Court. Although, the question that arises in the case of the new EBCG Regulation is not of the same character and intensity in terms of responsibility, the definition of banal crimes is interesting in terms of individual responsibility. From a theoretical perspective, banal crimes could arise in relation to any violation on behalf of the border guards or standing corps within the integrated border management for violations of international law.

Accordingly, banal crimes are those whose gravity emanates precisely from the fact that they normally cannot be seen from the perspective of their victims and are grave because the current world order somehow conceals their adverse consequences on the populations they target.[979] If this definition applied to irregular migrants in the Mediterranean, it would likely mean that the law-making policy on border-security at sea does not, in any way, protect refugees, asylum seekers or persons coming from vulnerable situations thus potentially violating the principle of *non-refoulement* or other rights concerning protection because of other human rights violations of international law occurring in an extended or high intensity. In a way, banal crimes are not about the

[978] Kalpouzos, Mann (2015) (n 14).
[979] ibid 4.

legal or policy measures adopted but the practice that may cause intentional or foreseeable high number of fatalities at sea.

In addition, it may cause the return to a place where people may be subjected to torture or cruel and inhuman or degrading treatment or punishment and face several other human rights abuses that violate human dignity. For instance, people returned to Libya[980] found themselves in deplorable conditions in reception centres or have been subjected to treatment that amounts to crimes. In the case of Libya, slavery has resurfaced in the last few years while the IOM continues to carry out evacuations from Libyan centres.[981]

An interesting analysis on what constitutes a systematic policy in the context of Kalpouzos and Mann's banal crimes, concerns the implication of high level authorities, including the state's interior ministry, and EU agencies, in the use of significant resources, such as extensive legislation, bureaucratization and institutionalization of the asylum regime, that potentially indicates a systematic policy rather than a random set

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[980] Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking, and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic. The EU-Libya Memorandum of Understanding, (firstly adopted by Italy and then was endorsed by the EU in its Malta Declaration, 2017). Retrieved at: http://eumigrationlawblog.eu/wpcontent/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf
Accordingly, the memorandum has been presented as the first chapter in a new era of cooperation on irregular migration and border control between Italy and Libya and it outlines two main objectives, (i) the control of migratory flows and (ii) the support to the development of the region. Palm, A. (2017). The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe? EU Immigration and Asylum Law and Policy/Odysseus Academic Network, 2.
It is also reported that the relationship of Italy and Libya dates to 2000 when the first bilateral agreement between them for signed. It concerned their collaboration in the fight against terrorism, organized crime, illegal traffic of drugs and irregular migration. Furthermore, in 2006 a memorandum of understanding was signed for a common engagement in the fight against irregular migration. Di Pascale, A. (2010). Migration control at sea: The Italian case. In Extraterritorial immigration control (pp. 274-304) (Brill Nijhoff) 297.

[981] International Organization for Migration, Humanitarian Evacuation on the Libyan Border, 28 February 2011 – 27 September 2011, Seven-month report on IOM's response.

of isolated acts.[982] The question that arises is whether it would be possible for refugee protection to expand to crimes against humanity for widespread or systematic violations against irregular maritime migrants in the Mediterranean. Any response to this question remains, currently, speculative. The starting point for this hypothesis, is that among the irregular maritime migrants in the Mediterranean there are potential refugees, fleeing violence and other international crimes or persecution. In this situation, persons with legitimate claim for international protection need to be outside of their country of origin to satisfy, as we saw, the basic element of the refugee definition in the 1951 Refugee Convention and thus to enjoy the right to asylum. The reasoning behind connecting banal crimes to protection is that asylum is not a crime and 'disguised' policies should not develop to imply otherwise. For example, one cannot apply policies to fight smugglers without due concern of the lack of viable legal pathways that would allow access to protection.[983]

There is a chain of indirect actions in the EU's external migration policies which may trigger some form of responsibility. These actions may be systematic practices, the results of which may amount to banal crimes. An example of systematic practices amounting to banal crimes can be observed in relation to the Libyan coastguards' actions in returning irregular migrants to Libya. Such practices may involve the detention of irregular migrants, torture or degrading treatment or punishment or other crimes of such severity. The EU's responsibility as an international actor relates to its financing of the Libyan coastguard, which interdicts and returns the boats of irregular migrants from

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[982] Kalpouzos, Mann, (2015) (n 14) 13.

[983] UNHCR, Keynote address by Volker Turk, Assistant High Commissioner for Protection, on Advanced Corse on International Criminal Law, Special focus: International Criminal Justice, Migration and human trafficking, The Hague Academy of International Law, 30 May 2016. Also see James Hathaway, 'The human rights quagmire of human trafficking', (2008) Virginia Journal of International Law 49 (1), 6.

the Mediterranean to Libya. This practice does not amount to a violation of the principle of *non-refoulement per se* because irregular migrants are not returned to their country of origin or habitual residence, as per the criterion of the 1951 Refugee Convention. Nevertheless, it deprives them of their rights regarding protection as these may derive under asylum law or in relation to other forms of protection. Therefore, this could amount to an indirect systematic practice.

This practice of returning irregular migrants does not fall within the definition of crimes against humanity because it does not satisfy the criteria of Article 7(1) of the Rome Statute on widespread and systematic attack that occurs within a military context.[984] In the case of banal crimes in Greece, the authors identified the element of vulnerable collectivity. Accordingly, in the case of asylum seekers in Greece, the attack is directed against a great number of people who form a vulnerable collectivity and are subject to crimes committed by a powerful organization. Similarly, if the EU's integrated border management system performed by the EBCG proves dysfunctional, new insights could be gained in the field of international criminal law particularly since this branch of law continues to develop. Some linkages may be observed between international criminal law and international refugee law, such as: (i) deportation and forcible transfer may constitute war crimes or crimes against humanity, and (ii) persecution.[985] It is noted that

[984] Article 7 Crimes against humanity 1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a)……., (d) Deportation or forcible transfer of population…. (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html

[985] UNHCR, Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law, Arusha 11-13 April 2011.

the 1951 Refugee Convention provides that those who have committed international crimes are excluded from the international protection status.[986]

Another difference between international criminal law and international refugee law, in terms of crimes against humanity where a widespread or systematic attack occurs, i.e., the element of persecution. Whereas persecution within the definition of crimes against humanity must be part of a widespread and systematic attack, the term 'persecution' in international refugee law is assessed within the meaning of the 1951 Refugee Convention which is wider than that of international criminal law.[987] Nonetheless, the reason for this approach is not to restrict the definition of a refugee. Accordingly, the International Criminal Court's Prosecutor has thus far interpreted the gravity of international crimes in relation to mass atrocities.[988] Banal crimes, according to Kalpouzos and Mann, must only be sufficiently serious to warrant investigation. [989]

The requirement of being sufficiently serious to warrant investigation may involve policies or decisions adopted in relation to irregular maritime migration that have resulted in fatalities in the Mediterranean. Since mere knowledge is sufficient to constitute such crimes, it could be argued that high-ranking Frontex officials were aware that the transition from *Mare Nostrum* to *Triton* operation would result in more fatalities constitutes a banal crime.[990] Indicative of this situation is that in just one week in 2015 ('black week') 1200 adults and children drowned in the maritime space between Italy

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[986] Article 1F, Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) 33

[987] Alice Edwards, A., Agnés Hurwitz, 'Introductory Note to the Arusha Summary Conclusions on Complementarities between International Refugee Law, International Criminal Law, and International Human Rights Law' (2011) International Journal of Refugee Law, 23(4), 856-859, 857-858.

[988] Kalpouzos, Mann (2015) (n 14) 24.

[989] ibid.

[990] Mann, I. 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' (2018) European Journal of International Law, 29(2), 347-372.

and Libya.[991] The positive legal duty to rescue in terms of EU policy making could become a source of another responsibility in international law if it is contrasted with the EU policies on the externalization of migration.

It is not coincidental that as of 3 June 2019, a Communication reached the Office of the Prosecutor of the International Criminal Court (ICC) pursuant to Article 15 of the Rome Statute, providing the Prosecutor with evidence implicating the European Union and Member States' officials and agents in crimes against humanity committed as part of a premeditated policy to stem migration flows from Africa via the Central Mediterranean route, from 2014 to date.[992] Accordingly, the evidence indicates criminal liability within the Court's jurisdiction for policies resulting in (i) the deaths by drowning of thousands of migrants, (ii) the *refoulement* of tens of thousands of migrants attempting to flee Libya, and (iii) complicity in the subsequent crimes of deportation, murder, imprisonment, enslavement, torture, rape, persecution and other inhuman acts, taking place in Libyan detention camps and torture houses.

Moreover, the ICC is already investigating crimes in Libya as a result of the Libyan civil war erupted in 2011. On a statement of 9 May 2017, Fatou Bensouda, the ICC Prosecutor stated in relation to the situation in Libya that serious and widespread crimes allegedly have been committed against migrants attempting to transit through Libya, alarmed by reports that thousands of vulnerable migrants, including women and children, are being held in detention centres across Libya in often inhumane conditions. The Prosecutor,

[991] ibid.

[992] Communication to the Office of the Prosecutor of the International Criminal Court, pursuant to Article 15 of the Rome Statute. EU Migration Policies in the Central Mediterranean and Libya (2014-2019).

made reference to the crimes, including killings, rapes and torture, alleged to be while Libya has become a marketplace for the trafficking of human beings.[993]

Whether the border guards or standing corps of the EBCG had enough knowledge of the situation must be a decisive element of whether crimes have been committed. Return policies, readmission and border control, allow for considerable human rights abuses by states such as Libya or Niger to be ignored. Several of these non-entry policies are addressed in the Communication to the ICC against the EU submitted by international lawyers. Moreover, the EU externalization policies which aim to encourage countries to carry out border controls internally and at sea, in exchange of workers' visa, as the case of Morocco, disrespect and restrict free movement within Africa (ECOWAS).

Therefore, a new dimension of irregular migration may concern a new type of responsibility triggered by the action and conduct of the EBCG, if the latter is of such nature and frequency that justifies such responsibility. Banal crimes further involve the element of vulnerable collectivity and the fatalities caused by the non-entrée practices. Whether banal crimes have been committed, it is useful to consider the years of the migration crisis during 2014 and 2019. As previously explained, the term of 'banal crimes' has not been legally acknowledged as part of international criminal law and it does not refer to such heinous crimes of widespread and systematic attack. What is relevant though is the fact that responsibility shifts towards the EU for the protection of the irregular maritime migrants through the practices of EBCG, therefore, a new type of responsibility may be possible for those policies which may have caused such high number of fatalities in the Mediterranean or have caused returned irregular migrants or

[993] International Criminal Court, Paragraphs 26 and 27 of the Statement of ICC Prosecutor to the UNSC on the Situation in Libya, 8 May 2017, New York.

stranded migrants to be subjected to torture or inhuman or degrading treatment or punishment.

The term of banal crimes is appropriate in relation to the high number of deaths of irregular migrants in the Mediterranean and it may create a new form of crimes. The term further aims to bring a fair share of individual responsibility, in a shared competence area for policies or acts (through its Agencies) that have caused a severe deprivation of rights, such as protection from *non-refoulement* and rescue in order to request any form of protection.

Policies regarding the externalization of migration and policies of external borders could result in banal crimes or even more serious violations that may amount to crimes against humanity. To explore this issue, the connection between international criminal law and international refugee law is subsequently explored by focusing only on certain elements that may apply to the rights of irregular maritime migrants in the Mediterranean. The EU's externalization of migration in several ways affects human mobility, which adheres to the right to leave any country and the right to protection from *non-refoulement* or other serious violations of human rights. The deaths in the Mediterranean affect the capacity of the EU as an international actor pointing to a connection between international criminal law and international refugee law that has thus far been ignored by the EU in terms of managing irregular migration. Both refugees and irregular migrants coming from vulnerable situations could be victims of regimes responsible for international crimes. In such cases, irregular maritime migration, is seen as a solution for the victims of such regimes.

How the EBCG would assess and decide upon this potential scenario, in line with the competences within the new regulation, remains uncertain; however, it is highly likely that the standing corps or the border guards would have the discretion to decide on the

spot whether an irregular migrant comes from a vulnerable situation, such as an oppressive regime that may have committed international crimes or other human rights violations of such severe nature. However, if this new definition of banal crimes is legally acknowledged as a new form of crime, it may give rise to individual responsibility for the standing corps or border guards under the mandate of the EBCG.

The scenario of returning or pushing back irregular maritime migrants to Libya, for instance, as a widespread and systematic practice, could amount to banal or crimes against humanity (if the ICC so decides in the case brought before it, as previously mentioned), because of the failed or fragmented policies of the EU based on Frontex's conduct. In this case individual criminal responsibility could be activated. There are several elements in international criminal law, such as forced displacement, deportation and forcible transfer, as well as persecution that could potentially trigger individual responsibility in the area of asylum and possibly irregular migration.

This point is supported by the International Criminal Tribunal of Rwanda, (ICTR) and the UNHCR at the Arusha Summary Conclusions.[994] It was identified that there is a strong interaction between international refugee law, international human rights law, international humanitarian law, and international criminal law as regards forced displacement.[995] Regarding deportation and forcible transfer, both may constitute war crimes and crimes against humanity according to both Statutes of the ICTR and the International Criminal Tribunal for former Yugoslavia (ICTY).[996] However, most importantly, it has been underlined in the Conclusions that the shared element in both

[994] Edwards, Hurwitz (2011) (n 987).

[995] Arusha Summary Conclusions, para 6. The Office of the UN High Commissioner for Refugees and the ICTR organized an expert meeting on Complementarities between International Refugee Law and International human rights Law, which was held in Arusha, Tanzania, from 11 to 13 April 2011.

[996] Arusha Summary Conclusions, para. 9.

crimes is the lack of genuine choice. The interpretation of this provided at the Arusha Summary Conclusions, is similar to banal crimes, regarding the crimes' gravity and consequences on those targeted.

Accordingly, the evidence of lack of genuine choice refers to 'action intended to raise fear among the targeted population resulting thus in their flight'.[997] However, in the Arusha Summary Conclusions, it was stated that large refugee overflows or situations of large-scale internal displacement could satisfy the element of lack of genuine choice for the purpose of establishing the crime of deportation or forcible transfer.[998] In the case of irregular maritime migrants, the concern would be if the practices of the EBCG has caused the forcible transfer or the deportation of irregular maritime migrants, who satisfy the element of lack of genuine choice before their smuggling journey.

The aspect of persecution has also been used by international refugee law and international criminal law; however, there are distinctions in its interpretation and application. Primarily, according to the 1951 Refugee Convention, the term persecution constitutes only one element of the refugee definition, linked to other elements, whereas in international criminal law, the Courts consider the *actus reus* of persecution and primarily the discriminatory intent of a widespread and systematic attack against a civilian population.[999]

Nevertheless, the Arusha Summary Conclusions suggest that some human rights violations[1000] could meet the threshold for the persecution of crimes against humanity even if they do not constitute such a crime. Because of that, despite their foundational

[997] Arusha Summary Conclusions, para. 11.
[998] ibid.
[999] ibid para 15.
[1000] ibid These violations include denial of freedom of movement, denial of employment, denial of access to the judicial process, denial of equal access to public services and hate speech.

differences, it is argued that there could be areas or elements that apply to both branches of law. There could be instances where the absence of elements, such as the armed conflict nexus or the policy requirement, may not be necessary to constitute crimes against humanity'. In relation to the irregular migration in the Mediterranean and the EU's action, it is possible to argue that the EBCG guards could be held individually responsible for violations that could trigger liability/responsibility for crimes against humanity even in the absence of the armed conflict nexus.

Although the International Tribunal's case law does not indicate a case concerning international refugee law or breach of *non-refoulment* to the degree that the results could have triggered elements of crimes against humanity, it has adjudicated upon some aspects that leave such a scenario open. These elements concern (i) the discriminatory intent, (ii) the attack, and (iii) the policy requirement.

Considering these three elements in relation to crimes against humanity as prerequisites, would not help us prove the commission of any such acts by the EBCG or other EU agency or actor. However, if these elements are waived, in accordance with some of the international court's case law, as it seems possible, the responsibility for the EBCG agents could not be discarded altogether. For example, in the *Tadic* case,[1001] which departed from Nuremberg, for example, there was no requirement regarding (i) armed conflict and (ii) discriminatory intent, to prove the commitment of crimes against

[1001] Para 283. *The ordinary meaning of Article 5 makes it clear that this provision does not require all crimes against humanity to have been perpetrated with a discriminatory intent. Such intent is only made necessary for one sub-category of those crimes, namely "persecutions" provided for in Article 5 (h).*
Also, in its Conclusion, the ICTY, para. 305. *The Prosecution was correct in submitting that the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. Such an intent is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5 (h), concerning various types of persecution.*
Prosecutor v. Dusko Tadic (Appeal Judgement), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999.

humanity.[1002] The same applied with the ICTR Statute.[1003] Additionally, the requirement for a plan or policy in relation to a crime against humanity to be committed was rejected by the ICTY (Appeals Chamber), which in the case of *Prosecutor v. Kunarac*[1004] held that neither the attack nor the acts of the accused need to be supported by any form of policy or a plan. In another instance, the Special Court for Sierra Leone, omitted the requirements of discriminatory intent and State or organizational policy.[1005] It has been reported that the policy element of crimes against humanity was added to the definition as an afterthought to avoid the possibility of random and isolated acts coming within the ICC's jurisdiction.[1006] Consequently, it is possible to depart from the four preconditions of the ICC Statute on crimes against humanity,[1007] if a new special court could be envisaged to adjudicate on banal crimes or crimes against humanity, may be committed in the years between 2014 to 2019 in the Mediterranean against irregular maritime migrants.

[1002] Leila Nadya Sadat, 'Crimes against humanity in the modern age', (2013) *American Journal of International Law*, *107*(2), 334-377.
[1003] ibid 346.
[1004] Regarding the requirement of a Policy or Plan and Nexus with the Attack, *neither the attack nor the acts of the accused needs to be supported by any form of "policy" or "plan". There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes. As indicated above, proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.* Para 98, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001.
[1005] Sadat, (2013) (n 1002) 349.
[1006] ibid 371.
[1007] Article 7 (1) Rome statute, ICC. The preconditions concern, the commission of the crime should be part of a widespread and systematic attack, directed against civilian population, with knowledge of the attack. UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6.

International criminal courts, tribunals, and special courts are established after the commitment of crimes in order to decide on the individual criminal responsibility of the actors involved. Even if the case of possible crimes or violations of international customary law concerning the irregular migrants in the Mediterranean, (due to the policies decided on externalization and integrated, or external, border control and smuggling, does not lead to international outcry, it still cannot be ignored; firstly, due to the number of fatalities caused and, secondly, because of the consequences upon those who were forcibly returned to places such as Libya. In a recent UN resolution, S/RES/2491 the Security Council reaffirmed the necessity to end the ongoing endangerment of lives of irregular maritime migrants during smuggling and trafficking in the Mediterranean Sea off the coast of Libya.[1008] The Security Council acting under Chapter VII of the UN Charter, condemns all acts of migrant smuggling and human trafficking into, through and from the Libyan territory and off the coast of Libya, that undermine further the process of stabilization of Libya and endanger the lives of hundreds of thousands of people.[1009]

In this first part of this section, we have engaged in an empirical analysis of the phenomenon of irregular maritime migration in the Mediterranean in order to provide an understanding of the the legal elements and other features of the phenomenon. The different domains of law, such as the transnational crime of smuggling and its relevant international framework, the international maritime law and international criminal law, all produce rights and responsibilities, which this part of the thesis attempted to demarcate in order to determine the extent of the relevant actors' responsibility. We have also examined new insights concerning responsibility, resulting from a spillover

[1008] UNSC Res (3 October 2019) UN Doc S/RES/2491 (2019).
[1009] ibid.

effect from the Member States' international obligations to the EU through its latter's Agencies. In this part the author supported the argument in favour of creating/establishing a new form of crimes as put forward by Kalpouzos and Mann, namely banal crimes, according to which the relevant policies concerning migration may result in criminal responsibility. Thus, the empirical research on the irregular migration has led to the analysis of the most relevant domains of law, making it clear that irregular migration cannot be addressed by a single instrument, law, or approach but involves the utilization of different legal tools and provisions as well as different approaches at the local, regional and international level.

In terms of Frontex's responsibility (it may be safest to use the term 'liability' under EU law. As we have seen in Section 5.1.7 on Fink's analysis on the extent of Frontex's responsibility, liability is possible under EU law, as it is for any violations of fundamental rights under the ECHR. Individual liability for Frontex's conduct could arise when actions performed in accordance with the Operational Plan or through Frontex's rapid response would knowingly result in banal crimes for irregular maritime migrants, raising the death toll of fatalities. While this remains largely theoretical and difficult to prove, the Communication before the ICC's Prosecutor for crimes against humanity (a greater form of crimes rather than banal crimes as described by Kalpouzos and Mann), could contribute to a better understanding of responsibility for Frontex in the future. The usefulness of recognizing such offences lies in the prevention of fatalities of irregular maritime migrants while at sea and the management of migration through a clear lens of fundamental rights by setting clear rules of conduct on policies which do not pose a threat to human rights or allow the disguised actions of multiple actors to avoid responsibility (or individual liability). As things are today, standing corps and border guards could hide behind their agency's mandate, further to the multiplicity of acts and

other actors, such as Member States or other agencies (such as Europol), therefore, avoiding liability for their actions. Individual liability, in addition to the agency's liability, is another safeguard respecting the ECHR and the EU Charter.

The EU could be indirectly responsible for banal crimes if two scenarios are materialized:

(i) when banal crimes are statutorily established and individual responsibility is not included in the Regulations of the Agencies involved in the irregular maritime phenomenon, in this case, the EBCG;

(ii) if new elements of crimes against humanity, which resemble banal crimes, suffice from the decision of the ICC on the Communication brought before it.

The next Part approaches the impact of the externalization policies on the EU's responsibility and explains how the externalization of migration policies could prove detrimental to the rights of irregular maritime migrants. It further examines how the EU could impose international obligations on states, through its own order and rules, focusing on the conditionality rules. The following Part also explores migration as an external policy which may help reduce irregular maritime migration in the Mediterranean and analyses the reasons why relying upon legal pathways is not a realistic option.

Part 2 – THE EU'S POLICY ON THE EXTERNALIZATION OF MIGRATION SINCE TAMPERE AND ITS SHIFTING RESPONSIBILITY

5.2.1 Introduction

In the AFSJ, responsibility towards irregular migrants shifted to the Union through the law and policies developed within a period of twenty years. From the pillar system to the spillover competence and then to the EU agencies, the Union has been progressively gaining control of the external competences in the area of migration, including asylum. This has resulted in the externalization of migration policies, including the principle of *non-refoulement*.[1010] At the same time, as an international actor, the EU has been gaining more responsibility than ever within the same area of shared competence.

From the 20th anniversary of the Tampere Conclusions,[1011] it is observed that the EU turns toward its own Agencies to support a deadlock in policies created from an emerging gap between the initial EU decisions and the Member States' implementation. This gap is evident in the external action and policies of the Member States and the EU ranging from the support provided to the Member States for the implementation of their international maritime obligations to the challenges faced regarding rescue and disembarkation. From a theoretical perspective, the analysis has so far indicated that the principle of solidarity has not led to a balance between European integration, migration, and protection. This could also be true in the nexus of security and *non-refoulement*.

Therefore, it is evident that the impact of the EU policies developed since Tampere have mapped the developments in the areas of migration and asylum, leading towards the

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[1010] See Study Three – Part 2.

[1011] Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999, 16 October 1999.

externalization of migration, since there was a spillover from Member States' competences to the EU and from the EU to its Agencies. This argument is the main subject-matter of this section and is developed into two parts; the first part deals with the externalization of migration by the EU as an international actor in the last 20 years and the second explores the EU agencies' changing state of play.

The Tampere Conclusions, referring to a common EU asylum and migration policy, set up the policy goal for a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit.[1012] Based on their respective competences under the Treaties, the Union and its Member States were called to contribute to: (i) a greater coherence of the internal and external policies of the Union and (ii) the partnerships with third countries with a view to promoting co-development.[1013] To this end, a stronger external action was needed, where all competences and instruments would be at the Union's disposal in its external relations and used in an integrated approach towards the development of an AFSJ.[1014]

Following Tampere, partnerships with third countries were implemented by returning persons to their country of origin and building up on stricter EU external borders. The returns of persons who were not allowed to stay in the Member States' territory required the adoption of readmission agreements of the EU with third (non-EU) states.[1015] A readmission agreement between the EU and a third country, on the basis

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[1012] ibid para 11.
[1013] ibid.
[1014] ibid para 59.
[1015] To this day, (Dec. 2019) 17 readmission agreements are signed by the EU with third States. The first readmission agreements came into force in 2004 between the EU and Hong Kong, and Macao, followed in 2005 readmission agreements with Sri Lanka and in 2006 with Albania, in 2007 with Russia, I 2008 with FYROM, Bosnia & Herzegovina, Montenegro, Serbia, and Moldova, in 2010 with Pakistan, in 2011 with Georgia and in 2014 with Azerbaijan, Turkey and Cape Verde. See European Commission, Migration and Home Affairs, https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission_en

of reciprocity, establishes a rapid and effective procedure for the identification and safe and orderly return of persons who do not, or no longer, fulfil the conditions for entry, presence, or residence in the territories of the third country or one of the EU Member States, and to facilitate the transit of such persons in a spirit of cooperation.[1016]

The first readmission agreement was formed in 2004, followed by the Union on Global Approach to Migration and Mobility (GAMM) a year after, is considered the overarching framework of the EU's external migration and asylum policy. Accordingly, it defines the EU's conduct in its cooperation with non-EU countries based on priorities embedded in the EU's external action, including development cooperation.[1017] Dialogues with non-EU countries based on GAMM, aim to enable the EU and the partner countries to discuss in a comprehensive manner all aspects of their potential cooperation in managing migration flows and the circulation of persons with a view to establishing mobility partnerships.[1018] The GAMM remains a good pathway example for regular migration when the criteria of the EU legal acts are satisfied and the Member States allow entry into their territory. However, in 2015 the GAMM has taken another form due to the

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[1016] Article 7(3) TFEU; Also see, Migration and Home Affairs, Definitions, readmission agreement. Retrieved at:
https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/readmission-agreement_en

[1017] European Commission, Global Approach to Migration and Mobility, Retrieved at: https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration_en

[1018] The GAMM mainly applies to a wide range of migration categories such as for short-term visitors, tourists, students, researchers, businesspeople or visiting family members. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, The Global Approach to Migration and Mobility, {SEC (2011) 1353 final} Brussels, 18.11.2011 COM (2011) 743 final.

migration crisis, with the EU policies refocusing on the fight against irregular migration as their main priority.[1019]

Following the Valetta summit in 2015, the EU's external policy response to the externalization of migration focused on engaging in relations with African countries, like Mauritania and Mali. A political declaration and an action plan were designed to: (i) address the root causes of irregular migration and forced displacement, (ii) enhance cooperation on legal migration and mobility, (iii) reinforce the protection of migrants and asylum seekers, (iv) prevent and fight irregular migration, migrant smuggling and trafficking in human beings, and (v) work more closely to improve cooperation on return, readmission and reintegration.[1020]

In order to manage migration and displacement in Africa, to address the root causes of migration, and to manage the flows into the EU from the African states, the European Commission created the *Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa*. The case of Niger is one example of the EU's externalization of migration. [1021] A mechanism was set up to support Niger's

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[1019] Elspeth Guild, (2019) Background Note: The Global Approach and the Partnership Framework European Conference, "From Tampere 20 to Tampere 2.0".
It is noted that I have attended the Conference, in Helsinki, Finland on 24th and 25th October 2019.
[1020] Council of the European Union, Valetta Summit Action Plan, 11-12 November 2015.
[1021] It is noted that Niger has received a total of EUR 190 million, have already been approved for Niger under the Trust Fund. The activities under the Emergency Trust Fund in Niger focus on protecting migrants and facilitating reintegration, strengthening the government's capacity to combat criminal networks and better manage its borders, as well as supporting host communities by creating economic alternatives for populations who live from activities related to irregular migration. European Commission, EU cooperation with Niger, 13 December 2017.
Niger is one of 15 member states of the Economic Community of West African States (ECOWAS), which provides visa-free travel for nationals of those countries and all nationals from ECOWAS member states are supposed to be able to legally travel as far as the Libyan border. With many West Africans transiting through Niger en route to North Africa and Europe, Niger's desert town of Agadez has long served as a key transit point. In 2015, the UN Office on Drugs and Crime (UNODC) reported that up to 4,000 people without travel papers were passing through the town

response to complex migratory flows that transited in its territory by promoting economic and social development and helping the national states and the EU Member States to improve their governance on migration through this mechanism.[1022]

The EU policy concerning irregular migration is criticized as unjustified, since statistics do not reveal the actual crisis at the EU's external borders.[1023] Nonetheless, there was a total of 114,276 irregular crossings into the EU of which 50.114 were by sea.[1024] One of the arguments concerns the refusal of entry of the 'non-desirables' during the examination of the visa procedure. Accordingly, Guild in a background paper for the purposes of the European Conference on 20 years from Tampere, identified that the policies of the EU and its Member States in relation to border controls and migration management, consist of mainly push and pull-backs, refusal of disembarkation from humanitarian assistance at sea in addition to criminal prosecution of their captains, amongst others. These policies arguably caused violent deaths witnessed in the Mediterranean.

In addition, it is concluded that the EU has conflated the two administrative fields, interior ministries and EU officials pretend that if they can direct border controls in third countries far from the EU borders while countries such as Libya, Turkey or Morocco

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each week. Global Detention Project, Country report - Immigration Detention in Niger: Expanding the EU-Financed Zone of Suffering Through "Penal Humanitarianism" 26/03/2019. Retrieved at: <https://reliefweb.int/report/niger/country-report-immigration-detention-niger-expanding-eu-financed-zone-suffering-through>

[1022] European Commission, EU Cooperation with Niger, ibid.

[1023] Guild, in her Background note to the European Conference, provides statistics with reference to the Frontex Risk Analysis of 2019 whereby out of 300 million entries at the external border in 2018, approximately 90 million of which were EU/EEA nationals, the rest were non-EU nationals. Moreover, it is stated that this constitutes approximately 0.0006% of total entries at the external border. (n 1019).

[1024] ibid 3.

refuse to admit people who might come to the EU but which the EU might not want, better migration management can be achieved for the EU. [1025]

Considering various arguments against the EU's policies in relation to migration, it is unavoidable not to consider that individual responsibility for the EBCG personnel or in the context of banal crimes may one day be sufficient to justify a breach of international law concerning irregular migration in the Mediterranean. In the ECtHR's 2012 landmark case *Hirsi Jamaa and Others v Italy*,[1026] Italy was found in violation of Article 3 ECHR because the applicants had been exposed to the risk of ill-treatment in Libya and of repatriation to Somalia or Eritrea. The case involved pushbacks of irregular migration from the Italian navy to Libya in the Mediterranean.

In his concurring opinion, Judge Pinto De Albuquerque highlighted that the right to seek asylum requires the complementary right to leave one's country and find effective protection outside of it, a right which states cannot restrict. According to the same judge's opinion, even if international refugee law did not apply, international human rights law imposes a duty upon states to protect persons in these circumstances, thus,

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[1025] ibid 4. Also see, Ruben Andersson, David Keen, Foreign Policy, 'The West's Obsession with Border Security is Breeding Instability', 16 November 2019
Retrieved at: <https://foreignpolicy.com/2019/11/16/border-security-european-union-instability-illegal-immigration/>
The article basically argues that the EU's external policy and management of the external borders which appears to be a fight against illegal immigration, forms a strategy which mainly is the externalization of the problem itself.

[1026] Moreover, the Court held that the alleged violations fell within Italy's jurisdiction, within the meaning of Article 1 of the Convention, because the principle of international law enshrined in the Italian Navigation Code envisages that a vessel sailing on the high seas was subject to the exclusive jurisdiction of the State of the flag it was flying. *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09 (ECtHR, 23 February 2012)

failure to take adequate positive measures of protection will constitute a breach of that law.[1027] Therefore, states cannot turn a blind eye to a clear need for protection.

Concerning the prohibition of collective expulsion, Judge Pinto De Albuquerque accepted the application of the *non-refoulement* principle to any State action conducted beyond State borders, to conclude that the procedural guarantee of individual evaluation of asylum claims and the ensuing prohibition of collective expulsion are not limited to the land and maritime territory of a State but also apply on the high seas. Consequently, it should not matter where the immigration or border control takes place as long as the border control is performed on behalf of the Contracting Party.[1028]

Hirsi brings to the surface the difficulties in the implementation of a protection framework for irregular maritime migrants. In terms of human rights, protection from *refoulement* has proved difficult to apply from theory to practice. In addition to human rights concerns, the policy developed for security reasons inevitably may have caused an imbalance between the protection of human rights and the fight against crime.

Moreno-Lax, identifies a double standard in relation to irregular migrants which, on the one hand, views them as a threat to security, and on the other as victims of smugglers, while she argues, that the EU discourse reflects that exact change.[1029] In particular, she argues that these two narratives, create a paradox which reduces migrants' human rights while human rights obligations are largely disclaimed through blame games and

[1027] Concurring Opinion of Judge Pinto de Albuquerque, ECtHR, *Hirsi* case, ibid.
[1028] ibid.
[1029] Violeta Moreno-Lax, 'The EU humanitarian border and the securitization of human rights: The 'rescue-through-interdiction/rescue-without-protection' paradigm.' (2018) *Journal of Common Market Studies*, *56*(1), 119-140.

accountability gaps.[1030] She explains that while legal amendments make an explicit reference to 'saving lives', there has been no transformation of the surrounding practices. The reduction of unauthorized arrivals remains the highest goal whereas the tool to achieve this is interdiction. Interdiction is connected to the securitization of migration, which, when considered as that, a new form of 'ethical policing' is created.[1031] The whole narrative of irregular migration mixing the security/securitization policies to human rights considerations has, nevertheless, had an impact in the development of the EBCG.

Moreno-Lax identifies that there are three phases of revolution for security which goes through Frontex, inception, adoption and development of its rules and regulations. The first phase concerned the adoption of the 2010 Maritime Guidelines,[1032] which were replaced by the 2014 Maritime Surveillance Regulation,[1033] that disconnected the fight against illegal migration from international protection. The second phase concerns the gradual introduction of humanitarian language, and the third phase starts with the *Hirsi*

[1030] ibid 119-120.
[1031] ibid 121.
[1032] Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ L 111, 4.5.2010, 20–26.*
[1033] Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union *OJ L 189, 27.6.2014, 93–107.*

judgement involving Italy's pushbacks and the operations of *Mare Nostrum*, *Triton* and *Sophia*.[1034]

It is argued that NATO's involvement in Triton (and in the EU's Common Security and Defense Policy) perceived as 'shooting-to-kill' policies at sea while at the same time marking a move away from defensive to 'offensive' borders proactively destroying the (only) means of mobility to unauthorized crossers even at the expense of human rights of maritime migrants including their right to life.[1035]

The same author reports that NATO's task was to conduct reconnaissance, monitoring and surveillance of illegal crossings when encountered with distress situations sending those who were rescued back to Turkey.[1036] The NATO's practice is justified on grounds of security turning into the militarization of controls. From a human rights perspective, the right to life of irregular maritime migrants may shrink to a mere right to survival, involving facing the violence and armed forces at border controls by the presence of NATO. Consequently, migrants' human rights are violated under the pretence of security and protection of the EU's borders.

The securitization and militarization of borders work at the expense of irregular maritime migrants' human rights. The externalization of migration as an effect of the EU's policies in border control, returns and readmission, did not, so far, effectively balance the irregular migrants' human rights against issues of security and control. However, the border control policies, inextricably connected to human rights, have gradually progressed with the development of the EU in its external capacity. I, thus,

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[1034] Moreno-Lax, V.(2018) (n 1029) 123.
[1035] ibid 127.
[1036] ibid 129.

argue that nothing has been foreseen in the Tampere conclusions on the funding of either border controls, migration, and asylum in non-EU countries, mainly since the policies at the time were based at the intergovernmental level.[1037]

Other forms of externalized migration options should be explored between the EU and third states to protect refugees and people coming from vulnerable situations. The following section involve the EU's policies concerning its cooperation with third states upon the conditionality principle and in accordance with its MFF in the context of protection of human rights for irregular migrants. As will become apparent from the following section, the EU is ready to expand to trade and development upon conditions that would benefit irregular migration and, eventually, achieve the effectiveness of the externalization policies of migration. However, at the same time, the conditionality principle represents a great opportunity to respect of human rights through conditions imposed by trade and development agreements.

5.2.2 The Impact of the Conditionality Principle on External Migration: Trade And Development Partnerships Between the EU and Third Countries

The rule of law conditionality principle reflected in the EU's, MFF is a new development aiming to facilitate the externalization of migration through cooperation agreements with third states. To encourage effective policies towards the externalization of migration, the new MFF for the period 2021–2026, emphasizes the fight against irregular migration, smuggling and border control capacity-building with increasing the

[1037] Iris Goldner Lang, Financial framework, in Philippe De Bruycker, Marie De Somer, Jean-Louis De Brouwer (eds.), European Conference from Tampere 20 to Tampere 2.0, European Policy Centre, 15–25.

allocations to external migration.[1038] It seems that the MFF is linked to the management of readmission and border controls' effectiveness.

A critical element of the MFF is that it relies on conditionality as an unfolding dominant approach towards cooperation with non-EU countries.[1039] Within the context of cooperation agreements of the EU with third states, conditionality should not be confused with the conditionality imposed on the Member States. As a principle imposed on the Member States, conditionality concerns their accession to the EU or a violation of the rule of law by a Member State. Particularly, Article 7 TEU provides that on a written proposal by one-third of the Member States, the European Parliament or the European Commission and the Council, may determine that there is a real risk of a serious breach by a Member State of the values of Article 2 TEU.[1040]

The rule of law conditionality is embodied in the newly proposed regulation on the protection of the Union's budget for the Member States.[1041] The conditionality principle in the newly proposed regulation promotes respect for fundamental values as an essential precondition for sound financial management and effective EU funding and

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[1038] ibid 2. The author states that the new MFF attempts to increase complementarity and links to the other two funds, Asylum and Migration Fund as well as Integrated Border Management Fund. In addition to that, it is stated that the new MFF proposes increased flexibility in order to respond to emergency situations, 4.

[1039] ibid 7.

[1040] Article 7 TEU, ibid. The European Commission decided to refer Poland to the CJEU for a breach of the rule of law of Article 2 TEU, through the mechanism provided in Article 7 TEU, on 20 December 2017. On 3 April 2019, the Commission launched this infringement procedure on the grounds that the new disciplinary regime undermines the judicial independence of Polish judges and does not ensure the necessary guarantees to protect judges from political control, as required by the Court of Justice of the EU. European Commission, Press Release 'Rule of Law: European Commission refers Poland to the Court of Justice to protect judges from political control', Brussels, 02.10.2019.

[1041] European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States Brussels,2.5.2018 COM (2018) 324 final, 2018/0136(COD).

respect for the rule of law for the European economy that flourishes most when the legal and institutional framework adheres fully to the common values of the Union.[1042] Although this is binding for the Member States in terms of respect for fundamental rights and the values of the Union, it is not as yet binding to third states. Moreover, the link to the readmission and effective border management introduces the risk that non-EU countries would pledge for more funding to meet their EU obligations. Goldner Lang concludes that the development aid objectives are altered in the direction of interest-driven migration and border management objectives.[1043]

The EU's new approach seems to take an alternative form of conditionality that links migration and trade**.** Accordingly, on a recent Discussion Paper issued by the Council of the European Union, it is stated that '[d]eveloping a coherent strategy towards a range of third countries, from the complex mix of migration-related and broader foreign policy interests of Member States, is one of the policy challenges faced by the EU'.[1044] The link between the two policy fields is a form of conditionality aiming to better address readmission arrangements with non-EU countries and returns through the link on visa regimes and liberation in some instances for nationals of non-EU countries based on the revised 2018 Visa Code.[1045]

Moreover, the Council of the European Union on 31st October 2019, the Commission, upon a reference to the EU Action Plan on Returns, notes that additional elements of

[1042] ibid, Explanatory Memorandum, Section I. Context of the proposal.
[1043] ibid.
[1044] Council of the European Union, "Migration and Trade – Presidency Discussion Paper", Brussels, 31 October 2019 (OR. en) 13449/19 LIMITE, JAI 1105 ASIM 122 RELEX 961 COMER 135.
[1045] In 2018, the Commission proposed to revise the EU Visa Code by including a structured mechanism linking visa issuance and cooperation on readmission. Under these revised rules (applicable as from February 2020), the EU will be able to adapt the rules related to the processing of visa applications depending on whether a third country cooperates satisfactorily on return and readmission of irregular migrants, for instance as regards visa application processing time, the visa fee, or the issuance of multiple-entry visas, ibid 3

leverage should include development assistance, neighbourhood policy, trade agreements and trade preferences — with the possibility to link the conclusion of free trade agreements or the granting of preferential treatment for certain third countries in parallel to the signing of a readmission agreement.[1046] The justification put forward by the EU is that trade is just as important to state development in terms of fostering economic growth, job creation and poverty reduction as well as an incentive-based way to promote human and labour rights, good governance, environmental standards and sustainable development.[1047] Reducing poverty would also contribute towards the elimination of one of migration's main drivers.

As an EU principle, conditionality could help non-EU states remain faithful to their international obligations in a time of crisis. However, conditionality as a principle, purporting to protect human rights and the rule of law was not included in the EU-Turkey deal. The EU-Turkey deal, discussed in section 3.2.5 in terms of its provisions and its failure to reduce irregular maritime migration amidst much criticism regarding human rights, did not contain a link to the rule of law or trade, but it was, nevertheless, funded by the EU. Regardless of how it is referred to, the EU-Turkey deal is an agreement between the Heads of Member States acting on behalf of the European Council and not the EU itself; nevertheless, it is useful to keep its results in mind as a reference for future agreements.[1048] If the conditionality as a principle develops into a mandatory term in

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[1046] ibid, Accordingly, the paper states that 'As far as the use of trade policy to promote more effective returns is concerned, and as developed further in the next point, the most recent trade agreements (FTA) concluded between the EU and its partners have included a relevant Protocol on movement of natural persons for business purposes, covering both the facilitation of entry procedures and a commitment to cooperate on return and readmission. The practical impact of these Protocols has not yet been evaluated given their recent entry into force.'
[1047] ibid.
[1048] See section 3.2.5, 'The Recent Response to the Phenomenon of Irregular Migrants in the Mediterranean'.

the agreements of the EU with non-EU states in the following years, it would be absurd to assume that the existing deals or agreements would be equally revised to include the states' human rights obligations.

At an international level, the UNGA in 2016 pointed out that trade agreements should reflect states' human rights obligations in order to provide meaningful opportunities to migrants and recognize them as stakeholders in trade matters.[1049] Accordingly, trade agreements would help coordinate migration and ensure that low wage workers are placed in employment that better matches their skills, based on monitoring and enforcing agreement trends. Establishing a proper framework would reduce the vulnerabilities experienced by migrants and reduce irregular migration. At the global level, trade is governed by the World Trade Organization (WTO), with the aim to guarantee an open, rules-based international trading system by setting rules for trade between its members, including the conclusion of bilateral or regional trade agreements and unilateral measures. The Council of the European Union argues that the EU, through its trade policy and agreements, promotes human rights, and sustainable development (i.e., respect for labour rights, and climate change).[1050]

Notably, according to Article 3 TFEU, trade falls within the EU's exclusive competences. This means that the EU (i) concludes preferential Free Trade Agreements, including, for example, the removal or reduction of customs tariffs and creation of rules and commitments for bilateral trade; and (ii) includes non-preferential trade provisions in agreements such as Partnership and Cooperation Agreements that provide a general

[1049] UNGA, 'Human rights of migrants: Note by the Secretary-General' (4 August 2016) A/71/285, para. 53–54.
[1050] Council of the European Union, 'Migration and Trade – Presidency Discussion Paper', Brussels, 31 October 2019 (OR. en) 13449/19 LIMITE, JAI 1105 ASIM 122 RELEX 961 COMER 135.

framework for bilateral political and economic relations.[1051] In terms of responsibility, the shift towards a more integrated policy, that leaves little to no margin of discretion to the Member States, is more evident in the externalization of migration and border controls with both the EBCG's competences and the migration-trade nexus shifting to an exclusive competence area.

To this end, the EU arguably aims to address disputes that could arise from cooperation agreements with third countries through the mechanisms applicable in international trade. Accordingly, the World Trade Organization Dispute Settlement may become relevant as with the EU's external competences in the field of migration. For example, the regulation concerning the Union rights under international trade rules established under the auspices of WTO,[1052] aims to govern settlement disputes, whereas the Union is authorized to suspend concessions or other obligations under the multilateral and plurilateral agreements covered by the WTO Dispute Settlement Understanding.[1053]

Further to the above, the European Commission adopts implementing acts determining the appropriate commercial policy measures and imposes sanctions or penalties upon violations of the trade agreements.[1054] However, the disputes on trade agreements are adjudicated by an Appellate Body of the WTO, because of a blockage of new

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[1051] ibid.

[1052] Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, [2014] OJ L 189.

[1053] ibid Article 3 (a).

[1054] ibid Article 4 on the exercise of Union's rights and Article 5 on the Commercial policy measures are relevant to this end. More specifically, Article 5 states, among others, that these are the suspension of tariff concessions and the imposition of new or increased customs duties and that the commercial policy measures shall consist of the introduction or increase of quantitative restrictions on imports or exports of goods, whether made effective through quotas, import or export licences or other measures.

appointments to the WTO's Appellate Body, is no longer able to deliver binding resolutions of trade disputes and guarantee the right to appellate review as of 11 December 2019.[1055] This type of dispute settlement does not yet have links to readmission agreements or any agreements in relation to the EU trust funds for migration and development and cooperation with non-EU countries. While the WTO's Appellate Body could be envisaged for readmission agreements and EU trust funds as monitoring mechanisms with similar legal accountability to that of international trade, it is unlikely to constitute the right platform for addressing human rights violations in the context of irregular migration.

In the context of migration, entangling human rights, especially the rights of this vulnerable category of irregular migrants in the Mediterranean, with border management involving non-EU countries with a record of human rights violations, does not seem to benefit migrants or provide protection from *non-refoulement*. It further does not seem to limit the EU's shifting responsibility towards non-EU countries by outsourcing or externalizing migration policies, either through the EU agreements or financial contribution on trade or border management. However, it becomes obvious that, the EU attempts to approach migration in a way that it may benefit human rights. Trade and development in the EU's external and exclusive competence do not provide a clear platform when linked to migration and human rights. However, it shifts the responsibility from the Member States towards an exclusive EU competence area.

[1055] European Commission, Dispute Settlement. Retrieved: <https://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/>

5.2.3 The Conditionality's Impact on Global Migration Goals Through Development

This section addresses the nexus between migration and development within a global approach of the EU's external policy. On the one hand, it examines its efforts to regulate or limit the large scale of irregular migration and, on the other, its efforts to provide financial aid to non-EU states in complex and fragile environments.

The argument is that the migration-development nexus provides both an opportunity and a method for the EU to encourage non-EU countries to fulfil their international human rights obligations. This encouragement comes in the form of conditionalities imposed by the EU through the international agreements with non-EU countries and, at the same time, it becomes conditional upon EU funding depending on gradual phases of implementation. The agreements in concern also facilitate the externalization of migration within a sustainable framework based on the migration and development nexus.

Further, while the EU Trust Fund aims to address the root causes of migration and provide humanitarian aid through development programmes, it may also have an impact on the EU's foreign and security policy. Overall, the aim is to reduce irregular migration by land and sea and, thus, the development-migration nexus could prove beneficial, provided that it is sufficiently monitored to fulfil non-EU states' obligations through human rights or rule of law conditionalities.

In the context of irregular migration and its external policy, the EU, as an international actor, is considered responsible for imposing international human rights obligations to non-EU states through conditionalities. These are included as fundamental rights within the ECHR or the EU Charter of Fundamental Rights. Therefore, the EU's external policy through development is globally oriented in its cooperation with non-EU countries because it seeks to encourage countries to comply with international human rights

obligations. On the one hand, financial assistance focuses on good governance, infrastructure, rural development, and strengthening resilience;[1056] on the other, the EU's external integrating development policy also serves as an instrument that limits irregular migration.[1057]

Economic development in non-EU countries aims to reshape the EU's external policies by addressing the root causes of migration and have a positive effect on limiting irregular migration thus having a positive impact on mobility at a global scale. The relationship between migration and development concerns economic and social development while it has become part of the international policy of the UN Agenda on Sustainable Development Goals and the Global Compact on Migration.[1058]

Part of the UN Sustainable Development Goals is (i) the protection of labour rights and the promotion of safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment, and (ii) the facilitation of orderly, safe, regular, and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies.

The European Development Fund (EDF), established in 1957 by the Treaty of Rome and launched in 1959, is the EU's main instrument for providing development aid to African, Caribbean, the Pacific, and overseas countries, and territories.[1059] The EDF derives

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[1056] European Parliament, Marta Latek, 'Interlinks between migration and development', January 2019. Retrieved at: <https://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement>

[1057] ibid.

[1058] Goal 8. Promote sustained, inclusive, and sustainable economic growth, full and productive employment and decent work for all; Goal 10. Reduce inequality within and among countries. UNGA, 'Transforming our world: the 2030 Agenda for Sustainable Development' [2015] A/RES/70/1.

[1059] European Commission, 'International Cooperation and Development – Building partnerships for change in developing countries', Retrieved at:

contributions directly from the EU Member States according to a contribution key and is covered by its own financial rules.

The European Commission reports that for the EU's external actions, the relevant legislation involves (i) the international partnership agreement of *Cotonou*[1060] for the actions financed from the EDF, upon the basic regulations related to the different cooperation programmes adopted by the Council and the European Parliament, and (ii) the financial regulations.[1061]

Further, up to 2013, the European Commission could only pool funds by signing a Contribution or Delegation Agreement with a third entity, usually a UN Agency or the World Bank, or by donors' contributions in accordance with its financial regulations.[1062]

The Financial Regulations governing the EU budget have, since 2013, allowed the European Commission to create and administer EU Trust Funds (EUTF) for external actions.[1063]

<https://ec.europa.eu/europeaid/funding/funding-instruments-programming/funding-instruments/european-development-fund_en>

1060 Acts adopted by Bodies created by International Agreements, Decision 1/2014 of the ACP-EU Council of Ministers of 20 June 2014 regarding the revision of Annex IV to the ACP-EC Partnership Agreement (2014/428/EU). Retrieved at:
https://ec.europa.eu/europeaid/sites/devco/files/revised-annex-4-cotonou-agreement-2014_en.pdf

1061 European Commission, *Supra* n. 236. Also see, Council Regulation (EU) 2018/1877 of 26 November 2018 on the financial regulation applicable to the 11th European Development Fund and repealing Regulation (EU) 2015/323, L 307/1.
The European Commission also reports that a specific set of rules governs contracts financed from EDF resources, which are similar to the ones used for the instruments under the EU budget. They are also included in the Practical Guide applicable to contract procedures for EU external actions. The Practical Guide (PRAG) can be retrieved at:
<https://wikis.ec.europa.eu/display/ExactExternalWiki/ePRAG>

1062 Volker Hauck, Anna Knoll, Alisa Herrero Cangas, EU Trust Funds–Shaping more comprehensive external action. ECDPM Briefing Note, (81), 20.11.2015 Retrieved at: <https://ecdpm.org/publications/eu-trust-funds-comprehensive-action-africa/>

1063 European Court of Auditors, 'European Union Emergency Trust Fund for Africa: Flexible but lacking focus', 2018. Retrieved at:
https://www.eca.europa.eu/Lists/ECADocuments/SR18_32/SR_EUTF_AFRICA_EN.pdf

The EUTFs' legal basis is Article 187 of the Financial Regulation of the EU Budget and Article 259 of the Rules of Application of the new Financial Regulation laying down found conditions in relation to the provision of funds: (i) stems from a joint initiative of the EU in cooperation with the European External Action Service and at least one Member State acting as a founder partner, (ii) brings added value to the existing EU interventions, (iii) contributes to increasing the EU's global visibility and political weight and (iv) ensures 'additionality' in order not to duplicate other donors' funds.[1064] Upon fulfilling the four conditions, the EU in cooperation with the electronic exchange system and at least one Member State, acting as a founding partner, may draft a Constitutive Agreement that defines the specific objectives of the Trust Fund.[1065]

However, the sharp increase in migration flows urged the EU towards an integrated global approach in its external development policy. The EU's efforts to control irregular migration through its external action are reflected in the development of its financial framework towards a flexible system of funding in non-EU countries by creating the EUTF. Hauck, Knoll, and Herrero Cangas argue that the EUTFs are created in order to deliver a more flexible and comprehensive EU support in challenging contexts.[1066] The EU has three EUTFs; namely, (i) the EU's Bekou Trust Fund for the Central African

[1064] Hauck, Knoll, Herrero Cangas, (2015) (n 1062) 3.
[1065] ibid.
[1066] ibid.

Republic set up in 2014,[1067] (ii) the EU Regional Trust Fund for Syria — Madad Fund,[1068] and (iii) the EU Emergency Trust Fund for Africa set up in 2015.[1069]

Certain characteristics may be identified in relation to the development trust funds; for example, (i) they can be country-specific, regional or global in their geographical scope, (ii) they can respond to different thematic priorities, and (iii) they may have specific legal requirements including priorities.[1070] For example, the EUTF for Africa aims to bring stability and address the root causes of destabilization, displacement and irregular migration.[1071] It is funded based on the following objectives: (i) programmes to create employment opportunities, especially for women and young people, as well as the reintegration of returnees, (ii) activities to support resilience in terms of food security and the wider economy, (iii) to improve migration management in terms of addressing irregular migration and smuggling, return, readmission, international protection, and legal migration, (iv) programmes to support governance, the rule of law, security and development including border management and conflict-prevention systems.[1072] The European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons for Africa, which was agreed at the Valletta

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[1067] It aims at funding post-conflict and transition related activities. It can also fund activities in neighbouring countries. It is reported that it follows the concept of linking relief, rehabilitation, and development. Positive results are reported in the medical field, in agriculture and employment creation. The initial budget was €64 million and was later increased around €100 million pledged by EU and contributing donors. ibid 3.

[1068] It aims at the stabilization, resilience and recovery needs of refugees from Syria in neighboring hosting countries and at increasing flexibility by using funding modalities making use of flexible procedures. These include fast track contracting and disbursement. It reached 1.8 billion voluntary contributions from EU Member States and Turkey. Retrieved at: https://ec.europa.eu/trustfund-syria-region/content/state-play_en. Accessed 31/12/2019.

[1069] Hauck, Knoll, Herrero Cangas, (2015) (n 1062)

[1070] ibid.

[1071] ibid The Africa Trust Fund covers three different regions: The Horn of Africa, the Sahel and Lake Chad, and North Africa. These are called “windows”, for the purposes of the trust fund.

[1072] ibid 6.

Summit on Migration in 2015, supports activities in 26 countries across three regions of Africa, particularly the Sahel and Lake Chad, the Horn of Africa and North of Africa.

The EU Trust Fund plays a central part in the EU's response to the migration crisis,[1073] while it is intended to be a flexible instrument compared to the EU's development tools based on simplified procedures. The European Trust Fund has approved projects in Niger, Nigeria, Senegal, Mali, and Ethiopia to facilitate returns and combat trafficking and smuggling.[1074] It corresponds to the EU's GAMM framework aiming to overcome fragmentation and provide incentives for better cooperation with African regions.[1075] It aims for stability and better migration management by addressing the root causes of destabilization, forced displacement and irregular migration. It has been argued that although flexible in the allocation of funds and the adoption of a monitoring system, it lacks a designed focus, mainly because of the challenges that it faced, including, for example, the risk management framework and the ability to measure performance for accountability purposes. [1076] The EUTF for Africa is supported by a Research and Evidence Facility, underpinned by a strong monitoring and evaluation framework[1077] and pledged €4.6 billion.[1078] Results-Oriented Monitoring (ROM), is the external monitoring system of the European Commission which aims at enhancing the latter's accountability and management capacities with a strong focus on results, while it supports the EU Delegation and Headquarter services by providing an external opinion

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[1073] Clare Castillejo, *The European Union Trust Fund for Africa: a glimpse of the future for EU development Cooperation* (Bonn, 2016)

[1074] To Niger, 189.9 million euro including 50 million from Italy's trust fund, Sengel 161.8 million, Libya 158.2 million, Ethiopia 157.7.5 million, Mali 156.5 million; Luca Barana, 'The EU Trust Fund for Africa and the Perils of a Securitized Migration Policy', Institute of International Affairs, IAI Commentaries 17/31, December 2017, 3. Retrieved at: https://www.iai.it/sites/default/files/iaicom1731.pdf.

[1075] Castillejo (2016) (1073)

[1076] European Court of Auditors, (n 1063) 4,5,14,16.

[1077] European Commission, EU Emergency Trust Fund for Africa (n 1074).

[1078] ibid.

on project implementation.[1079] Importantly, the EUTFs set for specific emergency assistance to non-EU states need to meet certain conditions and respond to specific governance principles. Their legal basis allows for faster decision-making once part of the trust fund is managed outside the EU budget.[1080] Essentially, it constitutes a new instrument, different from the EU ordinary lines and decision-making. There is an Operational Committee tasked with the examination, approval and supervision of the implantation actions and a Trust Fund Manager, who acts as the Secretariat.[1081]

The Funds create this external mechanism able to deliver fast results in cases of humanitarian need, as emergency measures, with flexibility in new faced challenges. At the same time, the EU Member States have shifted their competences relating to the EU's external funding through the trust funds towards the EU, while the key actor in relation to the trust funds is the European Commission. Accordingly, the Member States' concerns on the non-EU countries' implementation of their international obligations in relation to return and readmission and combatting of smuggling, are then communicated to the European Commission for further action.

The EU's external action in the field of development could combine the international obligations of non-EU states as a form of conditionality measures in the EU's international agreements through (and dependent upon) funding. If emergency funding is based on conditions regarding human rights in addition to other international obligations, pressure is imposed on non-EU states' governments for compliance with the rule of law. This could impact irregular migration in the Mediterranean, or decrease the

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[1079] Reportedly, the implementing partners oversee the managing EU-funded projects and are involved in ROM reviews together with the EC Operational Manager. European Commission, International Cooperation and Development, building partnerships for change in developing countries. Retrieved at: https://ec.europa.eu/europeaid/results-oriented-monitoring_en

[1080] Hauck, Knoll, Herrero Cangas, (2015) (n 1062),7.

[1081] ibid.

need for irregular migration, if appropriate measures are adopted in relation to human rights, crime, and exploitation in the countries that the EU develops its external policy in terms of emergency funding and development. This could also invert the Member States and the EU's fixation (reflected in the actions of EBCG) over absolute control of their borders, which may be considered harmful for the rule of law.

However, there has been some criticism over the migration-development nexus regarding human rights commitments and guarantees from non-EU states, especially concerning activities relating to border controls.[1082] The European Parliament expressed its concerns that the trust funds require the cooperation of the EU with non-EU countries that commit systematic violations of fundamental rights.[1083] International organizations and civil society have criticized the EUTF as the result of Member States' pressure towards the EU and its leadership to demonstrate action to the complete failure of plans to share refugees across the European countries in a fair and balanced way.[1084] There has also been criticism over the migration-development nexus. The main argument is that development, especially in the African region, takes a long time and is based on different priorities than the issues concerning migration such as, primarily, return and readmission.[1085] It is argued that there is a division in the EU institutions between the Directorate-General for Migration and Home Affairs (DG HOME) and the Directorate General for International Cooperation and Development (DG DEVCO) in that the goals of the EUTF fall within official development assistance (ODA), reporting criteria

[1082] Castillejo (2016) (1073)24,25.
[1083] ibid.
[1084] ibid 6.
[1085] ibid 7.

of the Development Assistance Committee of the Organization for Economic Cooperation and Development (OECD).[1086]

Accordingly, it is pointed out that:

> DG HOME transposes its concern for EU internal security to the external dimension of migration and asylum policy. As such, DG HOME's outlook on migration tends to be short-term and focused on security threats inside the EU. This means that its actions aim, primarily, to restrict human mobility and stem irregular immigration.[1087]

Another element contributing to the criticism regarding the different priorities of the EU and its Member States, involves the discord between the African countries' opinions and the EU's priorities. During the Valetta Summit negotiations, the African leaders were more concerned about the avenues to the EU through legal and labour migration, whereas the EU's priorities involved strengthening return and readmission. Although the concerns and criticism expressed on the EUTFs, the latter's aims and priorities and, most importantly, their connection to development and migration, remain valid and need to be fairly addressed to open new lines of communication and negotiation. This connection provides opportunities to address global migration and development, assist countries to develop and meet their international obligations in terms of migration and respect for human rights. Further, it establishes a significant channel to implement states' human rights and other international obligations through conditionalities.

In this thesis it is argued that, as an international actor, it is the EU's responsibility to address the non-EU states' obligations of human rights, security, and the rule of law. The

[1086] ibid 7.
[1087] ibid.

focus of the Member States' conditionality is on return and readmission[1088] but more can be done on behalf of the EU in relation to its Member States' interests in terms of conditionality, on the one hand, and the implementation of the international obligations of non-EU states on the other. At the same time, international law obligations could be incorporated into the conditions for EU funding. This could mark an era of strong political negotiations on behalf of the EU at the international political scene, acting as an international actor who advances peace and security within and outside the polity. The impact of a stronger Union in this area could have a positive effect on irregular migration globally. The EU could call for more conditionality with regards to international human rights obligations particularly with reference to (i) the ECHR and EU Treaties, including the EU Charter, (ii) the implementation of the international maritime obligations, (ii) the implementation of the international framework on transnational crime. For the second and third suggestions, a precondition is that a State is a signatory to these international instruments. In relation to the first suggestion, the reasoning relies on the equivalent protection doctrine if we consider that the European legal context on asylum is equivalent to the international legal framework. It can be recalled that the impact of international law on the European legal order was explored in Study Two- Part 2 of this thesis.

The principle of conditionality could be seen as a tool in assisting non-EU states to face challenges concerning human rights, the rule of law, and development, on the one hand, and combatting crime, on the other. However, the security factor that predominates the EU's external actions remains crucial and, as such, an EU priority clearly addressed by its

[1088] *ibid*, 5.

Global Strategy for Foreign and Security Policy.[1089] In its external policy, the EU adopts a global strategy based on the pragmatism that none of its Member States has the strength or the resources to address the threats and challenges faced by the Union alone, including those of the migration crisis.[1090] The Union's interests in peace and security must be preserved based on the Union's principles as well as the principles of the UN.[1091] This global impact is better understood through the international relations theory of the English School, whereas the three stages of politics (see 2.3.4) are realized in terms of rights in the world order resembling the implementation of global rights.

In its Global Strategy on Foreign and Security Policy, the EU underlines that it will be guided by a strong sense of responsibility and act globally to address the root causes of conflict, poverty, and human rights as a responsible global stakeholder. The priorities of the external action pursued by the EU are (i) the Union's security, (ii) state and societal resilience to the East and South, i.e., within a strict and fair conditionality framework vital to enhance resilience, (iii) an integrated approach to conflicts with the EU acting at different levels of governance, as, for example, in conflicts such as Syria and Libya, on

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[1089] *"We live in times of existential crisis, within and beyond the European Union. Our Union is under threat. Our European project, which has brought unprecedented peace, prosperity and democracy, is being questioned. To the east, the European security order has been violated, while terrorism and violence plague North Africa and the Middle East, as well as Europe itself. Economic growth is yet to outpace demography in parts of Africa, security tensions in Asia are mounting, while climate change causes further disruption. Yet these are also times of extraordinary opportunity. Global growth, mobility, and technological progress – alongside our deepening partnerships – enable us to thrive and allow ever more people to escape poverty and live longer and freer lives. We will navigate this difficult, more connected, contested and complex world guided by our shared interests, principles and priorities. Grounded in the values enshrined in the Treaties and building on our many strengths and historic achievements, we will stand united in building a stronger Union, playing its collective role in the world*", European Union Global Strategy, 'Shared Vision, Common Action: A Stronger Europe, A Global Strategy for the European Union's Foreign and Security Policy', June 2016, p.7. Retrieved at: <http://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf>

[1090] ibid, Federica Mogherini, High Representative of the Union for Foreign Affairs and Security Policy, addressing the Global Strategy, Shared Vision, Common Action.

[1091] ibid.

local, national, regional and global dimensions, (iv) cooperative regional orders, and (v) global governance for the 21st century, with the EU committed to a global order based on international law.[1092]

The Global Compact on Migration also contains conditionalities on states in terms of return and readmission connected to the implementation of states' obligations in order to receive more funding. Although not explicitly stated in the Global Compact on Migration, the idea concerning conditionalities is linked to co-development through funding. Accordingly, the EU will strive for a strong UN multilateral-based order and develop coordinated responses with international and regional organizations. In its external action, the EU, through its funding, contributes in preserving the UN and its own principles and values.

During the migration crisis, irregular migration in the Mediterranean originated from outside the EU. The EU's external action requires the strengthening of cooperation with non-EU states, through international agreements. International agreements, either in the form of readmission agreements or agreements on border control and combatting smuggling, oblige non-EU countries to meet their international obligations in line with the UN instruments and international customary law. Development could be a positive connection to migration if conditionalities are imposed. The benefits of safe, regular, and orderly migration envisaged in the Global Compact on Migration would positively impact the reduction of irregular migration by land (outside the EU) and sea (in the Mediterranean). Conditionalities could also contribute positively to the EU's foreign and security policy.

[1092] ibid.

This Study has identified states' obligations in accordance with international maritime law and the transnational crime of smuggling, as well as their respective gaps in the context of irregular maritime migration in the Mediterranean. Further, through the migration and development nexus, this Study has also identified the significance of EU funding, especially through the EUTFs, as well as the EU's responsibility as an international actor to address human rights obligations through conditionalities.

5.2.4 Examining new Legal Pathways as a Long-term Solution for Irregular Maritime Migration

Migrants' journeys to the EU without the proper documentation required by the immigration policies of the Member States is not possible. The EU, for example, has imposed carrier sanctions for carrying any unauthorized persons.[1093] Carrier sanctions concern private carriers for transporting undocumented passengers. Baird has argued that the sanctions against carriers are a fundamental 'remote control' measure of states and one of the leading examples of the privatization of migration management.[1094] The EU legislation obliges carriers to check and ensure that passengers have the required documents to enter the territory of a state. Arguably, while checks are carried out in ports of departure, carrier sanctions reportedly remain a quintessential form of extraterritorial migration control.[1095]

Accordingly, carrier sanctions are one type of non-arrival policy related to visa regimes and pre-entry clearance, instead of non-entry policies like maritime interception. The measures have been criticized not only for externalizing migration but also for its

[1093] Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, [2001] *OJ L 187.*
[1094] Theodore Baird, 'Carrier sanctions in Europe: A comparison of trends in 10 countries' (2017) European Journal of Migration and Law, 19(3), 307-334.
[1095] ibid.

privatization due to the involvement of private carriers who sometimes impose stricter levels of screenings. [1096] Moreover, there has been criticism against the carrier sanctions for limiting asylum claims in the EU,[1097] which may lead to the border authorities requesting that a person be returned to the third country of origin or a transit country.[1098]

The UN Resettlement[1099] has been the main legal pathway to the EU for refugees but not for persons coming from vulnerable situations. Resettlement is based on the principle of subsidiarity supported by the doctrine of fair burden-sharing[1100] on a voluntary basis by the Member States. As an example of good practice, Germany has allowed Syrians to apply for admission from within Syria, rather than having to apply the out-of-country criterion of the 1951 Refugee Convention.[1101] UN resettlement programs continue to require refugees to be outside of their country in order to apply for protection.

Temporary protection is another form of regular pathway, which has not been used by the Member States since the temporary directive remained inactivated during the migration crisis in the EU. There is no indication that the Member States will choose to utilize the Temporary Protection Directive in a future crisis.[1102] Other legal pathways at times of crisis remain the usual regular pathways of migration, with the most common

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[1096] ibid.

[1097] Sylvie Da Lomba, *The right to seek refugee status in the European Union* (Intersentia 2004), 112.

[1098] Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, [2001] *OJ L 187.*

[1099] See Chapter I, The International Efforts in providing humanitarian protection to migratory movements in the 1951 Convention for Refugees.

[1100] The term 'burden' in this case is used since migration was realized as a burden during the migration crisis.

[1101] Susan Fratzke, 'Engaging communities in refugee protection, the potential of private sponsorship in Europe', Migration Policy Institute Europe, September 2017.

[1102] Also see 4.3.1.1, and 4.3.7.

being the application for employment visa, education, family reunification, or tourist visa. Other forms of protection that the Member States could adopt during a time of crisis are humanitarian visas, community or private sponsorship programs or other forms of EU-wide international protection permits. These are mainly realized within the context of refugee protection. No other form of protection is available for the wider category of vulnerable migrants.

The EU does not follow a humanitarian visa system that would allow asylum seekers to access a member state safely. The Temporary protection directive was not followed by the Member States during the EU migration crisis; however, some options of humanitarian visas were identified by the European Parliament: (i) the visa-waiver approach, (ii) the limited territorial visas for asylum-seeking purposes, and (iii) the EU-wide international protection application travel permits.[1103] In relation to the visa-waiver, the European Parliament acknowledges that such an approach would have the most benefits in terms of individual rights. The visa waiver approach requires a revision of the current visa list in Council Regulation 539/2001[1104] for purposes of declassification or suspension of visa requirements for nationals of refugee-producing countries.

The second option of humanitarian visas, the so-called limited territorial visas for asylum-seeking purposes, may be an option for Member States' consulates to issue humanitarian visas to allow entry into their territories. That option, along with the EU-

[1103] European Parliament, Wouter van Ballegooij, Cecilia Navarra, 'Humanitarian Visas. European Added Value Assessment accompanying the European Parliament's legislative own-initiative report' (Rapporteur: Juan Fernando Lopez Aguilar), European Parliamentary Research Service, PE621.823 October 2018.
[1104] Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, [2001] OJ L 81.

wide international protection application travel, would lead to increased management, coordination, and efficiency of the asylum system.

In terms of responsibility, if EASO becomes an Agency responsible for the management of international applications and decisions,[1105] then the responsibility would shift towards the EU. The EASO teams would coordinate the assessments within the European external action service, making it thus an EU competency, rather than what it is today, one of the Member States. Allowing such a possibility, touches upon the core of the EU values and EU treaties in terms of protection. However, humanitarian visas allowing people to enter the EU and lodge their asylum claim upon arrival are never delivered by Member States' embassies outside the EU.[1106]

The Member States did not widely use community sponsorship as a regular pathway to enter the EU, and only six Member States allowed this type of sponsorship, with each adopting a different approach.[1107] Community sponsorship relates to certain reception responsibilities and assistance after the arrival of community groups.[1108] Private sponsorship differs from community sponsorship because it enables private citizens to support individual arrivals and further supplements the government's efforts concerning reception and integration. The first program emerged in Canada in 1979, and in 2016 it inspired the UNHCR Global Refugee Sponsorship Initiative to adopt similar

[1105] See Section 4- Part 2, on International Protection within the EU – The Effect of International law in the EU legal order.
[1106] IOM, 'Four Decades of Cross-Mediterranean Undocumented Migration to Europe: A Review of the Evidence', ENG 0577, 2017, 19.
[1107] Germany, Ireland, Italy, Poland, Slovakia and the UK were among the countries which offered some form of community sponsorship. Criteria differed in each of the six countries. For example, Slovakia reached for victims of persecution due to religious reasons especially with a Christian background. European Commission, European Migration Network, Resettlement and Humanitarian Admission Programmes in Europe – what works? (November 2016), 7
[1108] Fratzke (2017) (n 1101).

schemes.[1109] Fratzke reports that private sponsorship in Canada had faster results in benefiting refugees in finding employment than the support provided to refugees by the government. [1110] However, this option was not developed in the Member States' policies.

The *Humanitarian Corridors* were used to measure entry and private sponsorship by the Italian Community of Sant' Egidio. They resulted from a memorandum of understanding between the Community of Sant' Egidio and the Federation of Evangelical churches in Italy.[1111] It is reported that after nearly four years, the *Humanitarian Corridors* have enabled more than 2,000 people to legally enter Italy and 350 more to enter France on a humanitarian visa.[1112]

Protection must always be available; however, irregular migration is a much more complex phenomenon that requires the EU's response to be fair and balanced in terms of human rights. The EU, as an international actor, should also have a fair response in accordance with its international obligations, on the one hand, and the obligations to its

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[1109] Germany has adopted a Humanitarian Admission Program since 2013 and reportedly more than 20.000 visas have been issued. European Parliament, Humanitarian Visas, (2018), *Supra*, p. 56.
[1110] Fratzke (2017) (n 1101) 5.
[1111] Sant'Edigio, Humanitarian Corridors. Retrieved at: <https://www.santegidio.org/pageID/30112/langID/en/Humanitarian-Corridors.html>
[1112] UNHCR, Matthew Mpoke Bigg, 'Lifesaving program offers safe path to Italy for Refugees', 18 September 2019. Retrieved at: <https://www.unhcr.org/news/stories/2019/9/5d78b7424/life-saving-programme-offers-safe-path-italy-refugees.html>. Also, it is reported that, the first MoU allowed the safe and legal entry in Italy of 1.011 Syrians refugees from Lebanon. Between 2016 and 2017, 1.011 people have been welcomed in 80 different cities spread out in 18 Italian regions. On 2017, the extension for further 1.000 beneficiaries in the years 2018-2019 has been approved. A third "Opening of Humanitarian Corridors" Protocol – signed on January 12th, 2017, by the Italian Episcopal Conference (through Italian Caritas and Migrantes Foundation) and the Community of Sant'Egidio – is currently in progress and assure the legal and safe entry in Italy for 500 Eritrean, South-Sudane and Somali refugees from Ethiopia. Also, two different Humanitarian Corridors Protocols have been signed for refugees from Lebanon to France and Belgium, for a total of 650 visas for humanitarian reasons. Retrieved at: https://www.humanitariancorridor.org/en/humanitarian-corridors/

Member States, on the other, in terms of safety and security, especially with the expansion of the EU agencies' competences. Expanding legal pathways would greatly contribute to refugees' right to protection in crisis situations, such as during war or persecution. Nevertheless, the causes of irregular migration should also address the migration's drivers that may differ from the concept of persecution as defined in the 1951 Refugee Convention. The EU would then be responsible to act according to its own Treaties and the EU Charter in its extraterritorial policies.

While new legal pathways could contribute to the safe arrival of refugees to the EU, the response to the irregular migrants' protection should focus on the root causes of migration and the assistance provided through the development schemes and conditionalities for human rights imposed on third countries. During crises, the EU, with its Agencies' assistance, should develop any such measures that would allow people to move away from crisis situations.

5.2.5 Concluding Remarks

The phenomenon of irregular maritime migration in the Mediterranean entails several international and European legal obligations for the actors involved. In this last Study, the external action of the EU as an actor in international law indicates that there is a shifting responsibility from the Member States to the EU triggered by the migration and refugee crisis and reflected in the externalization policies on migration.

This shift in responsibility is reflected in the EU policy on two merits: (i) the EU's cooperation with non-EU states in the field of migration which entails the security factor and states' international obligations, and (ii) the strengthened legal mandate surrounding the operation and conduct of the EBCG, as a Union body, for the protection of external borders. These two merits do not seem to coincide with the EU competences.

The externalization of migration policies by the EU has, in some instances, caused a spillover effect concerning the EU's responsibility within its own legal framework, while in others, the Member States' responsibility as derived from their international obligations (i.e., maritime law obligations).

The responsibility for the protection and non-criminalization of the irregular maritime migrants is established by the obligations placed in international instruments for states within both: (i) international maritime law, particularly UNCLOS, SOLAS and SAR, and (ii) the international framework on transnational crime, particularly the Smuggling Protocol.

The international framework on maritime laws is the applicable legal framework within the EU through which the Member States fulfil their international obligations at sea. These include the duty of the Member States to render assistance and rescue persons in distress within reasonable action further to their obligation to establish national coordination centres for search and rescue. The right of entry regarding a vessel in distress is not absolute for rescued vessels or dinghies for the purposes of irregular migration; however, the principle of *non-refoulement* binds all states and authorities who gain *de facto* control, either on the contiguous or the territorial sea zone.

In addition to the international customary law on *non-refoulement,* the core principles of the freedom of high seas apply for a state's conduct towards irregular maritime migrants, with the exception of the flag principle, since the vessels used for the unauthorized journeys are unregistered. Accordingly, the ECtHR in *Hirsi* ruled that Italy had violated Article 3 of the ECHR for returning an asylum applicant to Libya as it amounted to torture, cruel, inhuman or degrading treatment or punishment. The principle of *non-refoulement* corresponds to Article 3 of the ECHR since it has the same

meaning concerning the non-return of persons to a place where their life would be threatened or there is a risk of being subjected to torture.

International maritime law were not drafted to foresee irregular maritime migration as a phenomenon at times of crisis and that is probably why there is no reference to the 1951 Refugee Convention. Nevertheless, the Smuggling Protocol, in its *travaux preparatoires*, took note of the principle of *non-refoulement*. What becomes relevant is the Member States' restrictive policies on borders and the lack of legal pathways to protection for human rights purposes. As a result, during the migration crisis in the EU, the demand for smuggling had increased. In addition to the Member States' restrictive internal border policies that promoted entry and stay restrictions, the EU developed externalization policies regarding migration.

The uncontrolled flows of irregular maritime migration prompted the EU to provide aid outside its Member States' borders and develop partnership agreements with third states. This development enhanced the externalization policy on migration further, but, at the same time, it provided new insights that could benefit irregular migration. It also indicated a shifting responsibility within the same competence area encouraged by the policies developed within the CFSP and through the EBCG's strengthened mandate.

The legal personality of the EBCG derived from its new Regulation creates a gap regarding accountability that affects the responsibility for any violations of fundamental rights. However, the shifting responsibility is evident since the Member States' competences are restricted by the enhanced competences of the EBCG, aiming to implement the EU policy on external borders and facilitate the externalization of migration. It has been identified that the Member States' competences are limited to procedures regarding return decisions, border management and maritime border surveillance, while the EBCG's are strengthened and include the overall effective

functioning of external border controls with an increased level of discretion in decision-making about the rights of the irregular maritime migrants.

From a theoretical point of view, the EBCG actions, as a Union body, may lead to the responsibility of the border guards and standing corps who are under its command and not under the Member States'. Since, the EU has no responsibility in terms of accountability for the conduct of the EBCG, it is possible to envisage a new form of responsibility that could potentially reach the threshold of individual criminal responsibility. This could be possible because of (i) the shifting responsibility regarding irregular maritime migrants in the Mediterranean, (ii) the strengthened competences and the discretion in decision-making while the operations are unfolding, and (iii) the EU's developing policies regarding the externalization of migration. This argument is primarily identified though the concept of 'banal crimes', a non-legal term used in the literature in the context of crimes against humanity.

As we have seen, 'banal crimes' has been recently used in the literature to describe crimes whose gravity emanates from the fact that they cannot be seen from the perspective of their victims but are caused by the policies of organizations or entities and may collectively provide a good basis for considerations on responsibility. If banal crimes are acknowledged as a new form of crime, they may indicate individual criminal responsibility. It is my suggestion that the elements which should not be applied or interpreted in strict line with that of the ICC Rome Statute, if a new ad hoc Criminal tribunal, be established to investigate the fatalities in the Mediterranean during the years of the recent migration crisis.

With that suggestion in mind, this Study has identified that there are linkages between international criminal law and international refugee law, more precisely, with regards to

deportation and forcible transfer, for example in the context of war crimes or crimes against humanity.

In this Study the author has pointed out that the Communication reached the ICC's Prosecutor pursuant to Article 15 of the Rome Statute with evidence implicating the EU and Member States officials (prior to the new Regulation of the EBCG), indicating that a crime may have been committed. The Study has also identified that the intensity of the deaths in the Mediterranean may not require the proof that it was part of a plan or policy (a requirement under the ICC Rome Statute for crimes against humanity). Moreover, it has also been identified that there might be instances that the threshold of crimes against humanity could be met, for example if the legal criterion regarding the lack of genuine choice is satisfied.

The second part of this Study has demonstrated that the impact of EU policies developed since the European Council's Tampere conclusions in relation to the externalization policies of migration, could shift the responsibility from the Member States to the EU, especially at times of crisis. The competences of the Member States gradually transferred to the EU thus shifting from intergovernmentalism to *supranational*ism and towards an international level of competence and responsibility. This involved the first readmission agreement in 2004, followed by the Global Approach to Migration and Mobility and the engagement with African countries in the 2015 at the Valetta Summit leading to the development of the EU Trust Fund for stability whilst addressing the root causes of irregular migration and displaced persons in Africa.

The shift in responsibility towards the EU is further developed through the Multiannual Financial Framework of the EU, which relies on conditionality as a form of mechanism obliging non-EU states to comply with obligations regarding readmission and border

controls. This new alternative form of conditionality to the principle of the rule of law conditionality of the Member States' accession, further links migration to trade. However, external trade is within the EU's exclusive competence in accordance with Article 3 TFEU. Therefore, it is possible that the World Organization Dispute Settlement may gain perspective to the external migration competences of the EU, particularly with regards to readmission agreements or the EU Trust Fund commitments, upon the development of an equivalent mechanism of accountability for fundamental rights breaches. However, this Study has suggested that the migration-development nexus within the EU's external action provides a unique opportunity for the EU (i) to have a positive impact on non-EU states international obligations, that affect irregular migration, and (ii) to reduce irregular migration in the Mediterranean with the cooperation of non-EU states.

6. CONCLUSIONS

This thesis concludes that the EU has a legal responsibility deriving from its own legal order and its internal and external competence within the AFSJ, which is conferred to its Member States to introduce a new category of persons in vulnerable situations in accordance with its constitutional framework. The responsibility is mainly conferred to the Member States, which ought to act based on the principle of conferral, solidarity and fair burden-sharing in accordance with the legal obligations under the CEAS and the EU treaties, including the EU Charter. This responsibility is subject to the ECtHR *Bosphorus* presumption of equivalent protection.[1113] This decision continues to apply today (*Avotiņš).[1114]* The autonomy of the EU in accordance with Opinion 2/13[1115] (also *Matthews*),[1116] is relevant and *lex specialis*, *(*also *Yusuf v. Kadi*)[1117] as provided for in the ARIO, points towards the possible responsibility of the EU, as an international organization.

The extent of the EU's responsibility depends on how the competences of the EBCG as an EU agency are implemented due to the agency's conduct or effective control within the EU's management of migration framework. This framework has an internal and external dimension. At the same time, as the EU develops into an international actor, its human rights obligations increase in the context of its actions and decision-making

[1113] *BosphorusHavaYollariTurizmveTicaretAnonimŞirketi and Institut de formation en droits de l'homme du barreau de Paris (intervening) v Ireland*, European Commission on Human Rights (intervening) and ors (intervening), Merits, App No 45036/98, ECHR 2005-VI, [2005] ECHR 440, (2006) 42 EHRR 1, IHRL 3264 (ECHR 2005), 30th June 2005, European Court of Human Rights [ECHR]; Grand Chamber [ECHR].
[1114] ECtHR (Grand Chamber), judgment of 23 May 2016, *Avotiņš v, Latvia,* app. n. 17502/07.
[1115] European Union: Court of Justice of the European Union, "O*pinion 2/13 pursuant to Article 218(11) TFEU,* ECLI:EU:C:2014:2454, 18 December 2014.
[1116] ECtHR, Matthews V. The United Kingdom, Application no. 24833/94.
[1117] Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, T-306/01.

processes requiring it to abide by fundamental rights as protected in its Charter and its Treaties.

The rights of irregular maritime migrants are identified within a blurred framework of protection, with their vulnerabilities exacerbated due to several factors, including smuggling, the drivers of migration[1118] and the principle of *non-refoulement* as interpreted by the ECtHR and the CJEU. The phrase 'irregular migrants coming from vulnerable situations' was used by the IOM to describe the situational circumstances of irregular migration at the discussions leading to the GCM.[1119] Overall, their rights are upheld to the extent that international law influences the European legal order in terms of human rights and its policies, which concern the EU's management of migration through its agencies as well as the EU's relations with non-EU states in its external role as an international actor.

As we saw in the introduction there is no statutory definition for irregular maritime migrants, other than the categories of asylum seekers or refugees, therefore limiting the protection of people who do not satisfy the criteria of the refugee definition. Their right to protection is directly linked to the right of asylum. In this area, international law has an extensive impact on the EU treaties, specifically, Articles 4, 18 and 19 of the EU Charter, Articles 67, 78 and 79 of the TFEU, and in the legal acts of the CEAS (i.e., the Qualification Directive and its recast).[1120] Consequently, irregular maritime migrants, as

[1118] United Nations, Global Compact on Safe, Orderly and Regular Migration, (11 January 2019) UN Doc A/RES/73/195).
[1119] IOM, Global Compact Thematic Paper, '*Protection of the Human Rights and Fundamental Freedoms of Migrants and the Specific Needs of Migrants in Vulnerable Situations',* See 3.2.4.
[1120] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L 304/12.

a category, are not recognised by the scope of protection of the 1951 Refugee Convention unless they collectively or individually satisfy the criteria for refugee or subsidiary protection definition as provided by the Refugee Convention and the Qualification's Directive. As many will fail to satisfy these criteria, the refugee definition proves insufficient to include the vulnerabilities of irregular maritime migrants affected by new drivers of migration (identified in the international dialogues leading to the Global Compact on Migration and of the New York Declaration on Refugees and Migrants). This thesis puts forward that the international obligation to justice, which prompted the institution of asylum, inherently includes vulnerabilities at its core. This observation is evident in the first two refugee conventions, (in 1933 and 1938). Despite that, in the 1951 Refugee Convention, two prevailing elements indirectly lead to increased irregular maritime crossings. These elements involved the 'out of the country' criterion and the lack of definition for the term 'persecution'. Nevertheless, the irregular maritime migration in the Mediterranean involves other situational characteristics that trigger the responsibility to protect individuals in need. These concern the vulnerabilities that arise from the drivers of migration, which may be caused at the country of origin or as a result of the irregular journey. The high number of fatalities in the Mediterranean indicates the increased vulnerabilities at sea, especially during the irregular journeys often involving human smuggling.

Council Directive 2004/83/EC, Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of '3 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU*; Also, see 4.3.1.2.*

This thesis concludes that in order to widen the right to protection to irregular maritime migrants in the Mediterranean, and elsewhere when the same characteristics apply, the theory of vulnerability developed by Fineman and embraced by Baumgärtel, should be utilized as a theory which, although has a universal dimension, can be applied based on individual circumastances. In the case of irregular migrants at sea, an examination of their individual circumstances can be assessed once safely on land. Therefore, this thesis concludes that irregular maritime migrants should be acknowledged as a vulnerable category.

Vulnerability arising in the context of irregular migration that is connected to new drivers of migration (i.e., events that could affect any one of us by virtue of our humanity) exemplifies how the concept/theory of vulnerability could be used in a legal context in an effort to prioritise respect for the human person and the human condition.

As Feinman put it, 'vulnerability should be understood as arising from our embodiment, which carries the possibility of harm, injury or misfortune from catastrophically devastating events, whether intentional or accidental or otherwise, and as of natural disasters beyond our individual control to prevent'. Vulnerability in the context of irregular migration goes hand in hand with legal principles and rights, such as non-refoulement, the right to leave any country (Article 13 UDHR) and seek asylum (Article 14 UDHR).

The approach taken in this thesis leaves considerable leeway to the European Courts to apply international customary law[1121] into the EU legal order, and to identify a wider

[1121] ICJ case of Chagos Archipelago, non-refoulement, See 3.1.5.

protection margin for irregular maritime migrants that will account for their vulnerabilities, building upon existing ruling, such as *M.S.S. v Belgium and Greece* and *Hirsi*.[1122] This conclusion aligns with the EU Charter, especially with the right to dignity, the right to asylum and the prohibition of refoulement. The Charter enhances the responsibility of the Member States but, most importantly, the Frontex's responsibility as its madate has strengthened its competences within the AFSJ (Regulation (EU) 2019/1896), mostly those concerning border controls within the EU migration management system. We have seen that there is a greater harmonisation and understanding between the EU and international levels, including the relationship between the two courts, CJEU and ECtHRbetween the EU Charter and the ECHR, and between the court rulings of CJEU and ECtHR (Articles 52 and 53 EU Charter).

This research has shown that the EU's responsibility is limited in a shared competence area but that through the spillover of competences towards the enhanced role of the EU agencies in managing migration at the borders, inevitably has, to some extent, shifted the responsibility based on their conduct and effective control. This is mostly evident in the case of Frontex, which has gained almost exclusive competences in the enforcement of its Operational Plans, rapid interventions, returns at the borders at land or at sea. These competences come as a result of the implementation of the EU management policies on migration. While the standing corps and border guards will now be part of the Agency's force, the responsibility for their actions is not to be shared with that of the Member States from which they were previously deployed. However, this research has concluded that while the shift in responsibility towards EBCG is, theoretically, established, there is no legal mechanism which foresees the responsibility

[1122] *Hirsi Jamaa and Others v. Italy* (n 1026).

of its personnel engaged in the operations, particularly in the form of an accountability mechanism for their wrongful actions. Research has shown that Frontex has engaged in breaches of fundamental rights in the past and there is a possibility that this could be repeated in the future.

In addition to Fink's work on the two responsibility regimes (legality review under Article 263 and 265 TFEU and the action and compensation for damages under Article 340 TFEU 41 (3) EU Charter), this research concludes that the EBCG owes increased accountability and liability arising from its extended tasks and competence, which should be balanced with strengthened fundamental rights safeguards, particularly in the exercise of executive powers.

A balanced assessment of the analysis concerning the role of the EBCG would suggest that the latter has a responsibility to draft an Operational Plan that explicitly states the permissible conduct in line with fundamental rights, therefore raising its accountability.

Based on the evidence and considerations explored regarding the fatalities in the Mediterranean, the thesis concludes that we need to acknowledge a new type of responsibility which would play a significant role in reducing the fatalities of irregular maritime irregular migrants at sea. The argument in favour of this new form of responsibility relies upon the contribution of Kalpouzos and Mann, who employ the (academic and not legal) term 'banal crimes' in the context of the reception conditions of asylum seekers in Greece. Banal crimes may trigger the responsibility of international organizations and, more precisely, that of the EU's for systematic or 'disguised' policies, developed and utilized through it's agencies, that may result in a high number of fatalities.

‘Banal crimes’ involve the element of vulnerability in relation to asylum seekers, as identified by the authors. This research has applied the theory of this new ‘crime’ in the case of irregular maritime migrants associated with the vulnerabilities they experience, and the EBCG’s actions as a result of the EU border management policies.

The EBCG’s conduct and the Member States’ response could lead to breaches of fundamental rights, which they are called upon to protect. Such breaches could arise in the context of a violation of the non-refoulement principle and pushbacks.

This research has further demonstrated that a connection between international criminal law and international refugee law exists. This is supported by the Communication to the International Criminal Court for the implication of the EU and Member States for crimes against humanity, even though, to this day, there is no relevant judgement. The thesis has identified another connection: that both refugees and irregular migrants in vulnerable situations could be victims of regimes responsible for international crimes. This research has identified that the elements of international criminal law that could trigger responsibility in the area of asylum and migration concern forced displacement, deportation, forcible transfer, and persecution.[1123] As we have seen, international criminal law rulings have identified the connection between international refugee law and international criminal law.[1124] Even if international crimes cannot be established, considering that irregular migration does not activate Article 7(1) of the Rome Statute provisions on the wider and systematic attack, international criminal law still raises serious concerns for the individual responsibility of the European

[1123] See 5.1.8.
[1124] Ibid

border guards and standing corps for their conduct in the Mediterranean while implementing the EU Commission's policies.

Analysis of the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the international maritime laws, confirmed the extraterritorial application of the principle *of non-refoulement* (*Hirsi*) but has produced no results regarding the EU's responsibility besides an obligation to produce guidelines to the Member States for their correct implementation in line with their international obligations as signatory parties of the Smuggling Protocol and of international maritime law, further to their obligations towards the respect of fundamental rights in the European context (ECHR, EU Charter ,EU Treaties). However, the research has proven beneficial in comprehending the transnational crime of smuggling and how it has developed within the migration sphere. It has also contributed to understanding international maritime laws in the context of migration and the actor's obligations for search, rescue, disembarkation and the connection to *non-refoulement*, and other human rights.

This research has identified that since Tampere, the externalization of migration policies has been developing, especially during times of crisis, enhancing the role of the EU agencies, especially at the external borders, and strengthening the EU's role as an international actor. It came as a result of the latest amendment of the EU Treaties, i.e., post-Lisbon and the EU's legal personality (Article 47 TEU). The externalization of migration policies is realized by the EU's international agreements with non-EU states and the EU funding to non-EU countries for purposes related to irregular migration and transnational crime through its agencies, which gave rise to further obligations for the EU as an international actor. The analysis on readmission agreements and the multiple EU trust funds as well as the MFF, which includes the financing of the EBCG, concludes

that the EU has a unique opportunity, to positively impact irregular maritime migration, and uphold its values on human dignity, freedom, democracy, equality, rule of law, and human rights. This research suggests that the nexus between migration and trade would perplex responsibility because it points to an exclusive rather than shared competence, in contrast with the nexus between migration and development. Therefore, the EU, as an international actor in its external competence, can have an impact when the policies on the external dimension of migration, materialised through international agreements with non-EU States, are linked to development through conditionalities with respect to human rights and the MFF. This research supports that the rule of law conditionality principle, which is linked to human rights, is reflected in the MFF of the EU and aims to externalize migration through the adoption of agreements with third states.[1125] Within the new MFF of 2021–2026, the EU aims to fight smuggling through border control with increasing allocations to capacity-building.[1126] The conditionality principle is a powerful tool in the hands of the EU, through which it could promote respect for fundamental values as an essential precondition for respecting the rule of law. Although this research identifies that responsibility has shifted to a great extent, it also pinpoints possible policy-making that would have an impact on the reduction of fatalities of irregular maritime migrants. Therefore, it suggests that the EU's responsibility should be reflected through a conditionality to oblige non-EU states to comply with the obligations regarding readmission and border controls in accordance with international human rights and the EU Charter in its external action and in the field of migration and asylum.

[1125] See 5.2.2.

[1126] ibid.

This thesis concludes that the conditionality principle, as a form of mechanism within the migration and development nexus, can positively impact non-EU states' international obligations eventually reducing irregular migration and fatalities in the Mediterranean. The EU, as an international actor could, in this way, contribute to the implementation of the GCM while promoting the rights enshrined in its own order and the EU Charter, in its cooperation with non-EU states in the AFSJ. To this end, it is concluded that the EU should establish an effective monitoring mechanism within its external competences, in accordance with its treaties. Lastly, the EU's responsibility for irregular maritime migrants in the Mediterranean is shifting to the extent that international law continues to impact its own order and the EU as an international actor. Steps should be taken by the EU to address the vulnerabilities of irregular maritime migrants within the right to asylum and as a distinct category of migrants coming from vulnerable situations. The EU's external action must be better addressed within the migration and development nexus. This provides an opportunity within the EU migration management strategies to be further developed by imposing human rights conditionalities in its international agreements with non-EU states for funding. Taking such steps, as per legal responsibility, the EU would reduce the vulnerabilities of irregular maritime migrants and the high number of fatalities witnessed during 2015–2020.

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