The Mediterannean Migration Crisis:
A Clash of the Titans' Obligations?

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By the end of 2015, record numbers of irregular migrants will have crossed the Mediterranean to reach Europe. The phenomenon has become a maritime refugee crisis of historic proportions, constituting the largest wave of mass migration since World War II.[1] As of late October 2015, some 670,000 people are estimated to have crossed the Mediterranean into Europe.[2] Over 3,100 have died or disappeared in the process.[3] Consequently, today the Mediterranean represents the most dangerous peacetime frontier in the world.[4]

Who are the migrants? In 2015, over 80 percent come from the world's top 10 refugee-producing countries, including Syria, Afghanistan, Eritrea, and Iraq.[5] While all come to Europe to seek a new life, only those who qualify for refugee status can remain in Europe.[6] The rest will be returned to their home countries. But the sought-after asylum protection afforded to refugees only materializes long after a migrant's journey has ended and can often take months, or even years, to finalize. In the interim, many migrants languish in detention or in legal limbo awaiting long-delayed legal proceedings before their status can be regularized in a manner that affords them stable housing and employment opportunities.

But many other human rights are applicable the moment a migrant comes

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under the control or jurisdiction of an EU member state.[7] Such rights can include: non-refoulement protection, which prohibits the return of a person to a serious risk of harm; a prohibition against mass expulsions; a ban on torture; and a right to make a claim for international protection, among others.[8] Moreover, many of these rights extend to migrants crossing into European territory, including by sea.[9] One prominent source of rights with such effect is the European Convention on Human Rights (ECHR), whose legal obligations extend to all EU member states.[10] The Convention allows individual applicants to make claims regarding their rights before the European Court of Human Rights in Strasbourg, whose judgments bind the EU member state concerned.[11] Still other instruments govern the age-old requirement to rescue persons in distress at sea.[12]

These varied protection obligations can limit the otherwise broad sovereign discretion that states enjoy, particularly at sea. Under the law of the sea regime, states may adopt laws and regulations—and exert the necessary control—to prevent the infringement of their immigration laws in various maritime zones.[13] Accordingly, the maritime context is fraught with conflict between states' power to control immigration and their competing obligations to protect human rights. This paper examines the European response, through November 2015, to the 2015 Mediterranean migration crisis through the lens of these conflicting rights and obligations. Specifically, it highlights the extent to which EU migration control policies significantly favor an expansive exercise of states' border control powers to the detriment of its human rights obligations to migrants crossing frontiers at sea.

Although this paper is more directly concerned with the immediate rights that attach during maritime transit, the current migrant profile suggests that a large proportion of those making the sea crossing presumptively qualify for refugee status.[14] This background demonstrates a largely lawful basis for the influx and contradicts suggestions that criminal elements—including smugglers, human traffickers, and terrorists—are well represented.[15]

The number of migrants arriving by sea in Europe has grown considerably in recent years. Between 2010 and 2013, the numbers ranged from a low of 9,700 to a peak of 70,000.[16] The figures skyrocketed in 2014 when nearly 220,000 migrants crossed the Mediterranean, but this figure was surpassed in the first seven months of 2015.[17] Several factors contributed to this spike, including the Arab Spring movements in North Africa, the collapse of Libya, insurgency and civil war in Syria, and systematic security issues in the Horn of Africa.

The European Union and its member states have organized a range of responses to manage Mediterranean border flows in recent years, from interceptions and summary returns to rescue operations. In 2009, in an effort to stanch the flow of migrants from that state, Italy initiated a series of controversial pushback operations through a bilateral arrangement with Libya.[18] Two years later, Italy intercepted and deported Tunisians in the wake of the Tunisian Revolution.[19] Following a tragic 2013 capsizing causing the deaths of more than 300 migrants, Italy organized a robust and well-funded naval search-and-rescue program, Mare Nostrum ("our sea"). Funded to the tune of $12 million per month, the program is estimated to have saved 130,000 migrants during its operation.[20] But political will eventually faded when neighboring European states refused to contribute, and some criticized it as creating a "pull factor" for migrants eager to reach Europe.[21] The following year Mare Nostrum was replaced by the EU-led Operation Triton with one-third the budget, reduced operational scope, and a mandate premised on border control and surveillance rather than search-and-rescue.[22]

That operation and others are managed by Frontex, the European agency responsible for the coordination of Europe's external border management with land, sea, and air operations.[23] In addition to its sea-based joint operations with Italy acting as host member state, Frontex coordinates other maritime operations hosted by other EU member states—notably Greece and Spain.[24] The joint operation with Greece, Operation Poseidon Sea, involves the participation of 23 member states in the eastern Mediterranean to tackle migration flows from Turkey across the Aegean Sea. This operation has gained more attention than Triton in recent months, since flows to Greece now outnumber those to Italy.[25] Such operations relate to surveillance of Europe's external border at sea and may involve search-and-rescue but are predominantly geared towards the detection of irregular migrants and preventing their entry into Europe. Moreover, Frontex is careful to limit its mandate to that of a coordinating body tasked with "operational cooperation between member States in the field of management of its external borders."[26] Accordingly, it stresses that international responsibility for any Frontex operations lies with the member states involved.[27] The most recent Frontex Regulation reflects as much, setting out legal responsibilities for participating member states rather than for the agency itself.

This article examines the emerging 2015 cross-Mediterranean European migration crisis by contrasting states' legal protection obligations against their broad immigration control powers. The following section examines a selection of key protection obligations in the narrow context of a recent ruling by the European Court on Human Rights, *Hirsi Jamaa*.[28] The human rights obligations this judgment imposed are threatened by migration enforcement powers embodied in a recent Frontex Regulation. This second section also examines the tension between these competing rights and duties to highlight the absence of a harmonized rights scheme in the context of international migration in Europe. A third section discusses the current European response to the migration crisis, focusing on recent maritime initiatives. The fourth and fifth sections examine a recent Law of the Sea arbitral award for its significance in contributing to the long-term harmonization of the competing rights and obligations existing at sea. The final part concludes by suggesting that the European Court of Human Rights is hampered by an inability to effectively regulate Convention rights compliance at sea. It discusses the arbitral award's more promising method of balancing human rights and state migration control powers in the maritime context. In doing so, this article proposes that the award offers not only a future alternative means of enforcing maritime migrant rights, but also provides a legal model for construing international instruments in a manner capable of balancing and weighing competing international rights.

The Legal Backdrop: Constraints on State Conduct at Sea

Despite the range of policy responses to the migrant influx, European states have suffered significant legal setbacks to their migration control activities in recent years. Some have been imposed by the ECHR, which is binding throughout all EU states and is interpreted and enforced by the European Court of Human Rights in Strasbourg. The Court is widely lauded as the most successful human rights tribunal in the world, not only because its judgments are legally binding on the affected state, but also because it handles claims by individual applicants alleging violations by a member state.[29] In early 2012, the European Court of Human Rights in *Hirsi Jamaa* issued an expansive judgment against Italy for its 2009 high seas interception of several Eritrean and Somali migrants and their immediate return by the Italian Navy to Libyan shores, pursuant to a bilateral agreement.[30] The Court found that the Italian government's conduct had violated several provisions of the ECHR, including the prohibition of torture and inhuman and degrading treatment; the ban on the collective expulsions of aliens; and the right to be afforded an effective remedy under national law. The judgment has significant relevance to the maritime migration control strategies under discussion today because of the key restrictions it implies for EU member state conduct, both individually and in the context of Frontex operations.[31]

A second legal setback to European migration control relates directly to Frontex. In September 2012, the European Court of Justice annulled the implementing rules for Frontex after finding that the Regulation was adopted in violation of the necessary procedures.[32] The annulled rules remained in effect until their replacement last year by a new Frontex Regulation. The new 2014 Regulation outlines the agency's authority to stop, board, search, seize, and conduct undocumented migrant vessels in the context of preventing illegal migration to Europe from its Mediterranean border.[33] It also reflects many of the new legal constraints imposed by the *Hirsi Jamaa* judgment. This section will canvass the legal developments resulting from that case and examine the extent of the 2014 Frontex Regulation's responsiveness to these changes.

Serious Harm from Third Country Disembarkations

In *Hirsi Jamaa*, the European Court of Human Rights found that Italy's transfer of migrants to Libya resulted in their inhuman and degrading treatment in violation of Article 3 of the ECHR.[34] It did so acknowledging that parties to the Convention have a right to control immigration at their borders.[35] The Court found that the applicants were not required to prove individual instances of actual harm suffered in Libya. Rather, migrants need only show prospectively that substantial grounds existed to indicate that, if returned, they would face a real risk of inhuman or degrading treatment in Libya.[36] To determine the risk of such treatment, the Court required examination of both the country's general situation and an applicant's specific circumstances. In this case, it found that reports from independent international human rights organizations offered substantial de facto evidence of inhuman and degrading treatment sufficient to outweigh the existence of Libya's domestic laws, human rights treaty ratifications, and undertakings to respect human rights in a bilateral agreement.[37] In so doing, the Court emphasized that Italy could not selectively rely on favorable evidence of Libyan country conditions while ignoring significant contradictory, negative evidence suggestive of widespread abuses.[38]

Serious Harm from Indirect Refoulement

The Court also found a second Article 3 violation because Italy's transfer of migrants to Libya exposed them to a risk of being returned to their home states of Eritrea and Ethiopia, thereby amounting to indirect refoulement. The Court found that the migrants were not required to show actual harm stemming from return to their home state. The proper analysis was prospective and required Italy to determine whether sufficient guarantees existed against the arbitrary return of migrants to their respective countries of origin.[39] The Court noted that such an obligation is "all the more important" when the third country is not party to the Convention.[40]

In its examination, the Court recognized the situations in Somalia and Eritrea as presumptively giving rise to Article 3 violations for repatriated migrants.[41] It found that Italy had no reasonable expectation that Libya could provide sufficient guarantees against migrant repatriations, given Libya's failure to ratify the 1951 Refugee Convention, the lack of Libyan asylum procedures, and Libya's refusal to recognize refugee status, despite the United Nations Refugee Agency's (UNHCR) presence in Tripoli.[42] On this basis, the Court concluded that the "Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned…"[43] Significantly, despite the UNHCR presence in the country, the absence of any formal Libyan legal protections was pivotal to the Court's finding that Italy had no reasonable expectation of sufficient guarantees.

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The Collective Expulsion of Aliens

One of the more dramatic findings in the *Hirsi Jamaa* judgment was that Italy's conduct amounted to an illegal collective expulsion of aliens.[44] Prior to this case, the provision banning collective expulsions was understood to have effect only within a state's own territory (including its territorial sea) or at its border. Here, however, Italy's conduct took place on the high seas, well beyond its territory.

This was the first time the Court had occasion to consider whether the ban applied to a high seas seizure and transfer of aliens to a third state.[45] Finding the language and drafting history of the provision inconclusive, the Court examined its purpose in light of current conditions.[46] It noted migrants' "increasing use… of the sea" and states' reliance on high seas interceptions as a migration control tool to conclude that the provision did, in fact, apply to the high seas context.[47] The Court was particularly influenced by the fact that a contrary interpretation would exclude "a significant component of contemporary migratory patterns" and render the ban ineffective in practice.[48]

To determine whether a collective expulsion occurred, the Court evaluated whether a state had conducted an individualized examination of each migrant's personal circumstances prior to his expulsion. The Court found that Italy had failed to conduct any identification procedure or individualized assessments and that its on-board personnel lacked interpreters, legal advisors, or the training necessary to conduct individual interviews. Thus, it found that Italy's conduct amounted to an illegal collective expulsion.[49] In September 2015, the Court found that even summary individual identifications and fingerprinting were insufficient to prevent such a finding of illegal collective expulsion.[50]

Effective Remedy Under National Law

A final aspect of the *Hirsi Jamaa* case involved Italy's failure to provide an effective remedy under national law in violation of Article 13 of the Convention.[51] Under the provision, a remedy must be effective both in practical and legal terms.[52] Furthermore, a national authority, usually a court, must be responsible for conducting such remedies.[53] For the purposes of an Article 3 violation, an effective remedy requires independent and rigorous scrutiny of the complaint.[54] In order for a mass expulsion claim to have an effective remedy, the expulsion measure itself must be capable of being suspended, given its potential for irreversible outcomes such as torture or death. The Court extended this suspensive effect requirement to Article 3 claims involving removal of an alien to a place involving risk of serious harm.[55]

Applying these rules, the Court found that Italy's conduct failed to constitute an effective remedy for the Article 3 and collective expulsion claims.[56] It cited not only the failure to conduct individualized migrant assessments, but also the ship's inability to effectuate such screenings given the lack of interpreters and legal advisors on board. The Court also noted the deliberate concealment of information regarding migrants' destinations and the willingness to use any means to challenge their return. It emphasized that an effective remedy under either claim requires a state party to guarantee "the right to obtain sufficient information to enable [migrants] to gain effective access to the relevant procedures and to substantiate their complaints."[57] It also emphasized that even if applicants had been provided an opportunity to appeal to the Italian criminal courts prior to Libyan disembarkation, it would not qualify as an effective remedy because an on-board appeal lacks suspensive effect.[58] The Court recently reiterated its position on suspensive effect by finding that automatic deportation decrees capable of immediate execution violate Article 13 in the mass-expulsion context.[59]

Frontex Regulations: Rights versus Powers

In many ways, the Frontex Regulation accommodates broad aspects of the

Hirsi Jamaa judgment. Yet on a more detailed level, it omits critical procedural aspects essential to the relevant Convention rights. Additionally, the structure of the Regulation itself compartmentalizes migrant protection obligations as general rules in a provision isolated from the specific rules authorizing states' interception practices, pushbacks, and third-country migrant transfers. Each of these issues is examined in turn.

Inadequate Regulation of Human Rights

In accordance with Article 3 of the Convention, the 2014 Frontex Regulation forbids the transfer of a person to a place where he faces a serious risk of torture, inhuman or degrading treatment, or persecution.[60] The Regulation requires that any state transferring migrants to another state must consider the general situation in the third country based on a range of sources. It forbids disembarkation where states "are aware or ought to be aware" that the third state engages in practices amounting to serious harm.[61]

Regarding the risk of serious harm from indirect refoulement, the Regulation forbids the migrant transfers to a state from which there is a "serious risk of an expulsion, removal or extradition to another country" in contravention of the principle of non-refoulement.[62] But this test misses the mark by setting an artificially high standard of "serious risk" of repatriation before prohibiting such a transfer. In contrast, the judgment requires a state to have a reasonable expectation of sufficient guarantees against repatriation, without which a migrant may not be transferred. Furthermore, the Regulation ignores states' procedural obligation to determine whether the transfer state itself provides sufficient domestic legal guarantees against arbitrary indirect refoulement; merely hosting UNHCR officials is insufficient.

As for mass expulsion, the Regulation only partially accommodates the judgment's safeguards. Prior to disembarking migrants in a third state, the regulations require a state to conduct identification and individualized assessments of intercepted migrants' protection needs.[63] It also requires that onboard staff undergo specialized fundamental rights training.[64] But the Regulation alludes to an operational plan governing the availability of shore-based medical staff, interpreters, legal advisors, and others "when necessary."[65] This provision for shore-based personnel falls far short of the Court's consideration that onboard interpreters and legal advisors constitute a relevant part of the determination of sufficient guarantees to examine a migrant's individual circumstances. In effect, the Regulation fails to require the onboard staffing capacity necessary to effectuate the screenings to prevent mass expulsions.

Nor does the Frontex Regulation entirely accommodate the Court's effective remedy requirements. Participating Frontex states must—as part of the individualized identification and assessments—provide migrants with information concerning both their impending destination and concerning their opportunity to allege a non-refoulement violation.[66] But the Regulation only requires states to provide such information in a way that migrants understand "or may reasonably be presumed to understand."[67] Such *reasonably presumed* understanding was not part of the Court's calculus and contradicts the stringent requirements for a remedy that is both practically and legally effective. The Regulation's requirement of a migrant's mere *presumed* understanding does not constitute an effective remedy because where mistaken, it is both practically and legally ineffective.

Structural Ambiguities

In addition to the incomplete procedural protections, the Frontex Regulation is also organizationally fragmented because it offers no practical guidance as to how or when state interception, pushback, and third-state transfer powers are limited by intervening obligations to protect migrant rights. The Regulation treats state protection obligations separately, and in isolation, from specific state immigration powers at sea. As such, it obscures the interaction and balance between states' rights and limiting duties. The result is a document that fails to provide a workable framework for the interplay between state protection obligations and maritime interception rights.

Regulation provisions governing state authority for migrant vessel detection, interception, and disembarkation are organized under a separate chapter titled Specific Rules. Those pertaining to migrant rights are contained separately under a chapter called General Rules. Broadly, the Specific Rules authorize a state to request information on and even stop, board, and search a vessel suspected of smuggling migrants when that vessel is located either in a state's territorial sea (within 12 miles of its coast), contiguous zone (from the outer edge of the territorial sea up to 24 nautical miles), or the high seas.[68] On the high seas, however, a state may only do so with permission from a vessel's registered state.[69]

When migrant smuggling suspicions are confirmed, a state has several options. It may seize the vessel or order it to change course away from the territorial sea or contiguous zone of the affected member state.[70] This latter option allows pushbacks from the territorial sea or the contiguous zone and effectively allows a state to tow a migrant vessel back out onto the high seas.[71] As a third option, a state may deliver migrants directly to the territory of a member state—or for the high seas, to the host member state or a neighboring participating member state.[72] A last option exists for unregistered vessels in the contiguous zone and high seas and for high seas vessels whose state of registration has so authorized: a state may transfer such migrants to a third country.[73] If disembarkation in the third country proves impossible, migrants must be disembarked on the host member's state territory. Finally, when migrants are rescued rather than intercepted, they must be disembarked at a place of safety determined by a rescue coordination center independent from Frontex.[74]

Within the provisions authorizing these expansive interception powers, not a single mention is made of the wide-ranging non-refoulement obligations accommodated in the general rules of the Regulation. Nor is any curtailment of state interception powers mentioned for purposes of guaranteeing fundamental individual rights. At a more practical level, the interception and disembarkation rules remain utterly devoid of any procedural requirements necessary to secure fundamental rights. This failure to cross-reference the Convention safeguards is surprising, particularly because other international legal obligations receive explicit treatment. State interception powers on the high seas, for example, are curtailed by aspects of the Protocol against the Smuggling of Migrants and by general rules of international law governing interference with vessels on the high seas.[75] So too are state disembarkation powers in the context of the international rescue regime.[76]

Additionally, the Regulation's fundamental rights protections are hampered by the compartmentalization of all operational details in a separate, publicly unavailable operational plan to which this author was refused access on security grounds.[77] Each border surveillance operation, including sea patrols, requires a separate operational plan.[78] For sea operations, an operational plan "should include…references to Union and international law regarding interception, rescue at sea and disembarkation," and "should be established in accordance with [this Regulation's provisions] governing interception, rescue at sea and disembarkation…"[79] In contrast, however, the operational plan "should include procedures ensuring" that various international protection needs are met.[80] Accordingly, while the operational plans detailing interception and disembarkation powers must reference relevant law and accord with Regulation provisions, the same is not required for operational plan provisions on international protection. Finally, the lack of public access to such operational plans makes independent scrutiny of sea patrol compliance difficult, if not impossible.

The principal deficiency of the Frontex Regulation is the tension between, on the one hand, human rights limitations on state conduct, and on the other, sovereign migration control powers. As a result, the Frontex Regulation fails to create a coherent, integrated scheme capable of providing practical guidance to those implementing interceptions at sea. Its inability to harmonize these competing rights and duties in a comprehensive manner will almost certainly result in continued human rights breaches over the course of the current migration crisis.

EU Response to the 2015 Crisis

In April 2015, two devastating events catalyzed a swift European response to the Mediterranean crisis. On 15 April, some 400 migrants drowned when their vessel capsized.[81] Five days later, another 700 individuals perished in a second capsizing when a vessel overturned in Libyan waters overnight.[82] Within days, EU leaders called an emergency summit of the European Council, the highest level of political cooperation in Europe. What resulted were a series of commitments to strengthen the European response to the migration crisis. The largest initiatives included tripling the budgets for the Triton and Poseidon Sea operations coordinated by Frontex; launching a maritime military operation to "disrupt criminal smuggling networks" and destroy smugglers' vessels and creating new relocation and resettlement programs to reduce the strain on Greece and Italy's identification, reception, and processing resources.[83] A new migration agenda detailed these plans, which also identified intermediate and long-term migration policies.[84]

As initially laid out, the response drew both praise and criticism. Merchant shipping organizations expressed support for expanded maritime operations, anticipating a reduced strain on merchant ships' rescue duty.[85] However, commentators and human rights advocates criticized the Frontex and anti-smuggling operations for focusing more on militarized border control strategies than on the humanitarian obligations to rescue those in distress and to accurately identify those eligible for international protection.[86]

Frontex Sea Patrols

Operation Triton was expanded both financially and geographically and now receives support from 26 member states that contribute equipment and/or personnel.[87] In addition to tripling its budget to 38 million euro, its geographic scope is now on par with that of its predecessor, the successful Mare Nostrum rescue operation.[88] Operation Poseidon Sea in Greece now has a budget of 18 million euro.[89] And although both Frontex operations engage in maritime rescue, their principal mandate remains migration surveillance and border enforcement, not rescue. Nonetheless, between June and early August 2015, the expanded operations had already rescued over 50,000 people.[90] In 2016, the Poseidon and Triton budgets will receive an additional 45 million euro.[91]

Little information is available concerning the important details of these expanded maritime operations. Operational plans for each, which provide detailed guidelines on the practical implementation of the 2014 Frontex Regulation, are not publicly available.[92] This makes it difficult, if not impossible, to assess the extent to which various aspects of interception operations currently comply with international legal standards, including those outlined in *Hirsi Jamaa*.

Naval Anti-Smuggling Operation

The other significant maritime initiative launched in response to the April crisis targets migrant smuggling networks. The EU Naval Force in the Mediterranean, known as Operation Sophia, was launched in July 2015 as a naval operation under the aegis of the EU's Common Security and Defence Policy.[93] Its stated mission is to disrupt the business model of human smuggling and trafficking networks in the Southern Central Mediterranean to "identify, capture and dispose of vessels and assets used or suspected of being used by smugglers or traffickers…"[94] Twenty-two member states now contribute to the operation, which includes seven naval units and seven air assets.[95] Launching in three sequential phases, the first phase supported detection and surveillance of migration networks.[96] The Operation's second phase, begun October 2015, targets the seizure and diversion of vessels suspected of smuggling, whether on the high seas or in the territorial waters of a state of origin.[97] Phase three originally envisioned the destruction of smuggling vessels in the territorial waters of the coastal state concerned (widely understood to be Libya). This phase requires either United Nations Security Council approval or consent of the Libyan authorities.[98]

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The anti-smuggling operation faces significant criticism as well as political hurdles. The plan has been attacked as "moronic and delusional" for creating a high risk of EU military entanglement in Libya for a predictably limited impact on smuggling operations.[99] Libya itself continues to suffer deep political instability from two self-proclaimed governments, stalled United Nations peace talks, and a growing presence of violent militias.[100] Its internationally recognized government opposes the plan and has threatened air strikes against any vessels in its territorial waters.[101]

Another concern addresses the feasibility of eliminating smuggling vessels. In reality, smugglers purchase and convert small fishing vessels on an ad hoc basis. These vessels are typically wooden fishing trawlers purchased from local fishermen, sometimes just a few hours prior to departure. In a port, they are indistinguishable from dedicated fishing vessels and frequently cannot be identified as smuggling vessels until fully loaded with human cargo offshore via smaller zodiac boats.[102] This raises valid concerns that widespread destruction of fishing vessels may damage the livelihood of local fishermen in an already fragile economy.[103] Another concern is that the military operation will further imperil the safety of the migrants themselves, producing heavy civilian casualties. Yet even if the plan manages to sidestep such fraught risks, skepticism remains about successfully disrupting smuggling operations and capturing the smugglers, who do not accompany the vessels but remain safely on Libyan shores.[104]

Moreover, the vast majority of migrant flows no longer originate from Libya but have been considerably overtaken by those crossing the Aegean Sea into Greece from Turkey.[105] Nonetheless, Operation Sophia launched its second phase in October 2015 and may soon proceed to phase three with the recent UN Security Council resolution authorizing EU naval forces to investigate vessels reasonably suspected of migrant smuggling or human trafficking off the Libyan coast.[106] This narrow resolution authorizes—for one year only—the inspection and seizure of vessels located on the high seas off Libyan shores but not within Libyan territorial waters.[107] Further action, such as the destruction of vessels, is limited by international law and due consideration of any good faith third party interests.[108]

The initiatives envisioned above illustrate European concern with irregular migration by sea but in a manner that emphasizes militarized criminal enforcement strategies over the legitimate and pressing human rights needs of most migrants, whose credible protection concerns remain secondary. This pattern is demonstrated not only by the expanded Frontex sea operations principally tasked with external border control over rescue obligations, but also by the security policy that justifies withholding relevant operational plans from the public domain.[109] More worrisome still, the Security Council Resolution at issue was adopted under Chapter VII of the United Nations Charter—a set of Council rules reserved for military responses to threats to peace, breaches of peace, and acts of aggression. When Venezuela abstained from voting on the matter, it expressed concern at the use of Chapter VII procedures in response to a purely humanitarian crisis.[110] Although security concerns surrounding international migration are certainly not new, the scale of acceptance of the phenomenon in the context of a Security Council resolution warrants concern.[111]

A New Way Forward? Strengthening Humanitarian Obligations under the Law of the Sea Convention

A common thread underpinning the phenomenon of maritime migration is the lack of interaction and harmonization between the law of the sea, the rescue frameworks, and the various regional and universal human rights instruments. In recent years, commentators have identified the need for tribunals to provide more integrated approaches to interpreting regime rights, so as to recognize their interrelationships in order to address the practical problems related to overlap or conflict between instruments. As the above sections demonstrate, considerable overlap can exist between international human rights and the law of the sea regime, and both areas of law have made some incremental progress toward recognizing and accommodating the need for interaction.[112] Room for improvement remains, particularly with regard to harmonizing laws on maritime interceptions for migrants.[113] This section discusses a very recent development in the law of the sea regime that provides just such an example of cross-regime harmonization.

In March 2015, an Award by the Permanent Court of Arbitration in The Hague interpreted certain provisions of the Law of the Sea Convention (UNCLOS) to require a state party to consider other rules of international law, including those found beyond the UNCLOS treaty. As a result, parties must now show due regard to competing or conflicting rights and obligations, wherever they might exist.

The Award at issue resolved a dispute between the governments of Mauritius and the United Kingdom over the legality, in light of various provisions of the UNCLOS treaty, of a 2010 U.K. declaration establishing a Marine Protected Area in the Chagos Islands.[114] Mauritius contended that the establishment of the Protected Area was incompatible with a prior promise made by the United Kingdom as early as 1965 to cede the Chagos Islands to Mauritius once they were no longer needed for U.K. defense purposes. As part of its unilateral undertaking, the United Kingdom also formally agreed to turn over to Mauritius fishing rights and prospective mineral and oil exploration rights for the archipelago.[115] According to Mauritius, the United Kingdom's establishment of the Marine Protected Area was inconsistent with several provisions of UNCLOS and therefore unlawful.

Although Mauritius made four principal claims attacking the legality of the Protected Area, the Tribunal only had jurisdiction to evaluate the merits of the fourth, which is examined here. In that claim, Mauritius argued that the Protected Area violated several substantive and procedural obligations under the Convention.[116] In particular, Mauritius alleged that the Protected Area was incompatible with Mauritian rights in two maritime zones: the territorial sea and the exclusive economic zone.

Mauritius claimed that the United Kingdom's establishment of the Protected Area violated Article 2(3), governing the territorial sea—the zone extending 12 nautical miles from a state's coastline. That provision provides only that:

> The sovereignty over the territorial sea is exercised subject to this Convention and to *other rules of international law*.[117]

Mauritius also alleged a violation of Art. 56(2) governing a coastal state's conduct in the exclusive economic zone, which can extend 200 nautical miles from the outer boundary of a state's territorial sea:

> In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State *shall have due regard to the rights and duties of other States* and shall act in a manner compatible with the provisions of this Convention.[118]

In these two claims, Mauritius argued that both provisions require recourse not just to the UNCLOS treaty itself, but also to legal rules existing beyond the Law of the Sea treaty, whether through the Article 2(3) reference to "other rules of international law" or by reference to "rights and duties of other States" found in Article 56(2). Accordingly, it claimed, such obligations are not wholly self-contained when member states act in these two maritime zones. The provisions can be violated, Mauritius argued, when a state's conduct exceeds legal limitations existing elsewhere in international law. The United Kingdom flatly refuted this position, asserting that the provisions are merely descriptive and do not constitute substantive legal obligations.[119]

Ultimately, the Tribunal agreed with Mauritius and concluded that both provisions contain legally binding substantive obligations.[120] It interpreted the "other rules" of Article 2(3) to include general rules of international law, which include such universally binding principles as the law of state responsibility and the principle of the abuse of rights—or its antipode: the duty to act in good faith. The Tribunal found that although the United Kingdom's 1965 promises to Mauritius did not, themselves, qualify as "other rules," the United Kingdom was nonetheless required "to act in good faith in its relations with Mauritius, including with respect to undertakings."[121]

As for Article 56(2), the Tribunal interpreted its "due regard" requirement to include both an obligation to consult and a balancing exercise reflecting the circumstances of each case.[122] So although a state need not strictly "avoid any impairment" of another's rights, it cannot conversely "proceed as it wishes."[123] Instead, the extent of a state's "regard" depends upon several factors to be carefully evaluated against one another in a balancing exercise: "the nature of the rights held; their importance; the extent of anticipated impairment; the nature and importance of the activities contemplated; and the availability of alternative approaches."[124] Accordingly, the coastal state must consider each of these factors in relation to the others, and the more significant the rights are at issue, the more carefully it must weigh and balance the competing interests.

Application of Articless. 2(3) and 56(2)

In assessing whether or not the United Kingdom had exercised good faith with regard to Mauritian rights in the territorial sea, and whether it had due regard to those same rights in the exclusive economic zone, the Tribunal found that, notwithstanding the textual differences in the two provisions, their requirements were essentially equivalent.[125] It further noted that due to similar language found in the provision governing the high seas, it could theoretically interpret the language of that provision in an identical manner.

The Tribunal found that the United Kingdom's creation of the Protected Area had effectively extinguished Mauritian fishing rights, and significantly affected Mauritian interests in decisions bearing on the future uses of the Chagos Islands. It found that the United Kingdom did not engage in a good faith consultation with Mauritius. Instead, the United Kingdom had delayed launching any consultation dialogue until very late in the process, condensed "the entirety of bilateral consultation" into a single meeting, and consistently withheld detailed information from Mauritius. In contrast to this process, the United Kingdom engaged in a far more comprehensive and genuine dialogue with the United States regarding the latter's military lease in the Chagos Islands. Finally, the Tribunal cited the United Kingdom's inexplicable urgency declaring the Protected Area, followed by a total absence of implementing measures thereafter, as evidence of "the inadequacy of its prior consultations with Mauritius."[126] Taken together, the United Kingdom failed to satisfy its consultation obligation under the provisions.

The United Kingdom's inadequate compliance with its duty to balance Mauritian rights against its own was equally problematic. The Tribunal cited the United Kingdom's "flawed" belief that Mauritius had no fishing rights and its presumption that the Protected Area was in Mauritius' interests.[127] It found (on balance) that the United Kingdom had met neither the "good faith" nor the "due regard" requirement imposed by the treaty provisions. Accordingly, the United Kingdom's declaration of the Marine Protected Area violated Articles 2(3) and 56(2) of the Law of the Sea Convention.

The Tribunal's interpretation of the two Law of the Sea provisions as substantive and legally binding is significant, both for the stringency and the breadth of requirements it now imposes on state parties acting in the relevant maritime zones. Its refusal to construe the provisions as merely descriptive imposes an entirely new calculus on member states, which may now need to reevaluate conduct previously assumed permissible in the two zones. The new interpretation now requires a member state to balance its rights against competing rights that may constrain its conduct. More importantly, such competing rights may lie beyond the scope of the Law of the Sea Convention and—as the Award exemplifies—may not constitute legally binding obligations under international law. Certainly, in the context of the Mauritius Award, the United Kingdom's undertakings did not amount to an internationally binding obligation when first introduced to Mauritius in 1965 (then a British colony). Since the Award, noncompliance with these provisions has had the potential to implicate member state liability under the Law of the Sea regime.

Relevance for Maritime Migration Enforcement

In the territorial sea, the new restraints imposed by other rules of international law now require a state to exercise good faith in its legal obligations to others. Equally, in the exclusive economic zone, a state must give due regard to others' rights by engaging in a balancing test proportionately calibrated to reflect the importance of the rights at issue. The tribunal has suggested that an essentially equivalent meaning would apply to the high seas provision. In the context of international maritime migration, an obligation of good faith and due reguard offers the potential for improved protection outcomes. Before a member state could, for example, order a migrant vessel to exit its territorial sea, tow such a vessel back onto the high seas, or directly transport and deliver migrants to a third state from the high seas, that state would have to carefully evaluate its sovereign immigration rights against other rules and the rights and duties of other States.

What issues are likely to arise if a state's migration control activities cannot be executed as currently envisioned? Is the harm to the member state from receiving irregular migrants on its territory as serious as the harm resulting from a failure to safeguard its obligations to prevent mass expulsions and refoulement or to guarantee access to asylum procedures for those under its jurisdiction? The availability of alternative approaches must also be considered to determine whether the member state can continue its border surveillance and control activities in a manner that does not impair its non-refoulement obligations and procedural safeguards to the asylum process. Accordingly, EU states would now need to evaluate their competing legal obligations under such binding instruments as the 1951 Refugee Convention, the European Convention on Human Rights, or the European Charter of Fundamental Rights. And yet many challenges remain.

Foremost among these obstacles is the legal barrier to launching an interstate Law of the Sea claim in the EU context.

Foremost among these obstacles is the legal barrier to launching an interstate Law of the Sea claim in the EU context. Because the European Community is itself a party to the Law of the Sea Convention, many of the provisions of the Law of the Sea Convention fall within the Community's purview, giving the European Court of Justice exclusive competence over many aspects of the UNCLOS treaty. As a result, the Law of the Sea Tribunal has declined to review at least one Law of the Sea claim between EU member States on grounds of comity and in deference to the European Court of Justice.[128]

Such legal barriers would not apply, however, where a non-EU member initiates a claim against an EU state. One such hypothetical example might involve a Turkish claim against Greece challenging Greek pushbacks to Turkish waters, which have already been documented.[129] Given the escalation of migrant flows to Greece and its current financial crisis, more drastic responses—such as resorting to a claim before an international tribunal—are not inconceivable.[130] Legal action against Greece, however, would be complicated by the fact that Greece itself is not a party to the Fourth Protocol barring collective expulsions.[131] And legal considerations aside, such a claim would negatively impact Turkey's status as an EU candidate country. Political considerations, therefore, remain critical, and EU incentives may override resorting to legal action. In October

2015, the EU offered Turkey three billion euro in aid and the prospect of reenergizing EU membership talks in exchange for clamping down on the migrant exodus off Turkish shores.[132]

Another challenge to enforcing a migration claim in the UNCLOS context concerns the juxtaposition of claimants to rights. While the Mauritian Award involved the exercise of one state's rights triggering the violation of another state's rights, a human rights claim need not—and perhaps could not—allege direct impairment of an individual claimant's rights. It could, however, conceivably allege a violation of wider rights owed to the international community.[133] Alternatively, a claim could be framed to allege a violation based on one state's conduct being internally inconsistent with its own competing international legal obligations. However, the extent to which such a claim might require direct impairment of another state's rights remains unclear.

In spite of these considerable practical obstacles, the expansive harmonization of rights and duties furnished by the Mauritius Award offers hope for improved protection prospects in the maritime migrant context. Since the Award, a coastal state legally authorized to intercept vessels in its territorial sea must now give due regard to competing rights and interests.

Significant challenges remain in initiating and enforcing a claim against a state for violations of its Law of the Sea obligations in a migration control context. The Mauritius Award, briefly summarized and discussed here, demonstrates that jurisprudence continues to evolve and does so in a manner that offers potential for integrating consideration of rights from more than one legal regime. This case highlights one such example of the progressive evolution of both substantive and procedural maritime standards now capable of harmonizing states' duties at sea.

Conclusion

Europe's 2015 Mediterranean migration crisis has prompted several initiatives to combat irregular sea-based arrivals. These migration suppression strategies persist and proliferate, notwithstanding the powerful legal influence of European Court of Human Rights judgments enforcing states' UNCLOS obligations. At the same time, the recently redrafted Frontex Regulations favor bold maritime interception practices that include pushbacks and third-country returns while failing to integrate legally binding substantive and procedural safeguards. The result is a lopsided, fragmented legal set of guidelines silent on the inter-relationship between states' competing rights and duties at sea.

And yet, the expansive interpretation of the two maritime zone provisions in the recent Law of the Sea Arbitral Award offers an important new means of harmonizing the array of competing rights and duties at sea. As a legal development, it constitutes an incremental step towards broader integration of regime rights and remains hampered by political and legal obstacles. But its potential for the future development of expansive maritime claims nonetheless constitutes a significant first step toward a legal regime capable of integrating and harmonizing rights and duties from other legal contexts and, in the process, protecting human rights at sea. Viewed in this sense, the Award represents a promising watershed contribution to the long-term harmonization of the competing rights and obligations existing at sea.

Notes

1. Patrick Kingsley and John Henley, "Greece Sends Cruise Ship to Ease Kos Migrant Crisis," *Guardian*, August 13, 2015, http://www.theguardian.com/world/2015/aug/13/greece-sends-cruise-ship-kos-migrant-crisis.

2. "Refugees/Migrants Emergency Response—Mediterranean," United Nations High Commissioner for Refugees; By that same date, the International Organization for Migration estimated the figure at 670,685. See: "Missing Migrants Project," International Organization for Migration, http://missingmigrants.iom.int/.

3. T. Brian and F. Laczko, eds., *Fatal Journeys: Tracking Lives UNCLOS During Migration* (Geneva: International Organization for Migration, 2014).

4. "IOM Releases New Data on Migrant Fatalities Worldwide: Almost 40,000 Since 2000," International Organization for Migration, September 29, 2014.

5. "Refugees/Migrants Emergency Response–Mediterranean," United Nations High Commissioner for Refugees.

6. Refugee status is defined by Article 1(a)(2) of the 1951 Convention relating to the Status of Refugees ("Refugee Convention"). To qualify, a person must be outside his country of origin and have a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion. All EU member states are party to both the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees.

7. The obligations of the European Convention on Human Rights, to which all EU member states are party, must be secured to everyone within the jurisdiction of a member state. See: Article 1, European Convention on Human Rights, CETS No. 005.

8. These rights exist in a range of international and regional instruments with varying degrees of overlap, but this article focuses on rights in the context of the European Convention on Human Rights, CETS No. 005.

9. In the European Convention on Human Rights context, Article 1 jurisdiction is also triggered by a member state's exclusive control over a foreign vessel on the high seas, including the rescue and interception contexts. See: *Xhavara v. Italy & Albania*, App. No. 39473/98 Adm. Dec. (2001); *Medvedyev & Others v. France*, App. No. 3394/03, Gd. Chbr. (2010).

10. The European Convention on Human Rights is an instrument of the Council of Europe and is enforced through the European Court of Human Rights based in Strasbourg. The Council of Europe is an intergovernmental organization that promotes democracy and human rights in Europe, with 47 member states, including all 28 EU members. The European Union has 28 member countries with the accession of Croatia in July 2013.

11. Council of Europe, "Convention for the Protection of Human Rights and Fundamental Freedoms," (European Convention on Human Rights, Ratified September 03, 1953), Articles 34, 46, CETS No. 005.

12. United Nations Convention on the Law of the Sea, (December 10, 1982), Article 98, 1833 UNTS 397; International Convention on Maritime Search and Rescue, April 27, 1979, 1405 UNTS 97; International Convention for the Safety of Life at Sea, November 1, 1974, 1184 UNTS 278.

13. See: UNCLOS, Articles 19, 21, 33, 42, and 60.

14. Nearly 60 percent of arrivals come from Syria, Eritrea, or Afghanistan; applicants with these nationalities have been granted international protection at rates of 95 percent, 89 percent, and 63 percent, respectively. See: United Nations High Commissioner for Refugees, *The Sea Route to Europe: The Mediterranean Passage in the Age of Refugees* (United Nations High Commissioner for Refugees, July 1, 2015), 6. A proposed Council Decision defines applicants who presumptively qualify for protection as belonging to nationalities generating a 2014 EU recognition rate of greater than 75 percent, which includes Syrians and Eritreans. See: European Commission, "Proposal for a Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece," May 27, 2015, 3, 5.

15. Frontex, for example, claims that "there is an underlying threat of terrorism-related travel movements especially due to the appeal of the Syrian conflict to both idealist and radicalized youths." It does so even as it concedes that "Frontex is not in a position to identify, nor does it have any information that suggests any nexus between terrorist travel and irregular migration routings and/or facilitation networks." See: Frontex, *Annual Risk Analysis 2015* (Warsaw: Frontex, 2015), 49. Nor have the November 13, 2015 terrorist attacks in Paris been tied to refugees; all of the terrorist suspects have been confirmed to be EU citizens. See: Victoria Richards, "Eight Terror Suspects Named So Far Are Not Refugees and Have EU Passports," *Independent*, November 18, 2015, http://www.independent.co.uk/news/world/europe/paris-attacks-the-eight-terror-suspects-named-so-far-all-have-eu-passports-a6738821.html.

16. United Nations High Commissioner of Refugees, *The Sea Route to Europe*, 5.

17. Ibid.; William Spindler, "Number of refugees and migrants arriving in Greece soars 750 per cent over 2014," United Nations High Commissioner for Refugees, August 7, 2015; United Nations High Commissioner of Refugees, *The Sea Route to Europe*, 5.

18. Efthymios Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Oxford: Hart Publishing, 2013), 10.

19. See: *Khalifa and Others v. Italy*, September 1, 2015 European Court on Human Rights decision. (Application no. 16483/12).

20. Adam Taylor, "Italy ran an operation that saved thousands of migrants from drowning in the Mediterranean. Why did it stop?," *Washington Post*, April 20, 2015.

21. Alan Travis, "UK axes support for Mediterranean migrant rescue operation," *Guardian*, October 27, 2014, http://www.theguardian.com/politics/2014/oct/27/uk-mediterranean-migrant-rescue-plan.

22. Elias Orjini et al., "Operation Triton: Europe's Mediterranean Border Patrol," *BBC*, November 13, 2014, http://www.bbc.com/news/world-africa-30039044.

23. "Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union," *Official Journal of the European Union* (2004).

24. These include Operations Hermes and Aeneas.

25. More than 124,000 migrants have reached Greece by sea between January and July 2015, and 50,000 of these arrived in the month of July. See: Spindler, "Number of refugees and migrants arriving in Greece soars 750 per cent over 2014."

26. "Council Regulation (EC) No 2007/2004," Art. 2(1)(a).

27. See: Melanie Fink, "A 'Blind Spot' in the Framework of International Responsibility: Third Party Responsibility for Human Rights Violations: the Case of Frontex," in *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement*, ed. T. Gammeltroft-Hansen and J. Vested-Hensen (forthcoming); United Kingdom House of Lords European Union Committee, 9th Report of Session 2007–2008, "FRONTEX: the EU External Borders Agency" (March 2008); Examination of Witnesses Jonathan Faull and Henrik Nielsen, Minutes of Evidence, 15, October 16, 2007. Inquiry from UK Baronness Tonge: "If someone is killed as a result of [Frontex officers] carrying weapons, whose responsibility is that? Is that the member State's responsibility or is it the responsibility of Frontex? Reply by Mr. Faull: They are not employees of Frontex in any way. They are officials of their member state which would take responsibil-

ity"; Bernard Ryan and Valsamis Mitsilegas, eds., *Extraterritorial Immigration Control: Legal Challenges* (Leiden, The Netherlands: Brill, 2010), 62.

28. See: *Hirsi Jamaa and Others v. Italy*, European Court of Human Rights, February 23, 2012.

29. Laurence R. Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime," *European Journal of International Law* 19, (2008): 125–26.

30. See: *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, Grand Chamber judgment decided on, February 23, 2012 by the European Court of Human Rights.

31. According to a Human Rights Watch Report cited in the *Hirsi Jamaa* judgment, some of the May 2009 interception operations conducted by Italy were part of a joint operation with Frontex.

32. Schengen Borders Code Decision 2010/252/EU Case C-355/10; the annulled rules had been adopted by Council Decision 2010/252/EU.

33. Regulation (EU) No. 656/2014 of the European Parliament and the Council of May 15, 2014, *Official Journal of the European Union* (2014), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.189.01.0093.01.ENG.

34. All 28 member states of the European Union are also party to the European Convention on Human Rights. Moreover, the rights in that instrument are also vested in the EU Charter of Fundamental Rights.

35. 27765/09, *Hirsi Jamaa and Others vs. Italy*, Grand Chamber of the European Court of Human Rights, para 113.

36. Ibid., para 114.

37. Ibid., paras 118, 125, 128.

38. Ibid., paras 125–31.

39. Ibid., paras 146, 152.

40. Ibid., para 147.

41. Ibid., paras 149–52.

42. Ibid., paras 152–56.

43. Ibid., para 156.

44. The collective expulsion of aliens is prohibited by Article 4 of Protocol No. 4 to the Convention. Greece and Switzerland are not parties to this treaty; Turkey and the United Kingdom are signatories but have not ratified the treaty. See: Chart of Signatures and Ratifications of Treaty 046, Council of Europe, http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/046/signatures?p_auth=sHpDxXKT.

45. *Hirsi Jamaa and Others vs. Italy*, para 169.

46. Ibid., paras 173–75.

47. Ibid., para 176.

48. Ibid., para 177.

49. Ibid., para 185.

50. *Khalifa and Others v. Italy*, European Court of Human Rights.

51. ECHR Article 13 provides that: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

52. *Hirsi Jamaa and Others vs. Italy*, para 197.

53. Ibid.; The Court observed that an authority need not be a judicial authority, but if not, its powers and guarantees will be evaluated to ascertain its effectiveness.

54. Ibid., para 198.

55. Ibid., paras 199–200.

56. Ibid., paras 202–04.

57. Ibid., para 204.

58. Ibid., para 206.

59. *Khalifa and Others v. Italy*, European Court of Human Rights.

60. Frontex Regulation, Article 4(1).

61. Ibid.

62. Ibid., Article 4.
63. Ibid., Article 4(1).
64. Ibid., Article 4(8).
65. Ibid., Article 4(3).
66. Ibid., Article 4(3).
67. Ibid., Article 4(3).
68. Ibid., Articles 6(1), 8(1), 7(1) respectively.
69. Ibid., Article 7(1).
70. Ibid., Articles 6(2)(a),(b), 7(2)(a),(b), 8(1).
71. Ibid., Articles 6(2)(b), 7(2)(b), 8(1).
72. Ibid., Articles 6(2)(c), 7(2)(d), 8(1) and 10(1)(a).
73. Ibid., Articles 8(3), 7(2), (11) respectively.
74. Ibid., Article 10(1)(c).
75. Ibid., Articles 7(2), 7(5)–(14).
76. Ibid., Article 9.
77. Infra., see: note 86.
78. 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, Council of the European Union, (2014), Preamble Clause, 17.
79. Ibid.
80. Ibid.
81. Damien Gayle, "Hundreds of migrants believed to have drowned off Libya after boat capsizes," *Guardian*, April 15, 2015, http://www.theguardian.com/world/2015/apr/14/400-drowned-libya-italy-migrant-boat-capsizes.
82. Patrick Kingsley, "700 migrants feared dead in Mediterranean shipwreck," *Guardian*, April 19, 2015, http://www.theguardian.com/world/2015/apr/19/700-migrants-feared-dead-mediterranean-shipwreck-worst-yet.
83. Special meeting of the European Council, April 23, 2015, 3(a).
84. 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," May 13, 2015.
85. According to a Senior Advisor for the International Chamber for Shipping, merchant ships assisted in Mediterranean rescue operations coordinated by the Rome Maritime Coordination Center resulting in the rescue of over 42,000 persons in 2014. Information was acquired through an email exchange.
86. "Saving Lives Is Imperative But What Next? UN Human Rights Experts Ask EU Leaders," United Nations Office of the High Commissioner for Human Rights, April 24, 2015.
87. "Frontex Expands its Joint Operation Triton," Frontex, May 26, 2015.
88. "European Commission makes progress on Agenda on Migration," European Commission, May 27, 2015.
89. "Frontex Expands its Joint Operation Triton," Frontex.
90. "Statement by First Vice-President Frans Timmermans, High-Representative/Vice-President Federica Mogherini and Migration and Home Affairs Commissioner Dimitris Avramopoulos on the recent incident in the Mediterranean," European Commission, August 6, 2015.
91. "Frontex Expands its Joint Operation Triton," Frontex.
92. Indeed, this author's request for the operational plans was denied for security reasons. See: Endnote 109 for further detail.
93. The Rome-based operation launched on July 28, 2015 with participation from 14 member states. See also: "European Union Naval Force—Mediterranean," European Union External Action, http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/factsheet_eunavfor_med_en.pdf.
94. "Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation

in the Southern Central Mediterranean (EUNAVFOR MED)," *Official Journal of the European Union* (May 18, 2015) Article 1.

95. Figures taken from EUNAVFOR Med Facebook page, see: EUNOVFOR Med Facebook page, https://m.facebook.com/EunavforMed.

96. CFSP 2015/778, Article 2(2)(a).

97. Ibid.; Article 2(2)(b); "European Union Naval Force—Mediterranean Operation Sophia," European Union External Action, October 2015.

98. Ibid., Article 2(2)(c).

99. Alastair Sloan, "EU plans to combat trafficking 'moronic and delusional' say government advisors," *EU Newsweek*, May 25, 2015, http://europe.newsweek.com/eu-trafficking-plans-moronic-delusional-say-government-advisers-327705.

100. "Global Conflict Tracker: Political Instability in Libya," Council on Foreign Relations; See also: Ahmen Elumami, "UN Libya deal stalls after an elected congress rejects draft," *Reuters*, October 20, 2015, http://www.reuters.com/article/us-libya-security-idUSKCN0SE25620151020.

101. Patrick Markey, "Libya's air force warns Europe over naval plan for migrants," *Reuters*, June 23, 2015, http://www.reuters.com/article/us-europe-migrants-libya-idUSKBN0P312B20150623#7rAi4hlCShem6lXK.97.

102. Patrick Kingsley, "Libya's People Smugglers: Inside the Trade that Sells Refugees Hopes of a Better Life," *Guardian*, April 24, 2015, http://www.theguardian.com/world/2015/apr/24/libyas-people-smugglers-how-will-they-catch-us-theyll-soon-move-on.

103. James Politi and Duncan Robinson, "Ban Ki-moon attacks EU plans for strikes on Libyan smugglers' boats," *Financial Times,* April 28, 2015, http://www.ft.com/cms/s/0/9955eaa2-edaf-11e4-a894-00144feab7de.html#axzz3p8e2cRJN.

104. Kingsley, "Libya's People Smugglers."

105. Since April 2015, Greece surpassed Italy as the principal destination for those crossing the Mediterranean. By mid-October 2015, 138,000 migrants had reached Italy by sea, compared to the 502,000 who had reached Greece. See: "Refugees/Migrants Emergency Response—Mediterranean," United Nations High Commissioner for Refugees.

106. United Nations Security Council "Adopting Resolution 2240 (2015), Security Council Authorizes Member States to Intercept Vessels off Libyan Coast Suspected of Migrant Smuggling," October 9, 2015.

107. Ibid., Paras 7-8, UNSC Res. 2240 (2015); Ibid.

108. Ibid., Para 8 UNSC Res. 2240.

109. In response to my email request for the operational plans to Operation Triton, the Frontex legal affairs unit responded that disclosure of operational information necessary for conduct of external border control "would hamper the course of the ongoing operations and thus it would undermine the protection of the public interest as regards public security…" Email on file with author, August 14, 2015.

110. United Nations, "Adopting Resolution 2240," 2015.

111. Fiona B. Adamson, "Crossing Borders: International Migration and National Security," *International Security* 31, no. 1 (2006): 165–99.

112. Tullio Treves, "Human Rights and the Law of the Sea," *Berkeley Journal of International Law* 28, no. 1 (2010); Irina Papanicolopulu, "International Judges and the Protection of Human Rights at Sea," in *International Courts and the Development of International Law*, ed. N. Boschiero et al. (The Hague: T.M.C. Asser Press, 2013): 535–44.

113. Natalie Klein, "A Case for Harmonizing Laws on Maritime Interceptions of Irregular Migrants," *International and Comparative Law Quarterly* 63, no. 4 (2014): 787–814.

114. The Arbitral Tribunal, In the Matter of the Chagos Marine Protected Area Arbitration: Mauritius v. UK (The Hague, March 18, 2015).

115. Ibid., para 448.

116. Ibid., para 158; The claim alleged violations under Articles 2, 55, 56, 63, 64, 194, and 300 of the Convention, as well as Art. 7 of the Fish Stocks Agreement.

117. Article 2(3), United Nations Convention on the Law of the Seas.

118. Ibid., Article 56(2) [emphasis added].

119. The Arbitral Tribunal, "In the Matter of the Chagos Marine Protected Area Arbitration," paragraphs 466, 472, 475–77.

120. Ibid., paragraphs 514, 518.

121. Ibid., paragraph 517.

122. Ibid., paragraph 518–19.

123. Ibid., paragraph 519.

124. Ibid.

125. Ibid., paragraphs 520.

126. Ibid., paragraph 533.

127. Ibid., paragraph 535.

128. See: Case C-459/03, *Commission v. Ireland*, ECR 2006, I-4635.

129. Some Greek pushbacks in Turkish waters have already been reported. See: Everton Gayle, "Greece's Illegal Pushbacks of Asylum Boats Puts Lives at Risk, Says Amnesty International," *Euronews,* August 25, 2015, http://www.euronews.com/2015/08/25/greece-routinely-pushes-back-immigrant-boats-out-to-sea-says-amnesty/.

130. In the land boundary context, Hungary has announced its plans to build a four-meter high wall spanning the length of its 110-mile border with Serbia. See: Patrick Kingsley, "Migrants on Hungary's Border Fence: 'This wall, we will not accept it,'" *Guardian*, June 22, 2015, http://www.theguardian.com/world/2015/jun/22/migrants-hungary-border-fence-wall-serbia; Greece is already resorting to the off-shore processing of migrants on board cruise ships as one means of addressing the lack of suitable processing facilities on its smaller islands, see: Kingsley and Henley, "Greece Sends Cruise Ship to Ease Kos Migrant Crisis."

131. See: Note 44.

132. Paul Taylor and Alastair MacDonald, "EU offers Turkey cash, closer ties for migration help," *Reuters*, October 16, 2015, http://www.reuters.com/article/us-europe-migrants-idUSKCN0S92HU20151016.

133. International law certainly recognizes breaches of obligations owed to the international community as a whole, though such claims are infrequent. See: Giorgio Gaja, "States Having an Interest in Compliance with the Obligation Breached," in *The Law of International Responsibility*, ed. James Crawford, Alain Pellet, and Simon Olleson (Oxford: Oxford University Press, 2010), 957–67.