

Focus

*THE MIGRATORY CRISIS:
CURRENT CHALLENGES FOR
INTERNATIONAL AND EUROPEAN LAW*

EUNAVFOR MED: FIGHTING MIGRANT SMUGGLING UNDER UN SECURITY COUNCIL RESOLUTION 2240 (2015)

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Abstract

To face the extraordinary migration crisis and consequent human tragedy in the Mediterranean, the need has emerged to fight human smugglers and traffickers. The European Union (EU) has launched EUNAVFOR MED, a naval crisis management operation aiming to disrupt the business model of human smuggling in the Central Mediterranean. With Resolution 2240 of 9 October 2015, the UN Security Council, acting under Chapter VII of the Charter, authorised the EU operation to undertake “all measures commensurate to the circumstances” in order to visit, seize, and dispose of vessels used by smugglers. The EU operation is currently limited to the high seas, yet its expansion into Libyan waters and territory is envisaged. This article discusses some issues arising from Resolution 2240 and its implementation by the EU, notably from the viewpoint of the international law of the sea, the rules governing the use of force and human rights law. Problems have also emerged as to the prosecution in Italy of the smugglers apprehended on the high seas. It is submitted that a number of issues have not been clarified by the legal texts adopted and that the action of the EU in this field is still ineffective and rather opaque.

Keywords: UN Security Council; European Union; migrant smuggling; law of the sea; human rights; armed force; criminal law.

1. INTRODUCTION

In recent years, the Mediterranean Sea has been defined as the world’s deadliest stretch of water, for thousands of migrants and asylum seekers have died since 2013, trying to reach Europe from Africa and the Middle East.¹ This unprecedented human tragedy has been addressed by the international community with a plurality of actions. Among other things, the need has emerged to fight the smuggling of migrants, addressing the conduct of individuals and organisations exploiting, for their personal profit, the situation of the thousands of people willing to cross

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¹ See Council of the European Union, “Council Conclusions on Migrant Smuggling”, Press release 120/16, 10 March 2016, para. 1.

the Mediterranean.² Of particular importance for human smuggling is the “Central Mediterranean Route”, the migratory flow from North Africa to Italy and Malta through the Mediterranean Sea. In 2014, detections of illegal migrants in the Central Mediterranean area reached a record level, with more than 170,000 persons having arrived in Italy; in 2015 the Central Mediterranean Route was also under intense migratory pressure.³ Smugglers have a traditional presence in Libya and, since the collapse of governmental structures, they have operated with impunity.⁴ Fighting smugglers has been identified as a priority by the European Union (EU). On 20 April 2015, in the wake of one of the biggest tragedies to have occurred in Libyan waters, the EU Council presented a “ten point action plan on migration”, outlining immediate actions to be taken. Among these, the Council included “a systematic effort to capture and destroy vessels used by the smugglers”, noting that “the positive results obtained with the Atalanta operation should inspire us to similar operations against smugglers in the Mediterranean”.⁵ A few days later, the Heads of State and Government of the EU, at the special meeting of the European Council convened on 23 April 2015 to address the situation in the Mediterranean Sea, committed to fighting the traffickers and invited the High Representative of the Union for Foreign Affairs and Security Policy (HR) “to immediately begin preparations for a possible Common Security and Defence Policy (CSDP) operation to this effect”.⁶

On 18 May 2015, the Council issued Decision (CFSP) 2015/778 on an EU military operation in the Southern Central Mediterranean (EUNAVFOR MED),⁷ providing that “the Union shall conduct a military crisis management operation

² See, in general, RONZITTI, “Coastal State Jurisdiction over Refugees and Migrants at Sea”, in ANDO et al. (eds.), *Liber Amicorum Judge Shigeru Oda*, The Hague, 2002, p. 1271 ff.; CAFFIO, “Immigrazione clandestina via mare”, *Rivista Marittima*, Supplemento, October 2003; SCOVAZZI, “La lotta all’immigrazione clandestina alla luce del diritto internazionale del mare”, *Diritto, immigrazione e cittadinanza*, 2003, p. 48 ff.; TREVISANUT, *Immigrazione irregolare via mare*, Napoli, 2012; and GALLAGHER and DAVID, *The International Law of Migrant Smuggling*, Cambridge, 2014.

³ See Frontex, Central Mediterranean Route, available at: <<http://frontex.europa.eu/trends-and-routes/central-mediterranean-route/>>.

⁴ See the Hearing of the Operation Commander of EUNAVFOR MED before the Italian Parliament, *Comitato parlamentare di controllo sull’attuazione dell’Accordo di Schengen*, 8 October 2015, available at: <<http://webtv.camera.it/evento/8424>>.

⁵ Press release IP/15/4813, available at: <http://europa.eu/rapid/press-release_IP-15-4813_it.htm>.

⁶ Final statement available at: <<http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/>>. On 13 May 2015, the EU Commission published “A European Agenda on Migration” (COM (2015) 240 final) which singled out the fight against migrant smuggling as a priority, setting the objective “to transform smuggling networks from ‘low risk, high return’ operations for criminals into ‘high risk, low return’ ones” (pp. 3-4, 8).

⁷ OJ EU, L 122, 19 May 2015, p. 31 ff. See FALEG and BLOCKMANS, “EU Naval Force EUNAVFOR MED Sets Sail in Troubled Waters”, CEPS Commentary, 26 June 2015; and MATTIELLO, “Le operazioni militari navali nel Mediterraneo”, *Senato della Repubblica, I dossier di documentazione, Servizio affari internazionali*, No. 2, 2015.

contributing to the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean”.⁸ The Decision appointed an Italian Operation Commander (Rear Admiral Enrico Credendino)⁹ and designated Rome as Operation Headquarters.¹⁰ EUNAVFOR MED was conceived as an *operation structured into different phases*. In particular, under Article 2(2) of Decision 2015/778, it shall:

“(a) in a first phase, support the detection and monitoring of migration networks through information gathering and patrolling on the high seas in accordance with international law; (b) in a second phase, (i) conduct boarding, search, seizure and diversion on the high seas of vessels suspected of being used for human smuggling or trafficking, under the conditions provided for by applicable international law, including UNCLOS and the Protocol against the Smuggling of Migrants; (ii) in accordance with any applicable UN Security Council Resolution or consent by the coastal State concerned, conduct boarding, search, seizure and diversion, on the high seas or in the territorial and internal waters of that State, of vessels suspected of being used for human smuggling or trafficking, under the conditions set out in that Resolution or consent; (c) in a third phase, in accordance with any applicable UN Security Council Resolution or consent by the coastal State concerned, take all necessary measures against a vessel and related assets, including through disposing of them or rendering them inoperable, which are suspected of being used for human smuggling or trafficking, in the territory of that State, under the conditions set out in that Resolution or consent”.

The actual launch of the operation was conditional upon a decision of the EU Council, to be adopted upon the recommendation of the Operation Commander and following approval of the Operation Plan and of the Rules of Engagement.¹¹ The Council was also entrusted to assess the conditions necessary to move beyond the first phase of the operation, “taking into account any applicable UNSC Resolution and consent by the coastal States concerned”,¹² whereas the transition between the different phases must be decided by the Political and Security Committee (PSC).¹³ EUNAVFOR MED was launched on 22 June 2015, by Council Decision (CFSP)

⁸ Art. 1(1).

⁹ Art. 3.

¹⁰ Art. 4.

¹¹ Decision 2015/778, *cit. supra* note 7, Art. 5.

¹² *Ibid.*, Art. 2(3).

¹³ *Ibid.*, Art. 6(1).

2015/972, which also approved the Operational Plan and the Rules of Engagement.¹⁴ Therefore, a second CSDP maritime operation is currently underway, along with the counter-piracy Operation Atalanta off Somalia.¹⁵ On 14 September 2015, the Council adopted a positive assessment that the conditions to move “to the first step of phase two on the high seas” had been met. That assessment was followed by a force generation conference and the approval of new Rules of Engagement for phase 2 on the high seas. A formal Decision of the PSC was enacted to launch on 7 October 2015 the first step of phase 2 “as laid down in point (b)(i) of Article 2(2) of Decision (CFSP) 2015/778”.¹⁶ The PSC also agreed to rename the mission as “Operation Sophia”, after the name given, in August 2015, to a baby born to a mother rescued by one of the ships assigned to the operation. At the time of writing (March 2016), the force consists of five naval units and six air assets.¹⁷ Since its inception, 22 EU Member States have contributed, in different ways, to the operation.¹⁸ As is the rule for CSDP military operations, Member States commitments to participate are decided at national level and on a voluntary basis.¹⁹ On the other hand, Article 9 of Decision 2015/778 provides that third States may also be invited to participate in the operation.

2. THE LEGAL BASIS OF EUNAVFOR MED UNDER EU LAW

The Council identified the legal basis for the establishment of EUNAVFOR MED, under EU law, in Articles 42 and 43 of the Treaty on European Union (TEU). Article 42(1) TEU states that a CSDP shall be an integral part of the Common Foreign and Security Policy (CFSP), providing the Union with an operational capacity drawing on civil and military assets; the EU may use these assets “on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations

¹⁴ Council Decision (CFSP) 2015/972 of 22 June 2015 launching the European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ EU L 157, 23 June 2015, p. 51.

¹⁵ See TONELLI, “The EU Fight against Piracy in the Horn of Africa: The External Action at Stake”, in ANDREONE et al. (eds.), *Insecurity at Sea: Piracy and Other Risks to Navigation*, Napoli, 2013, p. 53 ff.

¹⁶ PSC Decision (CFSP) 2015/1772 of 28 September 2015, OJ EU L 258, 3 October 2015, p. 5.

¹⁷ EUNAVFOR MED website, see at: <http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/index_en.htm>.

¹⁸ See the Hearing of the Operation Commander of EUNAVFOR MED before the Italian Parliament, *Commissione Difesa Senato e Camera*, 4 March 2016, available at: <http://webtv.senato.it/4194?video_evento=2346>.

¹⁹ Under Art. 5 of the Protocol (No. 22) on the position of Denmark, the latter does not participate in the elaboration and implementations of decisions and actions of the Union which have defence implications.

Charter”. Article 43 TEU specifies that the tasks pursued by these missions may include “joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation”, and may all “contribute to fight against terrorism, including by supporting third countries in combating terrorism in their territories”. EUNAVFOR MED is qualified by Article 1(1) of Decision 2015/778 as a “military crisis management operation”, whose aim is to contribute to “the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean”; that task is to be achieved “by undertaking systematic efforts to identify, capture and dispose of vessels and assets used or suspected of being used by smugglers and traffickers, in accordance with applicable international law, including UNCLOS and any UN Security Council Resolution”.

Some scholars have criticised the choice of the legal basis for the Decision, arguing that the objective of countering human and migrant trafficking should have rather entailed the adoption of acts founded on the external dimension of the EU competence on *judicial and police cooperation in criminal matters* (Part III, Title V, of the Treaty on the Functioning of the European Union – TFEU). According to one commentator, the Council chose a legal basis under the CSDP “to avoid an intervention of the European Parliament, who is after Lisbon co-responsible for internal security and criminal justice matters”.²⁰ These arguments seem however untenable, for the choice of the legal basis made by the Council must be regarded, in view of the *aim* and *content* of Decision 2015/778, as perfectly correct (at least from a legal viewpoint).²¹ EUNAVFOR MED was conceived of by Decision 2015/778 as an operation of a *military nature*, to be conducted outside the territory of the Union, in order to identify, capture, and dispose of vessels and assets used by smugglers and traffickers. As will be seen, the mandate of the operation may involve the *use of armed force* against foreign private ships, in *international spaces* (the high seas) or, during phase 3 of the operation, even in *areas under the sovereignty of a third State* (territorial waters and territory). One could certainly say that some of Operation Sophia’s assignments may share some features with police tasks. The Operation Commander spoke in this regard of a “new kind of operation”, blending military with police tasks.²² However, the planning of the operation was based on the as-

²⁰ MERCONE, “Some Notes on the Relations between UNSC Resolution 2240 (2015) Fighting Smugglers in Mediterranean and the EUNAVFOR MED ‘Sophia’ Operation”, European Area of Freedom Security & Justice, FREE Group, 19 October 2015, available at: <<http://free-group.eu/2015/10/19/some-notes-on-the-relations-between-uns-c-resolution-2240-2015-fighting-smugglers-in-mediterranean-and-the-eunavfor-MED-sophia-operation/>>.

²¹ As to the choice of the legal basis for a measure of the EU, see, *ex multis*, Court of Justice of the European Union, Case C-658/11, *Parliament v. Council*, Judgment of 24 June 2014, para. 52.

²² See Parliament Hearing of the Operation Commander, *cit. supra* note 18.

sumption, reaffirmed by its Commander, that in the present conditions of security these activities could not be carried out by mere police forces.²³

As to the aims of EUNAVFOR MED, Decision 2015/778 focuses on the prevention of human tragedies resulting from the smuggling of people across the Mediterranean whereas, surprisingly enough, no reference is made to the undeniable threats to the security of the Union also deriving from that phenomenon. Yet, as previously seen, CSDP missions may carry out “humanitarian and rescue tasks” under Article 43 TEU. On the other hand, in the speech HR Mogherini delivered before the UN Security Council on 11 May 2015, in order to inform the latter of the decisions taken by the EU to fight migrant smuggling, she stressed that the Mediterranean crisis “is not only a humanitarian emergency, but also a security crisis, since smuggling networks are linked to, and in some cases finance, terrorist activities, which contributes to instability in a region that is already unstable enough”.²⁴ In the light of all these considerations, one cannot deny that the main aims of the operation, at least as conceived in Decision 2015/778, fall within the CSDP, and more broadly within the CFSP. Besides, the competence of the EU in CFSP matters is in itself very wide, covering in accordance with Article 24(1) TEU, “all areas of foreign policy and all questions relating to the Union’s security”.

Two additional remarks are necessary. First, it is certainly possible to argue that a military operation such as EUNAVFOR MED *is not the most appropriate means, from a policy viewpoint, to tackle the current migration crisis*.²⁵ That has nothing to do with the assessment of the legality of Decision 2015/778 under the EU Treaties. Second, there is no denying that the fight against migrant smuggling and human trafficking by sea also requires actions which, under EU law, have to be adopted on the basis of the Treaty rules on judicial and police cooperation in criminal matters. The latter measures are however of a clearly distinct nature from the launching of a naval operation outside the EU. In effect, EU institutions have long since elaborated sets of legal rules dealing with migrant smuggling and human trafficking. As to migrant smuggling, on 28 November 2002 the EU Council adopted the so-called “Facilitators Package”, composed of Directive 2002/90/EC defining the fa-

²³ *Ibid.* There have been cases in which the smugglers have threatened to use weapons against merchant or military ships carrying out rescue operations in order to regain possession of boats used for the traffic: “Immigrazione: minacciata motovedetta italiana”, *La Gazzetta del Mezzogiorno*, 15 February 2015.

²⁴ See Security Council, UN Doc. S/PV.7439, 11 May 2015, p. 2 ff.

²⁵ See, for instance, “Remarks to the Press by the Vice-President of the International Federation of the Red Cross at United Nations Headquarters”, 6 May 2015, available at: <<http://www.ifrc.org/en/news-and-media/opinions-and-positions/speeches/2015/united-nations-headquarters-new-york-6-may-2015-ifrc-vice-president-francesco-rocca---remarks-to-the-press/>>; MEIJERS COMMITTEE, “Military Action against Human Smugglers: Legal Questions Concerning the EUNAVFOR MED Operation”, 23 September 2015, available at: <<http://www.statewatch.org/news/2015/sep/eu-meijers-cttee-eunavfor.pdf>>.

cilitation of unauthorised entry, transit and residence,²⁶ and of Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit, and residence.²⁷ Both the Agenda on Migration²⁸ and the Agenda on Security²⁹ have identified the fight against the smuggling of migrants as a priority for the EU, and on 27 May 2015 the first EU Action Plan against migrant smuggling (2015-2020) was published.³⁰ The Action Plan sets forth a number of concrete actions to be undertaken by EU institutions over a five year period, among which is the revision and the amelioration of the legal framework *in subiecta materia*. As to human trafficking, the policy framework for action was outlined in 2012 by the Commission's Communication on the EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016,³¹ whereas the main legislative instrument in force is Directive 2011/36/EU of 5 April 2011 on preventing and combatting trafficking in human beings and protecting its victims.³²

At the operative level, a number of initiatives have been developed in order to strengthen the cooperation among Member States, EU institutions, and agencies in the investigation and prosecution of migrant smugglers and traffickers. As to police cooperation, in particular, in March 2015 Europol launched the Joint Operational Team Mare (JOT Mare): a specialised team of experts, combining national resources and Europol expertise, which specifically focuses on criminal organisations involved in migrant smuggling across the Mediterranean Sea. JOT Mare aims at identifying concrete investigative leads (e.g., lists of suspected vessels) and support its partners in initiating investigations. In February 2016, a European Migrant Smuggling Centre (EMSC) was launched within Europol, to act as the main information hub and coordinating entity on migrant smuggling within the agency.³³ As to cooperation between prosecuting authorities, of great interest is the creation, on

²⁶ OJ EC L 328, 5 December 2002, p. 17 ff.

²⁷ *Ibid.*, p. 1 ff. The Directive aims to approximate the legal provisions of Member States with regard to the precise definition of the infringement in question and the cases of exemption, whereas the Framework Decision sets out minimum rules for penalties, liability of legal persons and jurisdiction.

²⁸ See *supra* note 6.

²⁹ COM (2015) 185 final, 28 April 2015.

³⁰ "EU Action Plan against Migrant Smuggling (2015-2020)", COM (2015) 285 final.

³¹ COM (2012) 286 final, 19 June 2012.

³² OJ L 101, 15 April 2011, p. 1 ff. The Directive provides for minimum common rules for determining offences of trafficking in human beings and punishing the traffickers. It also includes measures for the prevention of the phenomenon and the protection of victims' rights. See also Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ EU L 261, 6 August 2004, p. 19 ff.

³³ See EUROPOL, "Europol Launches the European Migrant Smuggling Centre", 22 February 2016, available at: <https://www.europol.europa.eu/content/EMSC_launch>.

29 September 2015, of a thematic group on migrant smuggling within Eurojust.³⁴ In accordance with Article 8 of Decision 2015/778, EUNAVFOR MED has concluded cooperation arrangements with Eurojust and Europol and established a structured cooperation with Frontex. Indeed, in the Central Mediterranean the Frontex led Joint Operation Triton is currently underway, whose main task is border surveillance and which is also carrying out activities in order to control irregular migration and to tackle cross-border crime. The two operations act in close coordination and have even established a division of responsibilities, EUNAVFOR MED operating immediately south of Triton's operational area.³⁵

3. RESOLUTION 2240 (2015) OF THE UN SECURITY COUNCIL AND ITS LEGAL BASIS

In its preamble, Council Decision 2015/778 points out that on 11 May 2015 the HR “informed the UN Security Council about the crisis of migrants in the Mediterranean and on the ongoing preparation for a possible Union naval operation”, and that she “expressed the need for the Union to work with the support of the UN Security Council”.³⁶ Additionally, Articles 1 and 2 of the Decision make a number of references to the requirement to carry out the naval operation in accordance with any applicable UN Security Council resolution. In this case the EU followed a different line of conduct from that adopted with respect to Operation Atalanta, which was organized only *after the adoption* by the Security Council of umbrella resolutions. By any means, the *phased approach* envisaged for EUNAVFOR MED allowed the EU to launch a first phase of the operation, exclusively focused on *information gathering* and hence not raising any particular international law issue, while working at the UN for the adoption of a resolution authorising further, more problematic phases. The diplomatic action undertaken by the EU and its Member States, since early 2015, met however with a number of difficulties, due to the opposition of the Libyan Government (and other African countries) and, more importantly, of the Russian Federation, to some aspects of the proposals initially put forward.³⁷ These difficulties were overcome only after “lengthy negotiations”, led by the United Kingdom, the initiator of the resolution.³⁸ On 9 October 2015, the Security Council adopted Resolution 2240 (2015), under the agenda item “Maintenance of

³⁴ On Eurojust, see Art. 85 TFEU.

³⁵ See Parliament Hearing of the Operation Commander, *cit. supra* note 18.

³⁶ *Supra* note 7. The intervention of the HR before the Security Council was the first application of Art. 34(2) TEU.

³⁷ See “Mediterranean Migrants: Libya Rejects EU Military Plans”, BBC, 11 May 2015, available at: <<http://www.bbc.com/news/world-africa-32686579>>.

³⁸ See the statement of Chad to the UN Security Council, UN Doc. S./PV.7531, 9 October 2015, p. 3. A crucial role in the elaboration of the draft resolution was also played by Italy (currently not a member of the Security Council).

International Peace and Security”.³⁹ According to the last paragraph of the preamble, the Security Council “acts under Chapter VII of the UN Charter”, notably with specific regard to “the necessity to put an end to the recent proliferation of, and endangerment of lives by, the smuggling of migrants and trafficking of persons in the Mediterranean Sea off the coast of Libya”. Resolution 2240 does not mention any of the three specific situations which, pursuant to Article 39 of the UN Charter, enable the Security Council to act under Chapter VII (threat to the peace, breach of the peace or act of aggression). This *modus operandi* is not uncommon in the practice of the Security Council,⁴⁰ and *in casu* it reflects a compromise. A draft initially presented by the United Kingdom had included references to the situation in Libya as being a “threat to the peace”, in line with previous resolutions dealing with the North-African country.⁴¹ That language was however deleted upon the insistence of the Libyan Government, which probably feared that any reference to the situation in the country as the *direct cause* of the migrant crisis could corroborate plans for international intervention in the Libyan territory.⁴²

Some commentators, before the adoption of Resolution 2240, raised some doubts *vis-à-vis* the *qualification of migrant smuggling and human trafficking in the Mediterranean as a “threat to the peace”* under Article 39 or, more generally, as a situation justifying recourse to Chapter VII of the Charter.⁴³ These doubts do not seem, however, justified. As is known, the Security Council enjoys a wide political discretion in determining the existence of a situation allowing for the recourse to measures under Chapter VII of the Charter. Even if one shares the opinion

³⁹ Resolution 2240 received 14 votes in favour whereas one member (Venezuela) abstained. See WILSON, “The Mediterranean Migrant Crisis: Key Considerations for the UN Security Council”, *Harvard National Security Journal*, 7 October 2015, available at: <<http://harvardnsj.org/2015/10/mediterranean-migrant-crisis/>>; BO, “Fighting Transnational Crimes at Sea under UNSC’s Mandate: Piracy, Human Trafficking and Migrant Smuggling”, *EJIL: Talk!*, 30 October 2015; ZICCARDI CAPALDO, “The EUNAVFOR MED Operation and the Use of Force”, 18 December 2015, *ASIL Insights*, Vol. 19, issue 27, 18 December 2015, available at: <<https://www.asil.org/insights/volume/19/issue/27/eunavfor-med-operation-and-use-force>>; CADIN, “La risoluzione 2240 (2015) sul traffico di migranti nel Mediterraneo: il Consiglio di sicurezza autorizza l’uso ... misurato della forza”, *OIDU*, 2015, p. 696 ff.; and LICASTRO, “La seconda fase dell’operazione EUNAVFOR MED”, *DUE – Osservatorio europeo*, 2015, available at: <<http://www.dirittounioneuropea.eu/index.php/it/indice>>.

⁴⁰ See LAVALLE, “The ‘Acting under Chapter VII’ Clause in Security Council Resolutions under Article 41 of the United Nations Charter: A Misconceived and Harmful Way of Invoking Authority”, *IYIL*, 2009, p. 233 ff.; and RONZITTI, *Diritto internazionale dei conflitti armati*, 5th ed., Torino, 2014, pp. 58-59.

⁴¹ See, among others, Resolution 2238 (2015) of 10 September 2015.

⁴² In the statement issued after the adoption of the resolution, Libya recognized “the grave threat to international peace and security posed by the smuggling and trafficking of migrants” (UN Doc. S/PV.7531, *cit. supra* note 38, p. 10).

⁴³ See MEIJERS COMMITTEE, *supra* note 25; BO, *supra* note 39; and MANANASHVILI, “The Legal and Political Feasibility of the EU’s Planned ‘War on Smuggling’ in Libya”, *EJIL: Talk!*, 10 June 2015.

that such discretion is not unlimited,⁴⁴ Resolution 2240 does not seem to give rise to particular problems. It is true that the situation which the Security Council intends directly to confront is different from a conflict of military nature. However, it emerges from the text of the Resolution, as well as from the context, that the Security Council based its decision to act on the premise that the current crisis in the Mediterranean amounts to an exceptional “humanitarian tragedy”, in view of the massive loss of lives which has occurred, a tragedy which is certainly worsened by the activities carried out by migrant smugglers and human traffickers.⁴⁵ That idea was reiterated in the interventions of many members of the Security Council after the adoption of the Resolution,⁴⁶ including Russia and African States, and is *widely shared in the international community*.⁴⁷ This is confirmed by the number of States having stressed, in the UN General Assembly, the magnitude of the migrant crisis in the Mediterranean, the fact that the latter is exacerbated by migrant smuggling and the consequent need to fight that criminal activity.⁴⁸ Resolution 2240 might be considered as yet another example of the trend to consider exceptional humanitarian emergencies as situations allowing the Security Council to act under Chapter VII of the Charter.⁴⁹

Needless to say, the reference to *regional organisations* in the operative part of Resolution 2240 must be interpreted as concerning the EU (in the preamble of the Resolution the Security Council expressly takes note of the EU Decision establishing EUNAVFOR MED). In order to delimit the scope of the actions to be taken by Member States and regional organisations, in accordance with Resolution 2240, one must spell out the definitions of “smuggling of migrants” and “trafficking in persons” postulated by the Security Council. In Paragraph 4 of the Resolution, the Security Council reaffirms the UN Convention against Transnational Organized Crime (UNTOC)⁵⁰ and its two supplementing Protocols against the Smuggling of

⁴⁴ Particularly convincing is the theory, put forward by CONFORTI AND FOCARELLI (*Le Nazioni Unite*, 10th ed., Padova, 2015, p. 246 ff.), according to which the Security Council should qualify as a threat to the peace only situations which are *effectively condemned by the majority of the international community*. The legal basis for this theory is found in Art. 24 of the UN Charter, under which the SC acts “on behalf of all Member States”.

⁴⁵ In the first paragraph of the preamble of Resolution 2240 the Security Council recalls “its press statement of 21 April on the maritime tragedy in the Mediterranean Sea”.

⁴⁶ See Russia, UN Doc. S/PV.7531, *cit. supra* note 38, p. 6; Nigeria, *ibid.*, p. 9; Libya, *ibid.*, p. 10.

⁴⁷ See also the Press statement of the African Union Peace and Security Council of 27 April 2015, African Union Doc. PSC/PR/COMM.1(D).

⁴⁸ See UN General Assembly, Meetings Coverage, 20 November 2015, GA/11729, available at: <<http://www.un.org/press/en/2015/ga11729.doc.htm>>.

⁴⁹ See RONZITTI, *Introduzione al diritto internazionale*, 5th ed., Torino, 2016, pp. 448-449. Cf., however, the statement of Venezuela before the Security Council, according to which the application of Chapter VII with respect to the humanitarian situation of migrants “is a serious mistake” (UN Doc. S/PV.7531, *cit. supra* note 38, p. 5).

⁵⁰ 15 November 2000, entered into force 29 September 2003.

Migrants by Land, Sea and Air⁵¹ and to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children⁵² as the “primary legal instruments” to combat the activities in question. Paragraph 5 of the Resolution, with an unusual didactic language, underlines that “although the crime of smuggling of migrants may share, in some cases, some common features with the crime of trafficking in persons, Member States need to recognise that they are distinct crimes, as defined by UNCTOC and its Protocols, requiring differing legal, operational, and policy responses”. On account of that language, States and the EU, when implementing Resolution 2240, will basically have to refer to the notions of “smuggling of migrants” and “trafficking in persons” as defined in the two supplementary Protocols to the UNCTOC. All EU Member States (with one exception)⁵³ are bound by both Protocols to the UNCTOC, of which the EU is also a party.

4. THE RIGHT OF INSPECTION OF FLAGLESS VESSELS

The core of Resolution 2240 is represented by Paragraphs 5-11. Paragraph 5 calls upon Member States, acting nationally or through regional organisations that are engaged in the fight against migrant smuggling and human trafficking, to inspect on the high seas off the coast of Libya any unflagged vessels that they have reasonable grounds to believe have been, are being, or imminently will be used by organised criminal enterprises for migrant smuggling or human trafficking from Libya. The greater part of the illegal activities *in subiecta materia*, particularly in the Mediterranean, involve vessels without a flag or registration, notably “inflatable boats, rafts and dinghies”, which are expressly mentioned in Resolution 2240 (2015).⁵⁴ The latter calls upon States *to inspect* the suspected vessels in question “as permitted under international law”. Indeed, the conduct recommended by the Resolution *vis-à-vis* flagless vessels is in itself lawful under the international law of the sea. It must be recalled that Article 110(1)(d) of the UN Convention on the Law of the Sea (UNCLOS)⁵⁵ provides that a warship is entitled to exercise on the high seas the *right of visit* of any vessel when there is reasonable ground for suspecting that “the ship is without nationality”. More particularly, the right of

⁵¹ 15 November 2000, entered into force 28 January 2004 (hereinafter “Smuggling of Migrants Protocol”).

⁵² 15 November 2000, entered into force 25 December 2003.

⁵³ Ireland is not a party to the Smuggling of Migrants Protocol.

⁵⁴ See Frontex, *cit. supra* note 3; Parliament Hearing of the Operation Commander, *cit. supra* note 18. With respect to inflatable boats, rafts, dinghies, and the other boats being too little to be registered, it might even be questioned whether they can be considered “ships” under international law. See Council of the European Union, Doc. 9804/07, “Commission Staff Working Document, Study on the International Law Instruments in Relation to Illegal Immigration by Sea”, 23 May 2007, p. 19.

⁵⁵ 10 December 1982, entered into force 16 November 1994.

visit under Article 110 UNCLOS involves a right to stop the vessel and to send a boat under the command of an officer to the suspected ship, in order to verify its nationality. If, after having checked the documents, there remains suspicion over the lack of nationality of the vessel, a “further examination” on board the ship (i.e. a search of the vessel) can be carried out, with all possible consideration. Such a right may be exercised also by any other duly authorised ship or aircraft clearly marked and identifiable as being on government service.⁵⁶ With special regard to the smuggling of migrants, the 2000 Protocol authorises States Parties “to board and search” vessels without a nationality suspected of being engaged in the activity in question.⁵⁷

Considering that legal framework, EUNAVFOR MED ships are certainly allowed to stop, board, and search a ship without nationality suspected of migrant smuggling or human trafficking.⁵⁸ It might however be questioned whether *further rights* can be exercised, under Resolution 2240 and international law, in respect of a vessel carrying illegal migrants confirmed to be without nationality. In that regard, it must be noted that Paragraph 8 of Resolution 2240 (providing for an authorisation to *seize* suspected vessels and to *dispose* of them), surprisingly enough, does not expressly refer to Paragraph 5 (and, as a consequence, to flagless vessels). As to the international law of the sea, UNCLOS confines itself to setting forth the abovementioned right of visit. According to some scholars, flagless ships *do not enjoy any protection under international law* and can be subjected to the jurisdiction of any State. As a consequence, the boarding State would, *inter alia*, be empowered to escort the stateless ship to a port and subject it (and the persons on board) to law enforcement procedures under national law.⁵⁹ Other international lawyers, however, hold a more cautious approach, underlining that UNCLOS does not provide universal jurisdiction over a stateless vessel and confines itself to setting forth a right of visit in order to verify the flag. In the view of an important part of the doctrine, the boarding State could assert its adjudicative and enforcement jurisdiction on the stateless ship (and the persons on board) only in the presence of

⁵⁶ UNCLOS, Art. 110(5). See, in general, LOWE and TZANAKOPOULOS, “Ships, Visit and Search”, in WOLFRUM (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford, 2012, para. 9.

⁵⁷ Smuggling of Migrants Protocol, Art. 8(7).

⁵⁸ With regard to Italian law, see Art. 12(9)-*quater* of the Legislative Decree No. 286 of 25 July 1998 (*Testo unico sull’immigrazione*), and Art. 7(3) of Decree of 14 July 2003 on the fight against illegal migration (GU No. 220 of 22 September 2003).

⁵⁹ This is the position under current US practice. See *Commander’s Handbook on the Law of Naval Operations*, Doc. NWP 1-14M, 2007, para. 3.11.2.3; THOMAS and DUNCAN (eds.), *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations*, *International Law Studies*, Vol. 73, 1999, p. 239. In the legal literature, see, among others, BROWNLIE, *Principles of Public International Law*, 7th ed., Oxford, 2008, p. 235; DE GUTTRY, *Lo status della nave da guerra in tempo di pace*, Milano, 1994, p. 183 ff.; and CAFFIO, *cit. supra* note 2, p. 53.

an appropriate nexus between the wrongful act, allegedly committed by the vessel, and its legal order.⁶⁰

With specific regard to ships without nationality suspected of being used in the *smuggling of migrants*, Article 8(7) of the Smuggling of Migrants Protocol authorises States Parties not only to board and search the vessel but also, when evidence confirms the suspicion, “to take appropriate measures in accordance with relevant domestic and international law”. Yet, many scholars argue that even that provision would not clarify the legal picture. On the one hand, it does not exactly spell out what kind of measures can be taken in respect of the ship; on the other hand, by referring to international law, it would leave the question, as to the need for an appropriate nexus between the wrongful act and the State asserting jurisdiction, open.⁶¹

In consideration of that unclear legal framework, *the lack of precision* of Resolution 2240 as to the exercise of adjudicative jurisdiction and enforcement actions vis-à-vis stateless ships is *unfortunate*. This is the more so, if one considers that, under the prevailing view in Italian case law, stateless ships are not *per se* subject to universal jurisdiction and the exercise of adjudicative and enforcement jurisdiction over the ships engaged in migrant trafficking would require *an appropriate link with the Italian legal order* (even if some recent judgments have identified that nexus on the basis of a “functional” interpretation of the legal norms concerning criminal jurisdiction).⁶² The judgment of the Tribunal of Crotone on the *Cemil-Pamuk* case⁶³ is often quoted as an application of the theory that the statelessness of the vessel is sufficient for the exercise of criminal jurisdiction.⁶⁴ However, that reading of the judgment does not seem to be correct. The Tribunal asserted the Italian jurisdiction only in consideration of the fact that the stateless vessel had transferred, on the high seas, a number of illegal migrants into another ship and that the second ship had entered the Italian territorial waters. As a consequence, the Italian jurisdiction was established on the basis of the *territoriality principle*, for the event deriving from the conduct of the “mother ship” (illegal entry into the national territory) had taken place in Italian territorial waters (doctrine of constructive presence).

⁶⁰ CHURCILL and LOWE, *The Law of the Sea*, 3rd ed., Manchester, 1999, p. 214; TANAKA, *The International Law of the Sea*, Cambridge, 2012, p. 162; PAPASTAVRIDIS, *The Interception of Vessels on the High Seas*, Oxford/Portland, 2013, p. 265. See also GUILFOYLE, *Shipping Interdiction and the Law of the Sea*, Cambridge, 2009, pp. 16-17. According to O’CONNELL (*The International Law of the Sea*, ed. by SHEARER, Vol. II, Oxford, 1984) when a ship is not registered or loses its nationality “its status is then a question for the municipal law of the owners, and it is likely that this would then claim to regulate the ship, and, in that sense, to become a law of the ship’s nationality” (pp. 755-757).

⁶¹ See SCOVAZZI, *cit. supra* note 2, p. 51; GUILFOYLE, *cit. supra* note 60, p. 185.

⁶² See *infra* section 10.

⁶³ *Tribunale di Crotone, Pamuk and Others*, 27 September 2001, RDI, 2001, p. 1155 ff; ANDREONE, IYIL, 2001, p. 273 ff.

⁶⁴ PAPASTAVRIDIS, *cit. supra* note 60, p. 265.

In any case, it is here argued that an *a contrario* interpretation of Paragraphs 5 and 8 of Resolution 2240, according to which Member States and regional organisations would not be allowed to carry out the enforcement actions envisaged by Paragraph 8 vis-à-vis flagless vessels, would lead to a result *clearly absurd* and *unreasonable*. As a consequence, one must conclude that the Security Council acted on the assumption that these kinds of measures can be taken in respect of ships without nationality *in accordance with customary international law* or at least that it left that issue open. Consequently, it is here submitted that in the course of operations directed at implementing Resolution 2240 the intervening State is allowed to take enforcement measures with respect to flagless ships (seizure of the vessel and apprehension of persons on board) and to assert adjudicative jurisdiction *when that is provided by its national law*.⁶⁵ That however does not solve all the problems. As previously seen, some legal orders set forth conditions or limitations as to the assertion of enforcement and adjudicative jurisdiction over flagless ships on the high seas and this in particular is the case with Italian law. Considering that all the suspected smugglers and traffickers apprehended at sea by EUNAVFOR MED are disembarked and prosecuted in Italy, this legal situation may determine problems as to the validation by Italian judges of the enforcement measures adopted with respect to flagless vessels and persons on board (seizure or destruction of the ship and arrest of suspected individuals). These issues will be dealt with in the following sections.⁶⁶

5. THE AUTHORISATION TO INSPECT AND SEIZE FLAGGED SHIPS AND ITS LIMITS *RATIONE TEMPORIS* AND *RATIONE LOCI*

As far as flagged vessels are concerned, in principle Paragraph 6 of Resolution 2240 (2015) calls upon Member States to inspect ships suspected of the activities at issue “with the consent of the flag State”. Under the Smuggling of Migrants Protocol each State Party has an obligation to designate an authority having the competence to receive and respond requests from other Parties for confirmation of registry and for authorisation to take appropriate measures vis-à-vis national vessels.⁶⁷ Hopefully that should facilitate, among parties to the Protocol, the requests for flag-State consent. On the other hand, the Security Council also decides, in

⁶⁵ This interpretation of the international law of the sea seems to be followed by the Regulation (EU) 656/2014 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 EU L 189, 27 June 2014, p. 93 (Art. 7). The Regulation governs the maritime operations coordinated by Frontex, including Joint Operation Triton currently underway in the Central Mediterranean (see also *supra* note 35 and corresponding text).

⁶⁶ See *infra* sections 7 and 10.

⁶⁷ Art. 8(6).

Paragraph 7 of the Resolution, to authorise Member States, acting nationally or through regional organisations,

“to inspect on the high seas off the coast of Libya vessels that they have reasonable grounds to suspect are being used for migrant smuggling and human trafficking from Libya, provided that such Member States and regional organisations make good faith efforts to obtain the consent of the vessel’s flag State prior to using the authority outlined in this paragraph”.

Furthermore, Paragraph 8 of the Resolution authorises Member States “to seize” vessels, inspected under the authority of the preceding paragraph, “that are confirmed as being used for migrant smuggling or human trafficking from Libya”. These provisions authorise States to take measures (*inspection* and *seizure* of a foreign private vessel) that might go beyond what is currently allowed under the customary international law of the sea, in particular where action is undertaken *without the express consent of the flag State* (the cases in which that situation may arise will be discussed in the following paragraph). In accordance with the principle of the freedom of the high seas, any attempt at inspecting a ship without the consent of the flag State, and *a fortiori* any attempt at seizing it in principle entails a violation of the exclusivity of flag State jurisdiction and a breach of international law, unless that conduct may find an appropriate basis under international law.⁶⁸ Now, it is generally accepted that an authorisation by the Security Council, acting under Chapter VII of the UN Charter, may constitute such an appropriate legal justification.

The authorisations by the Security Council to inspect and seize the vessels in question are however limited (*ratione temporis, loci* and *materiae*) and are subjected to a precondition.⁶⁹ *Ratione temporis*, the authorisations have been granted by the Security Council for a period of one year since the date of adoption of Resolution 2240. Needless to say, a renewal of the authorisation will be possible, as acknowledged by Paragraph 19 of the Resolution. That would in any case require a *new resolution* of the Security Council. *Ratione loci*, inspections and seizures may be carried out only “on the high seas off the coast of Libya”. Resolution 2240 does not authorise, for the time being, any enforcement action *within the Libyan territorial and internal waters*. That was “a step down” from the initial plans.⁷⁰ In effect, EU Council Decision 2015/778 envisages a second phase for EUNAVFOR MED, during which the European force should also conduct boarding, search, sei-

⁶⁸ See, in general, TREVES, “Codification du droit international et pratique des États dans le droit de la mer”, RCADI, Vol. 223, 1990-IV, p. 218 ff.

⁶⁹ Para. 10 of Resolution 2240 points out that the authorisations in paras. 7 and 8 do not apply with respect to vessels entitled to sovereign immunity.

⁷⁰ See, for instance, Sengupta, “Europeans Seek to Use Force Against Smugglers at Sea”, The New York Times, 10 September 2015.

zure, and diversion “in the territorial and internal waters” of Libya in accordance with “any applicable UN Security Council Resolution or consent of the coastal State concerned”.⁷¹ As to the *consent of the coastal State*, during the drafting of Resolution 2240 attempts at obtaining the authorisation of the then internationally recognised Government of Libya (based in Tobruk) met with considerable difficulties. In any case, the Tobruk Government did not control the whole Libyan territory and that would have complicated the conduct of the operation in areas under the authority of opposing factions, controlling in particular the region of Tripoli and its ports (where the majority of the smugglers operate). On the other hand, the Tobruk Government made it extremely clear that it would not have issued its consent if the EU had decided to negotiate with rival movements.

From a legal point of view, when acting under Chapter VII, the Security Council *could have authorised enforcement action in Libyan territorial waters or territory, even without the consent* of the territorial State. That would however represent an extraordinary action in the practice of the Security Council. In this case, that possibility looked immediately unrealistic due to the position of two permanent members of the Security Council (Russia and China) and of African States.⁷² In practice, Resolution 2240 has only authorised *a first step* of the envisaged EUNAVFOR MED phase 2 (“phase 2 Alpha”). The full implementation of phase 2, with an expansion of the operation into the territorial and internal waters of Libya (“phase 2 Bravo”) will be contingent upon the formation of a government of national unity in Libya, which could consent to that development, opening the way for a further Security Council resolution. In order to define the area covered by the abovementioned authorization, Resolution 2240 makes reference to “the high seas off the coasts of Libya”. The precise identification of the maritime zones in which the operation can take place is not obvious. On the one hand, the legal regime governing the sea areas off the coasts of Libya is far from settled. On the other hand, it is not immediately clear whether the notion of “high seas” under the Resolution also includes areas over which Libya claims exclusive rights as to the regulation of economic activities. One has to take into account that in 1973 Libya declared that the Gulf of Sidra forms part of its internal waters: the Gulf was in particular enclosed by a line, of approximately 300 miles, along the 32°30’ parallel of north latitude.⁷³ However, this claim was rejected by a good number of States, including major EU States (France, Germany, Italy, Spain, and the United Kingdom).⁷⁴

⁷¹ Decision 2015/778, *cit. supra* note 7, Art. 2.

⁷² The need to fully respect the sovereignty and territorial integrity of Libya is affirmed in para. 2 of Resolution 2240 and was reasserted by some UN members after its adoption. See UN Doc. S/PV.7531 (*cit. supra* note 38), notably the statements of Chad (p. 3), Malaysia (p. 4), China (p. 6), Jordan (p. 7).

⁷³ UN Legislative Series, National Legislations and Treaties relating to the Law of the Sea (ST/LEG/SER.B/18), 1976, p. 26. See FRANCONI, “The Gulf of Sidra Incident (United States v. Libya) and International Law”, *IYIL*, 1980-81, p. 85 ff.

⁷⁴ See ROACH and SMITH, *Excessive Maritime Claims*, 3rd ed., Leiden, 2012, pp. 46-48.

In February 2005, Libya established a fisheries protection zone, in respect of the General People's Committee Decision No. 37 of 2005.⁷⁵ In order to delimit the exclusive fishery zone the Libyan General People's Committee issued a separate Decision (No. 105 of 2005).⁷⁶ The delimitation of the Libyan fishery zone met with the protests of a number of States and of the EU Presidency: considering that Libya claims the Gulf of Sidra as part of its internal waters, the new 62 mile fishery zone seemed to be measured from the external limit of a 12 mile territorial sea delimited from the closing line of the Gulf.⁷⁷ Additionally, in 2009 Libya declared an Exclusive Economic Zone (EEZ) "adjacent to and extending as far beyond its territorial waters as permitted under international law".⁷⁸ The outer limits of that zone have not been precisely delimited yet.

What conclusions can be drawn from such an intricate legal picture? First, EUNAVFOR MED is certainly not going to acknowledge the Libyan claim to the Gulf of Sidra and as a consequence will consider the Libyan territorial sea as not extending beyond a 12 mile belt from the coastline. Second, it seems safe to argue that the notion of "high seas off the coasts of Libya" also includes areas possibly claimed by Libya as part of its fisheries conservation zone or EEZ. It is true that according to Article 86 UNCLOS, which is expressly mentioned in Resolution 2240 as reflecting international law, the high seas provisions of the Convention "apply to all parts of the sea that are not included in the EEZ". Yet, UNCLOS attributes to the coastal State, in its EEZ, sovereign rights and jurisdiction linked to the economic exploitation of the zone, the protection of the marine environment and marine scientific research, reaffirming at the same time the freedom of navigation for all States in the EEZ. Considering that the authority given to EUNAVOR MED by Resolution 2240 concerns the control of navigation for the purpose of preventing unlawful migration, that authority should also extend to waters claimed by Libya as EEZ or fisheries conservation zones. That was indirectly confirmed by the Libyan delegate at the time of adoption of the Resolution. According to his statement, Libya does not object to the deployment of a European maritime force off its coasts, even if it invokes "coordination and cooperation" between the EU and the countries concerned, "particularly when it involves military operations in the EEZ of these countries".⁷⁹ That statement seems to allude to the claim, put forward by a number of coastal States, as to the control of the activities of foreign warships in their EEZs. More particularly, some coastal States require an authorisation with respect to the carrying out of military manoeuvres whereas others even claim to subject the navigation of warships in

⁷⁵ "Law of the Sea Bulletin", No. 58, 2005, p. 14 ff.

⁷⁶ *Ibid.*

⁷⁷ See ATTARD, "Mediterranean Maritime Jurisdictional Claims: A Review", in BASEDOW, MAGNUS and WOLFRUM (eds.), *The Hamburg Lectures on Maritime Affairs 2009 & 2010*, Berlin, 2012, p. 89 ff., p. 99.

⁷⁸ "Law of the Sea Bulletin", No. 72, 2010, p. 79.

⁷⁹ UN Doc. S/PV.7531, *cit. supra* note 38, pp. 10-11.

their EEZ to their consent. Apart from the dubious legality of these claims, one must underline that the authority, granted by Resolution 2240, to carry out the described activities on the high seas – which as noted above includes areas under the economic jurisdiction of the coastal States concerned – *is not subject to any specific condition concerning the coastal State's consent.*

6. THE REQUIREMENT TO MAKE “GOOD FAITH EFFORTS” TO OBTAIN THE FLAG STATE’S CONSENT

Under Resolution 2240 (2015) the authorisation to inspect flagged ships is subject to some preconditions. First, the warship must have “reasonable grounds to suspect” that the vessels “are being used for migrant smuggling and human trafficking”.⁸⁰ Second, before boarding a vessel suspected of the activities in question, the Member State or regional organisation must make good faith efforts to obtain the consent of the vessel’s flag State. The model centred on the requirement to undertake “good faith efforts” is not completely new in UN practice. One may quote as a first precedent, also concerning the Libyan crisis, Resolution 2146 (2014). In Paragraph 5, the latter authorises States to inspect on the high seas a vessel suspected of illicitly exporting crude oil from Libya; in Paragraph 6 however it also requests that Member States “before taking the measures authorised in Paragraph 5, first seek the consent of the vessel’s flag State”. In this case the authorisation to carry out the inspections was confined to ships having previously been identified by a Security Council committee, as underlined by a number of States.⁸¹ Another example is offered by Resolution 2182 (2014) on Somalia, with regard to the enforcement of the ban on charcoal export and of the arms embargo. Paragraph 15 of the Resolution authorises Member States to inspect, in Somali territorial waters and on the high seas off the coast of Somalia, vessels which they have reasonable grounds to believe are violating the ban or the embargo; yet the following paragraph requests States, prior to any inspection, “to make good-faith efforts to first seek the consent of the vessel’s flag State”. On both occasions, the formula was adopted in order to meet the preoccupations put forward by a number of Security Council members (notably, China, Russia, and some developing States) as to a possible erosion of the freedom of navigation and the principle of exclusive flag State jurisdiction.⁸² These States

⁸⁰ The formula is identical to that of Art. 8(2) of the Smuggling of Migrants Protocol.

⁸¹ UN Doc. S/PV.7142, 19 March 2014: see in particular the statements of Argentina, Russia, and China (pp. 2-3).

⁸² As to Resolution 2146 (2014) see *supra* note 81. With regard to Resolution 2182 (2014) see UN Doc. S/PV.7286, 24 October 2014, notably the statements of China and Argentina (at 4-5). Jordan did not accept even that compromise and decided to abstain, arguing that the authorisation granted by the Security Council “may still be open to abuse and threaten the maritime trade on the high seas” (p. 3).

also stressed the need to scrupulously comply with the conditions and limitations set forth by the Security Council and that the authorisation should not be regarded as a precedent for establishing customary international law.

Going back to Resolution 2240 (2015), the text of Paragraph 7 clearly entails that, before carrying out the inspection, the warship *has to request the permission of the flag State*. On the other hand, the formula in question also implies that the inspection can take place in situations in which *the consent has not been expressly given by the flag State*, provided good faith efforts were made to get such a consent. The precise identification of these situations is however problematic.⁸³ Some of the aspects left open by Resolution 2240 (2015) should be clarified by the Operation Plan and Rules of Engagement of EUNAVFOR MED (both documents are classified “confidential”).⁸⁴ Yet the imprecision of Resolution 2240 could open the way to disputes as to the lawfulness of more specific rules adopted by the EU. In any case, considering the text of the relevant paragraphs of Resolution 2240, as well as its context, it seems that an inspection (under the good faith efforts formula) can be carried out in case of *lack of response, on the part of the flag State*, to a request made by the intercepting State. One could speak in that regard of a sort of *tacit consent* on the part of the flag State.⁸⁵ However – in contrast to, for instance, some bilateral interdiction agreements concluded for fighting the proliferation of weapons of mass destruction, drug trafficking or illegal fishing – Resolution 2240 does not establish a precise time-limit within which a response has to come from the flag State.⁸⁶ In this regard, it must be noted that according to Paragraph 9 of Resolution 2240 flag States, having received requests under Paragraphs 7 and 8, are called upon “to review and respond to them in a rapid and timely manner”. In the light of the above, one has to conclude that the intervening State, in order to comply with the good-faith efforts requirement, must transmit the request to the flag State and, before boarding the vessel, has to wait for a time *which it deems reasonable in the light of the concrete circumstances*. Among these, the existence of a danger to the human life of persons on board the vessel may naturally have a special weight.

Yet, *quid iuris* if the authorisation is *expressly denied* by the flag State? It is submitted that in that case an inspection could not be carried out and, if it had already started, should be immediately stopped. On the other hand, if the consent of the flag State is conditioned upon certain limitations, the inspection and possible

⁸³ WILSON, *supra* note 39, pp. 5 and 8.

⁸⁴ A request for access to these documents was refused, on 29 October 2015, by the General Secretariat of the Council. See at: <http://www.asktheeu.org/en/request/eunavfor_med_operation_sophia_op>.

⁸⁵ On this point Resolution 2240 clearly goes beyond the Smuggling of Migrants Protocol, which requires the *express authorisation* of the flag State in order to carry out any inspection of a suspected vessel.

⁸⁶ Resolution 2240 does not specify whether the request has to be in writing nor whether the flag State has to acknowledge receipt of the request. See also WILSON, *supra* note 39, pp. 5 and 8.

seizure of the vessel could take place only according to these limitations. These conclusions seem to be required by a reading of Resolution 2240 carried out in accordance with the criteria for the interpretation of Security Council resolutions outlined by the International Court of Justice.⁸⁷ In effect, in addition to the text of Resolution 2240, of great relevance are *in casu* the statements issued by a number of States, at the moment of its adoption, stressing the need to interpret the resolution in a strict manner and so as not to disrupt the principle of flag State jurisdiction.⁸⁸ Also the practice concerning previous references to the formula in question, or to analogous ones, confirms that, in the view of the majority of UN members, they do not intend to supersede the principle of the exclusive jurisdiction of the flag State. Overall, the “good faith efforts” formula clearly constitutes a compromise between the model characterised by the authorisation to inspect vessels *without flag State consent*, at times applied by the Security Council,⁸⁹ and the traditional rule under which *express flag State permission* has first to be obtained by the interdicting State (confirmed also by the Smuggling of Migrants Protocol). In any case, the Security Council has once again stated in Resolution 2240 that the authorisations there given shall not affect customary international law *in subiecta materia*.

7. THE “DISPOSAL” OF INSPECTED VESSELS CONFIRMED TO HAVE BEEN EMPLOYED BY THE TRAFFICKERS

Since its initial conception, the naval operation to be launched in the Mediterranean for fighting migrant smuggling was envisaged as necessarily including the authority to destroy, or at least render inoperable, vessels and other assets employed in order to commit this activity.⁹⁰ Council Decision 2015/778 delineates, in its Article 2(2), a third phase of the mission, in which EUNAVFOR MED shall

“in accordance with any applicable UN Security Council Resolution or consent by the coastal State concerned, take all necessary measures against a vessel and related assets, including through disposing of them or rendering them inoperable, which are suspected of being used for human smuggling or trafficking, in the territory of that State, under the conditions set out in that Resolution or consent”.

⁸⁷ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports, 2010, p. 403 ff., para. 94.

⁸⁸ See UN Doc. S/PV.7531 (*cit. supra* note 38), in particular the statements of Russia and Chile (pp. 6-7).

⁸⁹ See, for instance, Resolution 665 (1990) of 25 August 1990 on Iraq-Kuwait, para. 1; Resolution 787 (1992) of 16 November 1992 on Serbia and Montenegro; Resolution 1973 (2011) of 17 March 2011 on Libya, para. 13.

⁹⁰ European Council, special meeting of 23 April 2015, *cit. supra* note 6 and related text.

Under the EU Decision, the measures aimed at disposing of the vessels should take place in a third phase of the mission and “in the territory of the State concerned” whereas EUNAVFOR MED has only reached phase 2 on the high seas and the prospect of a resolution authorising the destruction of vessels in Libyan territory or territorial waters is still some way away.

Yet, in Paragraph 8 of Resolution 2240 the Security Council, after authorising Member States to seize the vessels that have been inspected and are confirmed as being used for human smuggling or trafficking, “underscores that further action with regard to [...] vessels inspected under the authority of Paragraph 7, including disposal, will be taken in accordance with applicable international law with due consideration of the interests of any third parties who have acted in good faith”. The paragraph in question is obviously applicable only to foreign flagged vessels lawfully intercepted under the authority of the Resolution and, as previously argued, is also applicable to flagless ships.⁹¹ It however displays a certain measure of ambiguity. First, one has to determine what is meant by “further action [...] including disposal”. Second, one must clarify the proviso according to which such further action is allowed only “in accordance with applicable international law” and “with due consideration of the interests of any third parties who have acted in good faith”.

As to the definition of further action, including disposal, considering that the first part of Paragraph 8 already authorises the seizure of the traffickers’ vessel, it is clear that that notion refers to the *confiscation* of the vessels by the national courts of a Member State and also to the possible *destruction* of the ships, under the conditions spelled out below (the French version refers to “*leur destruction*”). That interpretation is confirmed by the reference to the EU Decision 2015/778, made in the preamble of the Resolution, and by a general assessment of the background circumstances of adoption of the resolution. More particularly, taking into account all these factors, it is submitted that Paragraph 8 of Resolution 2240 can safely be read by a Member State (and the EU) as giving it the power to take the following actions: (a) to *seize* the ship; (b) to *divert* it to a port and have it *adjudicated* upon by the national courts; (c) to *confiscate* or *destroy* it, in accordance with the decisions of national courts or of the commander of the intercepting ship. The proviso concerning due consideration of the interests of third parties having acted in good faith would seem to exclude in principle the confiscation or destruction of a flagged ship *without the consent of the flag State or a decision of a national court of the capturing State*. The latter would in particular be necessary in order to determine the owners of the seized vessel and their possible good faith.⁹² It seems that this

⁹¹ See *supra* section 4.

⁹² In particular, if a legitimate owner is found and if it is also determined that the latter acted in good faith (e.g., having the ship being stolen) a court could decide to return the vessel to him. The adjudication of the vessel by the capturing State should in principle be subject to the existence of an appropriate title for the exercise of adjudicative and enforcement jurisdiction. See, in this regard, *infra* section 10.

rule should apply in principle even in respect of flagless ships, for it is generally considered that “a ship without nationality is not an ownerless movable because the lack of nationality does not affect the property of the ship”.⁹³

At the same time, one cannot exclude, under the broad formula employed by Resolution 2240, the *immediate destruction of a vessel*, confirmed as being used by traffickers, when the commander of the capturing ship *bona fide* determines that the vessel could not be escorted to a port, in particular considering its sea-unworthiness or on account of weather and sea conditions. It is worth noting that an official report submitted on 25 January 2016 by the Commander of EUNAVFOR MED, released by WikiLeaks in February 2016,⁹⁴ affirms that during the first six months of the operation 67 vessels (wooden and rubber) have been destroyed. In this regard, during a parliamentary hearing, Admiral Credendino has confirmed that the vessels intercepted by EUNAVFOR MED are destroyed at sea whenever it is not possible to divert them to a port, pointing out that abandoning them on the high seas would endanger international navigation.⁹⁵

8. THE AUTHORISATION TO USE “ALL MEASURES COMMENSURATE TO THE SPECIFIC CIRCUMSTANCES” AND THE DUTY TO RESPECT HUMAN RIGHTS

In Paragraph 10 of Resolution 2240 the Security Council “decides” to authorise States and regional organisations to use all measures commensurate to the specific circumstances in confronting migrant smugglers or human traffickers. That clearly implies an authorisation to undertake *coercive measures* vis-à-vis those ships and individuals, suspected of being engaged in the smuggling of migrants, which resist boarding or any other activity covered by the resolution. This language is often used in resolutions adopted by the Security Council for authorising States or regional organisations to enforce compliance with international sanctions and is generally

⁹³ LAGONI, “Merchant Ships”, in WOLFRUM (ED.), *The Max Planck Encyclopedia of Public International Law*, Oxford, 2012, para. 33.

⁹⁴ Council of the European Union, “EUNAVFOR MED Op. SOPHIA Six Monthly Report from 22 June to 31 December 2015”, Doc. EEAS (2016) 126, 27 January 2016, pp. 11, 22.

⁹⁵ See Parliament Hearing of the Operation Commander, *cit. supra* note 18. Admiral Credendino has specified that disposal at sea would not contravene international conventions on environmental protection as it could be justified by the notion of *force majeure*. This practice seems to be followed also by Italian vessels operating within the national mission “Mare Sicuro” and by vessels assigned to Frontex Joint Operation Triton. In this regard, see the aggregate data on the activities carried out in the Central Mediterranean, from March to December 2015, by vessels from “Mare Sicuro”, Frontex, EUNAVFOR MED, the Italian Coast Guard, and Guardia di Finanza published in the “Editorial”, *Rivista marittima*, January 2016: “Smugglers arrested: 502; ships seized: 1; total boats sunk: 768 rafts and boats (if we consider the total area of Mare Sicuro operation), 285 rafts and boats (if we consider only the boats destroyed by units operating within Mare Sicuro)”.

interpreted as including a right to use armed force.⁹⁶ Indeed, after the adoption of Resolution 2240, France stressed that “the text precisely defines the circumstances in which the recourse to force would be authorised to combat resistance by traffickers”.⁹⁷ The initial draft resolution circulated by the United Kingdom envisaged an authorisation to use “all necessary means” in confronting the smugglers.⁹⁸ Such formula was however regarded as too broad by some UN members, who wanted to prevent any possible “abusive” interpretation of the mandate granted.⁹⁹ As noted in the legal literature,¹⁰⁰ the language finally adopted in Paragraph 10 of Resolution 2240 on the one hand expressly refers to the criterion of *proportionality* in the use of coercion,¹⁰¹ and, on the other hand, it seems also capable of including measures not amounting to an use of armed force properly so called (for instance, when activities are carried out with the flag State’s authorisation). In effect, in the case in question force will be directed at private individuals, or vessels, for “law enforcement” objectives.¹⁰² That also explains the requirement to carry out activities authorised by Resolution 2240 “in full compliance with international human rights law”.¹⁰³ Furthermore, Member States and regional organisations are called upon “to provide for the safety of persons on board as an utmost priority and to avoid causing harm to the marine environment or to the safety of navigation”. These require-

⁹⁶ See BLOKKER, “Outsourcing the Use of Force: Towards more Security Council Control of Authorized Operations?”, in WELLER (ed.), *The Oxford Handbook of the Use of Force In International Law*, Oxford, 2015, pp. 213-214. For a recent example, see Resolution 1973 (2011), *cit. supra* note 89.

⁹⁷ UN Doc. S/PV.7531, *cit. supra* note 38, p. 6. Venezuela abstained from voting on Resolution 2240 (2015) precisely because the latter authorises “the use of military force to deal with the humanitarian situation of migrants” (p. 5).

⁹⁸ See also Art. 2 (2) of Decision 2015/778, *cit. supra* note 7.

⁹⁹ See FALEG and BLOCKMANS, *cit. supra* note 7, p. 3: “Russia insisted on a watertight mandate to prevent a repetition of what it considered to be an abuse by Western nations” of the 2011 Resolution on military intervention in Libya.

¹⁰⁰ See CADIN, *cit. supra* note 39, p. 700.

¹⁰¹ See also the statement of the United Kingdom after the voting (“any action will be proportionate”): UN Doc. S/PV.7531, *cit. supra* note 38, p. 2.

¹⁰² The issue whether one must conceptually distinguish between measures involving the use of armed force in international relations and mere “police actions” or “law enforcement activities” is beyond the scope of this article. See GUILFOYLE, *cit. supra* note 60, p. 272 ff.; and PAPASTAVRIDIS, *cit. supra* note 60, p. 68 ff.

¹⁰³ As to the applicability of the European Convention on Human Rights (ECHR) with respect to maritime interception activities carried out on the high seas see, *inter alia*, European Court of Human Rights, *Medvedyev v. France*, Application No. 3394/03, Judgment of 29 March 2010; *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment of 23 February 2012. See also TREVES, “Human Rights and the Law of the Sea”, *Berkeley Journal of International Law*, 2010, p. 1 ff. available at: <<http://scholarship.law.berkeley.edu/bjil/vol28/iss1/1>>; PAPASTAVRIDIS, *cit. supra* note 60, p. 73 ff.; and LEHMANN, “The Use of Force Against People Smugglers: Conflicts with Refugee Law and Human Rights Law”, *EJIL: Talk!*, 22 June 2015, available at: <<http://www.ejiltalk.org/the-use-of-force-against-people-smugglers-conflicts-with-refugee-law-and-human-rights-law>>.

ments reflect the safeguard clauses envisaged, in respect of maritime interception activities, by Article 9 of the Smuggling of Migrants Protocol.

It is generally accepted that the basic rules governing the use of force in boarding private vessels have been articulated in the international case law, notably by the International Tribunal for the Law of the Sea in its judgment on the *Saiga* case, where it is stated that international law “[r]equires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law”.¹⁰⁴

One must keep in mind that in the case in issue coercion would be used against vessels generally having on board victims of trafficking and migrants (who can also be sometimes regarded as victims of the smugglers). Hence, taking into account the need to preserve as an the utmost priority the life of persons on board as well as the abovementioned *considerations of humanity* it is apparent that military force should be used only as a measure of last resort.¹⁰⁵ EUNAVFOR MED Rules of Engagement are classified as confidential.¹⁰⁶ However, from the remarks made before parliamentary bodies by the Operation Commander¹⁰⁷ and by Lieutenant General Wosolsobe,¹⁰⁸ it seems to emerge that current EUNAVFOR MED Rules of Engagement are very prudent as to the use of military force, basically confined to situations of *self-defence*.¹⁰⁹ In the Italian legal order, the rule currently governing the use of force in the framework of maritime activities directed at contrasting illegal immigration is also essentially based upon the principle of self-defence.¹¹⁰

Particular emphasis is placed by Resolution 2240 on the need to treat migrants with humanity and dignity and on the obligation of States and regional organisations to comply with *international human rights* and *refugee law*. In this regard,

¹⁰⁴ *The M/V “Saiga” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, para. 155.

¹⁰⁵ According to PASTAVRIDIS (*cit. supra* note 60, pp. 301-302), the use of force in operations involving the “interception of human beings” would be allowed exclusively in self-defence.

¹⁰⁶ See *supra* note 84.

¹⁰⁷ See Parliament Hearing of the Operation Commander, *cit. supra* note 18.

¹⁰⁸ See House of Lords, EU External Affairs Sub-Committee, EU Naval Force – Mediterranean (Operation Sophia) Inquiry (available at: <<https://www.parliament.uk>>), Evidence Given by Lieutenant General Wolfgang Wosolsobe, Director General, European Union Military Staff, 3 March 2016.

¹⁰⁹ Under Resolution 2240 the use of force by EUNAVFOR MED vessels seems to be permitted also in order to carry out the basic task of the operation (contrasting human smugglers and traffickers), provided the abovementioned requirements of necessity, proportionality and humanity are fully respected.

¹¹⁰ According to Art. 7 of the Ministerial Decree of 14 July 2003 (*cit. supra* note 58), when the use of force is necessary, the intensity, duration and scope of the response must be commensurate to the intensity of the offence, and to the imminence and effectiveness of the threat. See CAFFIO, *cit. supra* note 2, p. 44.

the Security Council expressly recognises that among the migrants “may be persons who meet the definition of a refugee under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto”.¹¹¹ The same preoccupations were expressed, at the time of adoption of the Resolution, by many members of the Security Council.¹¹² As far as the EU is concerned, however, and notwithstanding the worries sometimes expressed,¹¹³ there seems to be no reason to believe that the abovementioned obligations could be disregarded. The EU Decision establishing EUNAVFOR MED expressly states in its preamble that the operation will be conducted in accordance with international law and in particular with the 1951 Geneva Refugee Convention, “the principle of non-refoulement and international human rights law”.¹¹⁴ More importantly, the obligations stemming from international law with respect to the treatment of asylum seekers have been fully incorporated into the law of the EU, and of its Member States, and in many respects significantly expanded (notably, by the so called “subsidiary protection”).¹¹⁵ As to the basic principle of *non-refoulement*, envisaged by Article 33 of the 1951 Refugee Convention,¹¹⁶ it is well established in EU primary law, particularly in Article 78 (1) TFEU and in Articles 18 and 19 of the EU Charter of Fundamental Rights (and implemented in relevant secondary legislation).¹¹⁷ Last but not least, the case law of the Court of Justice of the EU¹¹⁸ and of the European Court of Human Rights (ECtHR)¹¹⁹ have certainly contributed to the full consolidation of the principle in the law and practice of the EU and its Member States.

¹¹¹ Resolution 2240, para. 7 of the preamble.

¹¹² See UN Doc. S/PV.7531 (*cit. supra* note 38), p. 3 (Chad), p. 4 (Malaysia), p. 6 (Russia and France), p. 7 (Chile and Jordan), p. 8 (USA), p. 9 (Nigeria).

¹¹³ See, for instance, LEHMANN, *cit. supra* note 103.

¹¹⁴ Para. 6.

¹¹⁵ Under EU law, protection is also granted to a person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his country of origin, would face a real risk of suffering “serious harm” as defined in Art. 15 of the “Qualifications Directive” (death penalty or execution; torture or inhuman or degrading treatment or punishment; serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict): see Directive 2011/95/EU 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, OJ EU L 337, 20 December 2011, p. 9 ff.

¹¹⁶ See TREVISANUT, “The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea”, Leiden JIL, 2014, p. 661 ff.

¹¹⁷ See, in particular, Art. 4 of Regulation 656/2014, *cit. supra* note 65.

¹¹⁸ See, among others, Joined Cases C-175/08, C-176/08, C-178/08, and C-179/08, *Salahadin Abdulla and Others* [2010] ECR I-1493, para. 53; Case C-31/09 *Bolbol* [2010] ECR I-5539, para. 38; and Joined Cases C-411/10 and C-493/10, *N. S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR I-13905.

¹¹⁹ *Hirsi Jamaa and Others v. Italy*, *cit. supra* note 103.

In practice, *all the migrants or asylum seekers* intercepted or rescued at sea by EUNAVFOR MED, in the framework of phases 1 and 2 Alpha, have been *disembarked in Italy* and entrusted to the Italian authorities for assessing their status. In effect, it seems that, in accordance with a PSC Decision, EUNAVFOR MED will comply with the procedures for the disembarkation of persons rescued at sea adopted for the Frontex Operation Triton.¹²⁰ In this regard, there has been no major incident reported as to violations of the international rules on refugees and other protected persons.¹²¹

Delicate issues could arise with respect to an eventual transition to the operation's "Phase 2 Bravo" in Libyan territorial waters. In that case one could suggest, as the most practical solution, the disembarkation in Libya of migrants rescued or intercepted in its territorial waters. Apart from the existence of an effective government of national unity in Libya, that solution would also require the adoption by the EU of adequate procedures or controls in order to exclude any possible violations of human rights and refugee law.

9. THE ISSUE OF RESPONSIBILITY AND COMPENSATION

Resolution 2240(2015) does not include any reference to an obligation of the interdicting State (or regional organisation) to compensate a boarded vessel for the interference. On the other hand, Article 9(2) of the Smuggling of Migrants Protocol provides for an obligation to compensate the ship, for any loss or damage it may have sustained, where the grounds for the measures taken "prove to be unfounded" and the ship in question has not committed any act justifying them. A similar obligation is envisaged by Article 110(3) UNCLOS, with regard to ships suspected of being without nationality. How can this omission in the text of Resolution 2240 be explained?

One could argue that the compensation obligation, as envisaged by the abovementioned treaties, is nonetheless applicable by virtue of the references, in Resolution 2240, to the requirement to carry out inspections and other measures in accordance with international law and the express *renvoi* to the Smuggling of Migrants Protocol. However, the fact that Resolution 2240 does not refer to any rule on compensation could also suggest a different reading, which seems preferable. Particularly, it is suggested that *under Resolution 2240 a duty of compensation would arise for a boarding State, or regional organisation, only in the case of a breach of a requirement envisaged by the Resolution*. One may refer to the violation: (a) of the condition to carry out the inspection only in the presence of

¹²⁰ See Parliament Hearing of the Operation Commander, *cit. supra* note 18, and Council of the European Union, "EUNAVFOR MED Op. SOPHIA Six Monthly Report", *cit. supra* note 94, p. 11.

¹²¹ See also European Parliament, Parliamentary Questions, 27 October 2015, Answer given by HR Mogherini on behalf of the Commission, E-012462/2015.

“reasonable grounds” to suspect involvement in the proscribed activities, notably where bad faith or negligence of the boarding State or organisation can be proved; (b) of any condition imposed by the flag State when delivering its authorisation; (c) of any other rule set forth by Resolution 2240 as to the manner in which the authorised activities have to be carried out, including those relating to the lawful use of force. In other words, it seems that an obligation to compensate should be limited to situations amounting to an unlawful act of the intercepting State or organisation, excluding *in casu* any reading in favour of forms of “strict liability” and *a fortiori* any responsibility from lawful acts of the boarding State or organisation. That seems to be a logical consequence of the *lack of any reference to compensation obligations* in Resolution 2240 and, more importantly, of the fact that the boarding States, in the case in issue, carry out *functions of general interest*, in order to avert a humanitarian tragedy, under a specific mandate from the Security Council.

Another thorny issue, which is not tackled by the Security Council Resolution (which is obvious) nor by the EU Decision having established EUNAVFOR MED (which is less obvious), is that of the *attribution of a wrongful act* committed by a vessel assigned to the operation. It is not clear whether the responsibility should be attributed to the flag State of the vessel or to the EU, or to both.¹²²

10. ARREST AND PROSECUTION OF SMUGGLERS AND TRAFFICKERS

Under Council Decision 2015/778, the mission of EUNAVFOR MED seems to be focused on the identification, capture, and disposal of the vessels and assets used by smugglers or traffickers. Unlike the legal acts adopted by the EU Council in order to establish the counter-piracy Operation Atalanta, Decision 2015/778 does not provide for a clear mandate of EUNAVFOR MED to ensure the arrest and prosecution of the individuals suspected of migrant smuggling or human trafficking. Possible action *vis-à-vis* suspected smugglers and traffickers is only referred to in the Decision’s preamble. More particularly, in Paragraph 7 it is noted that States may intercept on the high seas vessels suspected of the activities in question, where there is flag State authorisation or where the vessel is without nationality, and that they “may take appropriate measures against the vessels, persons and cargo”. Then, in Paragraph 9, the Council observes that “a State may take appropriate measures against persons present on its territory whom it suspects of smuggling or trafficking humans with a view to their possible arrest and prosecution, in accordance with international law and its domestic law”.

As to Resolution 2240 (2015), its preamble includes a somewhat stronger language *in subiecta materia*, making reference to “the obligations of States under ap-

¹²² On that issue, which is beyond the scope of this article, see, in general, EVANS and KOUTRAKOS, *The International Responsibility of the European Union*, Oxford, 2016.

plicable international law to exercise due diligence to prevent and combat migrant smuggling and human trafficking” and “to investigate and punish perpetrators”. In addition, Paragraph 15 “calls upon all States with relevant jurisdiction under international law and national legislation, to investigate and prosecute persons responsible for acts of migrant smuggling and human trafficking at sea”.¹²³

That being the legal framework established at UN and EU level, one must underline that in practice a number of individuals suspected of the acts at issue have effectively been apprehended by ships participating in Operation Sophia. More particularly, they have all been entrusted to the Italian authorities, as acknowledged by the report submitted on 25 January 2016 by the Operation Commander,¹²⁴ and confirmed by HR Mogherini before the European Parliament. In answering, on 4 March 2016, to a parliamentary question, the HR stated:

“[I]n the first part of the second phase of its mandate [...] EUNAVFOR MED Operation Sophia is authorised to conduct boarding, search, seizure and diversion on the high seas of vessels suspected of being used for human smuggling or trafficking. So far, 48 suspected smugglers/traffickers have been apprehended and are in the Italian judicial system; they have either been sentenced, awaiting trial or are under investigation”.¹²⁵

From a strictly legal perspective, this practice may give rise to a number of issues. First and foremost, *the existence of an appropriate basis under Italian law for asserting criminal jurisdiction over these individuals must be assessed*. Second, one must consider the possibility of legal actions challenging the legality, under human rights standards, of measures of arrest and detention of the suspected smugglers, carried out by EUNAVFOR MED ships in the course of their law enforcement operations. With regard to the first issue, it must be noted that under Italian legislation and jurisprudence the bases for asserting criminal jurisdiction vis-à-vis suspected smugglers and traffickers apprehended on the high seas are not so solidly established, at least in some cases. Indeed, the Italian criminal system is based upon the general *principle of the territoriality* of penal law (Articles 3 and 6 of the Criminal Code) and the exercise of national criminal jurisdiction in respect of a crime carried out by a foreigner on foreign territory (or on the high seas) has an

¹²³ At the time of adoption of Resolution 2240 the UK stated that all EU Member States contributing to EUNAVFOR MED now have the authority to interdict smugglers on the high seas and that “any smugglers stopped will be arrested and their boats seized” (UN Doc. S/PV.7531, *cit. supra* note 38, p. 2).

¹²⁴ See Council of the European Union, “EUNAVFOR MED Op. SOPHIA Six Monthly Report”, *cit. supra* note 94, p. 11.

¹²⁵ European Parliament, Parliamentary Questions, 4 March 2016, Answer given by HR Mogherini on behalf of the Commission, E-015553/2015.

exceptional character. In accordance with Article 7 of the Criminal Code, foreigners can be prosecuted before Italian courts with regard to a set of specific offences affecting essential national interests, listed in numbers 1-4 and having nothing to do with the subject of the present discussion, or with respect to “any other offence for which special provisions of law or international conventions provide for the applicability of Italian law”. Apart from these situations, under Article 10 of the Criminal Code a foreigner who commits a crime against a foreigner outside Italian territory can be prosecuted in Italy only when several conditions are met: (a) the alleged offender must be in Italy; (b) the offence must be one for which a minimum sentence of three years of imprisonment is established; (c) there must be a request from the Minister of Justice (or the complaint of the victim of the offence if required under Italian law); (d) no extradition may take place.

It goes without saying that the Italian jurisdiction is established when the ship boarded is of *Italian nationality*¹²⁶ or when the proscribed conduct is carried out *in Italian territorial or internal waters*. As far as *ships without nationality* are concerned, it has already been mentioned¹²⁷ that Italian case law does not seem to follow the theory according to which flagless ships *per se* can be subjected to the jurisdiction of any State. As a consequence, the assertion of Italian jurisdiction vis-à-vis suspected smugglers on board ships without nationality should be founded on one of the grounds envisaged by the Italian Criminal Code.

In this connection, one must underline a *trend in the Italian case law to broadly interpret the territoriality principle*, so as to establish the Italian jurisdiction vis-à-vis foreigners apprehended on the high seas (both on foreign flagged vessels and on flagless vessels). That is made possible by a broad construction of Article 6(2) of the Criminal Code which, in order to determine the *locus commissi delicti*, provides that a crime is considered to have been committed in the territory of the State when the act or the omission constituting the crime was at least “in part” perpetrated there, or the effects of the offence occurred there.¹²⁸ Indeed, Italian courts have declared their jurisdiction when the smugglers or traffickers are *part of a criminal network* and *at least a fraction of the conduct attributable to the network took place in Italian territory* (e.g. mother ship operating in connection with smaller vessels departing from the Italian coast or territorial waters,¹²⁹ or carried along with it and having penetrated into Italian waters;¹³⁰ and complicity in the crime by persons sit-

¹²⁶ See Art. 4 of the Italian Criminal Code.

¹²⁷ See *supra* section 4.

¹²⁸ See MASTROJENI, “I limiti spaziali di applicazione della legge penale e i rapporti con giurisdizioni straniere”, in DE VERO (ed.), *La legge, penale, il reato, il reo, la persona offesa*, Torino, 2010, p. 101 ff.

¹²⁹ *Corte di Cassazione (Sez. I penale)*, 1 February 2013, No. 16653 (rubbed dinghy departed from Sicily).

¹³⁰ See the *Cemil-Pamuk* case, *cit. supra* note 63.

uated in Italy,¹³¹ whose communications with the smugglers had for instance been intercepted). In these situations, the Italian jurisdiction is extended to all the participants in the crime, including the smugglers or traffickers operating on the high seas. A recent decision of the Court of Cassation has also affirmed Italian jurisdiction where a mother ship on the high seas transfers the migrants into smaller vessels, unfit for navigation, in order to deliberately provoke rescue interventions by other ships and the consequent transfer of the migrants into Italian territory. That, on the basis of a complex legal reasoning according to which the conduct of the rescuers, leading to the disembarkation of the migrants in Italy, should be considered as the action of an *autore mediato* (a person who is used in order to commit a crime, and who is not punishable for that crime); as a consequence *the conduct is attributed to the smugglers operating from the high sea* and the offence is regarded as committed in the Italian territory.¹³² This interpretation, under which also the commander of a EUNAVFOR MED vessels could be regarded as an *autore mediato*, is however not generally accepted in the legal literature.¹³³

Article 7 of the Italian Criminal Code has also been invoked in order to justify an extension of the Italian jurisdiction. On the one hand, according to some scholars, the assertion of the Italian criminal jurisdiction in respect of persons on board flagless ships could be justified under Article 7(5) of the Criminal Code if read in connection with Article 8(7) of the Smuggling of Migrants Protocol.¹³⁴ On the other hand, the Court of Cassation has extended the Italian jurisdiction in respect of the crime of participation in an organised criminal association (*associazione a delinquere*, Article 416 of the Criminal Code) on the basis of the joint application of Article 7(5) of the Criminal Code and Article 15(2)(c) UNCTOC.¹³⁵ Yet, both these interpretations may be disputed as not in line with the traditional reading of Article 7(5) of the Criminal Code. According to the latter, the applicability of Italian criminal law cannot simply derive from an international convention which provides for a *faculty* (or even a *generic obligation*) of the State to punish certain offences and which is implemented in the Italian legal system by a law including an *ordine di esecuzione* (order of execution); to that effect, the adoption, in the implementing

¹³¹ *Corte di Cassazione (Sez. I penale)*, 23 June 2000, No. 4586; and *Corte di Cassazione (Sez. I penale)*, 20 August 2014, No. 36052.

¹³² *Corte di Cassazione (Sez. I penale)*, 28 February-27 March 2014, No. 14510. See CATALDI, “Giurisdizione e intervento in alto mare su navi impegnate nel traffico di migranti”, *Giur. It.*, 2015, p. 1498 ff.

¹³³ See ANNONI, “L’esercizio dell’azione penale nei confronti dei trafficanti di migranti: le responsabilità dell’Italia... e quelle degli altri”, *SIDI Blog*, 6 May 2015, available at: <<http://www.sidiblog.org/author/alessandra-annoni/>>; and LICASTRO, *supra* note 39, pp. 5-6.

¹³⁴ See LEANZA and GRAZIANI, “Poteri di *enforcement* e di *jurisdiction* in materia di traffico di migranti via mare: aspetti operativi nell’attività di contrasto”, *CI*, 2014, p. 163 ff., p. 191.

¹³⁵ Under this provision a State Party may establish its jurisdiction when the offence is one of those established in accordance with Art. 5(1) UNCTOC and is committed outside its territory with a view to the commission of a serious crime within its territory.

legislation, of a *specific norm providing for the applicability of Italian criminal law to the offence in question* would also be necessary.¹³⁶

In the light of that uncertain legal picture, one must share the opinion of a legal commentator who has advocated, for the sake of legal certainty, the introduction of *ad hoc* legislative rules governing the assertion of criminal jurisdiction over migrant smugglers or human traffickers apprehended at sea.¹³⁷ A laudable effort to clarify the legal regime, and systematise the Italian case law *in subiecta materia*, has been undertaken by the DNAA (*Direzione Nazionale Antimafia ed Antiterrorismo*). In particular, the *Procuratore nazionale* (National Prosecutor) issued on 9 January 2014 a document, addressed to the District Public Prosecutor Offices, including “operational proposals” for the solution of issues concerning the exercise of criminal jurisdiction and the adoption of other measures in respect of vessels engaged in the smuggling of migrants.¹³⁸ It is however apparent that these guidelines are far from settling all the issues. Besides, they confirm the existence of areas in which the possibility of exerting criminal jurisdiction is very much questionable (notably when it is not possible to establish that at least a fraction of the *iter criminis* occurred in Italian territory).

As mentioned above, in Resolution 2240 the Security Council calls upon all States with relevant jurisdiction to investigate and prosecute persons responsible for acts of migrant smuggling and human trafficking at sea; that action must however be “consistent with States’ obligations under international law, including international human rights law and international refugee law, as applicable” (Paragraph 8). In this respect, regard being had to the case law of the ECtHR, one cannot exclude the possibility that the apprehension by ships assigned to EUNAVFOR MED (but also to Frontex Operation Triton) of individuals suspected of human smuggling and trafficking could give rise to legal actions, notably to individual applications lodged with the ECtHR, challenging the arrest and detention under Article 5 ECHR. Among other things, the ECtHR has stated that the Convention is applicable not only in respect of State conduct carried out on board a national vessel¹³⁹ but also when a foreign (and supposedly a flagless) private vessel is intercepted on the high seas by a State ship and then escorted into a port.¹⁴⁰ Even if the judgements issued by the ECtHR have thus far accepted that the special circumstances of an arrest during a maritime interception operation must be taken into account in interpreting Article 5 ECHR, intercepting States, as observed in the legal literature, would be wise to contemplate adequate measures to avoid any possible legal challenge, for

¹³⁶ ANNONI, *cit. supra* note 133. See also MANTOVANI, *Diritto penale. Parte Generale*, 7th ed., 2011, p. 905, note 15.

¹³⁷ See ANNONI, *cit. supra* note 133.

¹³⁸ “Proposte operative per la soluzione dei problemi di giurisdizione penale nazionale e possibilità di intervento”, *Diritto penale contemporaneo*, with an introductory note of SPIEZIA, available at: <<http://www.penalecontemporaneo.it>>.

¹³⁹ See, in particular, *Hirsi Jamaa and Others v. Italy*, *cit. supra* note 103, paras. 81-82.

¹⁴⁰ See *Rigopoulos v. Spain*, Application No. 37388/97, Judgment of 12 January 1999; and *Medvedyev v. France*, *cit. supra* note 103, paras. 66 and 67.

“there are clearly many ECtHR judges who would apply the Strasbourg case law on point strictly, irrespective of the practical challenges that could present in many maritime law-enforcement operations”.¹⁴¹

Considering that legal framework, it would also seem opportune to provide, at the European level, for a mechanism envisaging the exercise of criminal jurisdiction vis-à-vis the smugglers/traffickers also for other EU Member States, in order not to leave this onerous burden exclusively upon Italy.¹⁴² Even if certainly complex, a mechanism of that kind would implement in the area under consideration the *principle of solidarity and fair sharing of responsibility*: expressly affirmed in EU primary law in respect of the policies of the Union in the field of border checks, asylum, and immigration (Article 80 TFEU), the latter also extends to measures adopted in order to combat illegal immigration and trafficking in human beings.¹⁴³ One could even contemplate the devolution to the new European Public’s Prosecutor Office of competences *in subiecta materia*, although that possibility appears unlikely in practice.¹⁴⁴ For the time being, it is to be hoped that the “Hotspot Approach”, developed by the EU Commission and recently triggered in Italy, will at least provide some operative support, notably by Europol and Eurojust, for the investigation and prosecution of the smugglers.¹⁴⁵

11. SOME FINAL REMARKS ON THE IMPACT OF EUNAVFOR MED (PHASES 1 AND 2 ALPHA)

In the tenth paragraph of its preamble, Resolution 2240 recalls the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention

¹⁴¹ GUILFOYLE, “ECHR Rights at Sea: *Medvedyev and Others v. France*”, *EJIL: Talk!*, 19 April 2010, available at: <<http://www.ejiltalk.org/echr-rights-at-sea-medvedyev-and-others-v-france/>>. Cf. PETRIG, “Arrest, Detention and Transfer of Piracy Suspects: A Critical Appraisal of the German *Courier* Case Decision”, in ANDREONE et al. (eds.), *cit. supra* note 15, p. 153 ff. In answering a question before the House of Lords, Lieutenant General Wosolobe stated that “much care has been taken to ensure a legally watertight process, using the Italian law enforcement authorities throughout” and that “to date, no prosecution has been dismissed due to a failure of process”: House of Lords, EU Naval Force – Mediterranean, *cit. supra* note 108.

¹⁴² See ANNONI, *cit. supra* note 133.

¹⁴³ On the principle of solidarity, see GESTRI, “La politica europea dell’immigrazione: solidarietà tra Stati membri e misure nazionali di regolarizzazione”, in LIGUSTRO and SACERDOTI (eds.), *Problemi e tendenze del diritto internazionale dell’economia. Liber amicorum in onore di Paolo Picone*, Napoli, 2011, p. 895 ff.

¹⁴⁴ *Ex Art. 86(4) TFEU* the European Council may decide, by unanimous vote, “to extend the powers of the European Public Prosecutor’s Office to include serious crime having a cross-border dimension”.

¹⁴⁵ Cf. Explanatory Note on the “Hotspot” Approach, p. 8 (available at: <<http://www.statewatch.org/news/2015/jul/eu-com-hotspots.pdf>>). See CASOLARI “The EU’s Hotspot Approach to Managing the Migration Crisis: A Blind Spot for International Responsibility?”, in this *Yearbook*.

on Maritime Search and Rescue (SAR). More specific in this regard is the preamble of the EU Decision establishing EUNAVFOR MED, which – after affirming that the operation shall be conducted in compliance with international law, including the UNCLOS, SOLAS and SAR treaties – points out that these conventions include “the obligation to assist people in distress at sea and to deliver the survivors to a place of safety; and to that end the vessels assigned to EUNAVFOR MED will be ready and equipped to perform the related duties under the coordination of the competent Rescue Coordination Centre”.¹⁴⁶

In practice, it seems that search and rescue tasks have so far absorbed a great part of the activities carried out by EUNAVFOR MED. According to the most recent data available (March 2016), vessels assigned to the operation have rescued nearly 9,000 migrants at sea, whereas the number of suspected smugglers apprehended is around 50 and the smuggling boats destroyed around 80.¹⁴⁷ These numbers have given rise to some doubts as to the effectiveness of EUNAVFOR MED in attaining its main declared objective. It was established as “a military crisis management operation contributing to the disruption of the business model of human smuggling and trafficking networks”,¹⁴⁸ yet it has so far mainly operated as a search and rescue operation, not very different from the Frontex led Joint Operation Triton (whose main task is border control) or the Italian missions “Mare Nostrum” and “Mare Sicuro”.¹⁴⁹

There is no denying the extraordinary importance of the results obtained by EUNAVFOR MED with respect to the saving of lives. However, a number of analysts have argued that the assets assigned to the operation, combat vessels and aircraft with very sophisticated technology, are not the best resources, in terms of capability and costs, to be employed for rescue activities.¹⁵⁰ The Operation Commander and top EU officials have contrasted these arguments, by stressing that EUNAVFOR MED has attained important results in terms of intelligence gathering and, more importantly, would now constitute an effective deterrent to the smug-

¹⁴⁶ Decision 2015/778, *cit. supra* note 7, para. 6. For a recent overview of these issues, see DI FILIPPO, “Irregular Migration and Safeguard of Life at Sea”, in DEL VECCHIO (ed.), *International Law of the Sea: Current Trends and Controversial Issues*, The Hague, 2014, p. 9 ff.

¹⁴⁷ See Parliament Hearing of the Operation Commander, *cit. supra* note 18; and House of Lords, EU Naval Force – Mediterranean (*cit. supra* note 108), Evidence Session, Witness: Richard Lindsay, Head of Security Policy Department, Defense and International Security Directorate, Foreign and Commonwealth Office, 17 March 2016.

¹⁴⁸ Decision 2015/778, *cit. supra* note 7, Art. 1.

¹⁴⁹ See, for instance, the testimony of Mr Kingsley before the House of Lords (“this is essentially a search and rescue operation by another name”): House of Lords, EU Naval Force – Mediterranean (*cit. supra* note 108), Evidence given by Mr Peter Roberts, Senior Research Fellow, Sea Power and Maritime Studies, Royal United Services Institute, and Mr Patrick Kingsley, Migration Correspondent, Guardian Media Group, 10 March 2016.

¹⁵⁰ See, e.g., the statement of Mr. Roberts in House of Lords, EU Naval Force – Mediterranean, *ibid.*

glers and traffickers.¹⁵¹ These assertions are however difficult to assess and are far from being generally accepted.¹⁵² As to the deterrence effect, it remains to be seen, for instance, whether the arrests and the prosecutions carried out in Italy will lead to the conviction of the suspected smugglers and to effective and dissuasive criminal penalties. Truly, a significant contribution to the disruption of the business model of human smuggling and trafficking networks may come from the confiscation or destruction of boats and rafts used by the traffickers. The smugglers have however adapted their practice; they are no longer using more expensive wooden or fiberglass boats and prefer to place migrants on “rubber inflatable crafts, purchased in bulk in China”.¹⁵³ In any case, it is clear that much more significant results could derive from the transition of EUNAVFOR MED to the Phases 2B and 3 and an expansion of the operation into Libyan territorial waters and territory.

More generally, the entire operation seems to suffer from a number of ambiguities. As previously noted, similarly to what happens with the Frontex Triton Operation, the disembarkation of all the apprehended smugglers, traffickers, migrants and asylum-seekers takes place in Italy (yet, the area of operation also covers the SAR zone of Malta). That, however, is not clearly stated in the Decision establishing EUNAVFOR MED nor, as far as is known, in other publicly available acts. The peoples of Europe deserve more transparency on the part of a Union in which decisions should be taken “as openly as possible and as closely as possible to the citizen” (Article 1 TEU).

As is well known, the present situation as to the management of migration flows through the Mediterranean Sea imposes an extraordinary burden upon Italy and some effective mechanism for the fair distribution of that burden among all Member States should be introduced. Apart from obvious policy considerations, such a solution would also be in line with the principle of solidarity and fair sharing of responsibility (Article 80 TFEU), as has already been mentioned.¹⁵⁴ We are however still a long way from that. As to the new “Hotspot Approach” launched by the EU Commission, although it might certainly represent an important operative support to frontline Member States, it seems more a palliative measure than a cure vis-à-vis such an unprecedented crisis.¹⁵⁵

¹⁵¹ See Parliament Hearing of the Operation Commander, *cit. supra* note 18, and the testimony of Lieutenant General Wosolsobe in House of Lords, EU Naval Force – Mediterranean, *cit. supra* note 108.

¹⁵² See, for instance, the remarks of Lord Tugendhat (Chairman) in House of Lords, EU Naval Force – Mediterranean, *ibid.*

¹⁵³ See the testimony of Lieutenant General Wosolsobe in House of Lords, EU Naval Force – Mediterranean, *ibid.* Cf. also *supra* note 95.

¹⁵⁴ *Supra*, section 10.

¹⁵⁵ See *supra* note 145.