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OPERATION EUNAVFOR MED *SOPHIA* IN THE FRAMEWORK OF THE  
EUROPEAN AGENDA ON MIGRATION:  
PRACTICAL ASPECTS AND QUESTIONS OF INTERNATIONAL LAW

Eugenio Carli\*

SUMMARY: 1. Introduction. – 2. Institutional and Normative Features of the EU Common Security and Defence Policy. – 3. EUNAVFOR MED *Sophia*: Operational Scope and International Law Aspects. – 3.1. The Mandate. – 3.2. Applicable International Law. – 3.2.1. The Content of the UN Security Council Authorization to Fight the Migrant Smuggling. – 3.2.2. The Nature of the Principle of *Non-Refoulement* and its Application *Ratione Loci*. – 4. Concluding Remarks.

## 1. Introduction

Among the “immediate action” types of measures included in the European Agenda on Migration of May 2015 drafted by the European Commission (EC), reference was also made to the possible deployment of Common Security and Defence Policy (CSDP) operations in order to “systematically identify, capture and destroy vessels used by smugglers”.<sup>1</sup> Furthermore, and with the idea of working in partnership with third countries to intervene in regions of origin and transit of migrants, the EC specified in the communication that one of the objectives was to make migration “become a specific component” of ongoing CSDP missions already deployed in Africa, such as EUCAP Sahel Mali and Niger.<sup>2</sup> Both statements are proof of the intention on the part of the European Union (EU) to tackle migration with on-the-field measures, resorting to its operational and military capacity under the CSDP.

The present paper deals with the Operation EUNAVFOR MED *Sophia* in the South Mediterranean Sea and its role as a tool for fighting irregular migration and contributing

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<sup>1</sup> Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European Agenda on Migration*, of 13 May 2015, COM(2015) 240 final, p. 3.

<sup>2</sup> *Ivi*, p. 5.

to save human lives. In the paragraph that follows, we will briefly mention the main institutional and normative aspects of the CSDP. The third paragraph will address the scope of the Operation, with a particular focus on its mandate (§ 3.2.1.) and the international legal framework encompassing it (§ 3.2.2.). Within the latter subparagraph, reference will be made to the various forms of authorization issued by the United Nations Security Council (UNSC) and to the applicability of the principle of *non-refoulement*. Finally, in the fourth paragraph, we will draw some conclusions on the results achieved by the Operation in light of the European Agenda on Migration.

## **2. Institutional and Normative Features of the EU Common Security and Defence Policy**

The CSDP is an integral part of the EU Common Foreign and Security Policy (CFSP). It provides the EU with an operational capacity, drawing on civilian and military assets in order to use them on missions in third countries for the management of crises, acting in accordance with the principles of the United Nations Charter<sup>3</sup> and international law.<sup>4</sup> The implementation of this policy will lead to a common defence,<sup>5</sup> when the European Council will so decide unanimously.<sup>6</sup>

Under Art. 43(1) of the Treaty on the European Union (TEU), as modified by the Lisbon Treaty entered into force on 1 December 2009, the EU may use those assets to conduct “joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilization. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.”<sup>7</sup> Compared to the previous version of the TEU,<sup>8</sup> three types of tasks have been added: disarmament, military advice and assistance and post-conflict stabilization. The use of those tasks to counter terrorism is also a novelty. Thus the spectrum of action of the EU for international missions is now quite wide and includes all the most relevant types of intervention, from peace-keeping to coercive peace-enforcement operations.

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<sup>3</sup> TEU, Art. 42(1).

<sup>4</sup> TEU, Art. 21(1).

<sup>5</sup> December last year, the Permanent Structured Cooperation (PESCO), as outlined in Arts. 42(6) and 46 of the TEU and in Protocol no. 10, was instituted among 25 Member States. Through the PESCO, Member States increase their effectiveness in addressing security challenges and advancing towards further integrating and strengthening defence cooperation within the EU framework. PESCO can be considered one small step towards the creation of a European common defence. See the PESCO factsheet at [https://eeas.europa.eu/sites/eeas/files/eu\\_factsheet\\_pesco\\_permanent\\_structured\\_cooperation\\_en\\_0.pdf](https://eeas.europa.eu/sites/eeas/files/eu_factsheet_pesco_permanent_structured_cooperation_en_0.pdf).

<sup>6</sup> TEU, Art. 42(2).

<sup>7</sup> TEU, Art. 43(1).

<sup>8</sup> TEU, OJ C 321E, 29 December 2006, pp. 1-331, Art. 17(2).

The main institutions and organs involved in the implementation of the CSDP are, first of all, the Council of the EU (hereafter, the Council), and the Foreign Affairs Council in particular, which has the responsibility for the elaboration of the external policy of the EU in accordance with the strategic guidelines provided by the Council. The operational management of the CSDP is entrusted with the High Representative of the Union for the Foreign Affairs and Security Policy (hereafter, High Representative), who acts under the authority of the Council and in close collaboration with the Political and Security Committee (PSC). This is a permanent body consisting of one ambassadorial level representative from each Member State and chaired by the European External Action Service.<sup>9</sup> The PSC monitors the international situation with regard to the areas covered by the CFSP, delivers opinions to the Council upon request of the Council itself or the High Representative and oversees the implementation of the agreed policies. Furthermore, the PSC exercises the political control and the strategic direction in all CSDP missions.

As regards military operations specifically, the EU Military Committee is the highest military body instituted within the Council and works under the authority of the PSC. It brings together the Chiefs of Defence of all Member States and is entrusted with the task of advising and sending recommendations to the PSC on all military aspects of the CSDP. One degree below in the hierarchy is the EU Military Staff, which is composed of military personnel seconded by the Member States and is placed under the direct authority of the High Representative. It elaborates and evaluates military objectives, having also functions of early warning and strategic planning of the missions.

Member States contribute to the concrete conduct of missions by putting civilian and military personnel at the disposal of the EU, through a transfer of authority,<sup>10</sup> and the necessary assets. Third countries can also participate in CSDP missions, as laid down in *ad hoc* international agreements concluded with the EU. Furthermore, the EU can resort to NATO assets and capabilities when deploying a CSDP mission, as provided in the 2003 *Berlin Plus* Agreement.<sup>11</sup> Each CSDP mission is regulated by a Council Decision, adopted unanimously on a proposal from the High Representative or an initiative by a Member State.<sup>12</sup> This Decision settles all aspects related to a mission, such as its mandate, chain of command, financial arrangements, release of information and third states' participation.

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<sup>9</sup> On the EEAS, see TEU, Art. 27(3) and Council Decision 2010/427/EU, *establishing the organisation and functioning of the European External Action Service*, of 26 July 2010, in OJ L201, 3 August 2010, p. 30.

<sup>10</sup> The transfer of authority grants to the EU the operational command and control on the Member States' forces.

<sup>11</sup> This consists of a package of arrangements between the EU and NATO, aiming at improving the working partnership between the two organizations, ensuring effective consultation, cooperation and transparency in crisis management and peace-building operations. Operations launched in the framework of *Berlin Plus* are *Concordia* in Macedonia (2003) and *EUFOR Althea* in Kosovo (2004-current).

<sup>12</sup> TEU, Art. 42(4).

To date, the EU has conducted thirty-seven missions<sup>13</sup> in the Balkans, Sub-Saharan Africa and Horn of Africa, Caucasus and some Asian States (Iraq, Indonesia and Afghanistan). Sixteen missions – six of which are military – are currently ongoing,<sup>14</sup> including Operation *Sophia*, on which we will focus in the next paragraph.

### 3. EUNAVFOR MED *Sophia*: Operational Scope and International Law Aspects

#### 3.1. The Mandate

EUNAVFOR MED *Sophia*<sup>15</sup> is a CSDP military naval operation agreed upon with the Council Decision 2015/778<sup>16</sup> and launched on 22 June 2015.<sup>17</sup> The general scope of the mission is the disruption of the business model of human trafficking networks in the Southern Central Mediterranean, in compliance with the guidelines of the European Agenda on Migration seen before. Although it may also contribute to saving human lives, it seems rather clear from the tenor of Council Decision 2015/778 that *Sophia* is primarily a military operation and not a rescue one.<sup>18</sup> Its mandate has been extended until 31 December 2018.<sup>19</sup> Twenty-six Member States (except for Denmark and Slovakia) are participating for the time being,<sup>20</sup> with Italy providing the Operation Headquarters, located in Rome, and the current Operation Commander, Rear Admiral Enrico Credendino.

The mandate of *Sophia* consists of four phases. In the first one, which is now completed, the mission has detected and monitored the migration networks through information gathering and patrolling on the high seas. In the first part of the second

<sup>13</sup> The first one was the Operation *Concordia* in the Former Yugoslav Republic of Macedonia, launched in January 2003.

<sup>14</sup> 10 July 2018.

<sup>15</sup> For general information on the mission, see <<https://www.operationsophia.eu/>>.

<sup>16</sup> Council Decision (CFSP) 2015/778, *on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED)*, of 18 May 2015, in OJ L122, 19 May 2015, p. 31.

<sup>17</sup> Council Decision (CFSP) 2015/972, *launching the European Union military operation in the southern Central Mediterranean (EUNAVFOR MED)*, of 22 June 2015, in OJ L157, 23 June 2015, p. 51.

<sup>18</sup> The Decision, in fact, refers to individuals captured and/or rescued in the context of the Operation only in a very incidental manner. The rescue of migrants or victims of human trafficking is only foreseen in Recital no. 6, para 2, where the Council recalls “the obligation to assist persons in distress at sea and to deliver survivors to a place of safety” under the UNCLOS, SOLAS and SAR Conventions. Moreover, it is no coincidence that reference in the European Agenda on Migration to the possible deployment of a PSDC operation is under the heading “Targeting criminal smuggling networks” (and not “Saving lives at sea”). On the non-rescue nature of *Sophia*, see M. ESTRADA-CAÑAMARES, *Operation Sophia Before and After UN Security Council Resolution No 2240 (2015)*, in *European Papers*, 1, 2016, n. 1, pp. 185-191 e G. PACCIONE, *Operazione EUNAVFOR-MED II o Sophia e l'azione delle Nazioni Unite e dell'Unione europea contro i trafficanti di esseri umani*, in *Difesaonline*, 11 July 2016, available at <<http://www.difesaonline.it/evidenza/diritto-militare/operazione-eunavfor-med-ii-o-sophia-e-lazione-delle-nazioni-unite-e>>. Contra M. RIDDERVOLD, *The Maritime Turn in EU Foreign and Security Policies: Aims, Actors and Mechanisms of Integration*, London, 2018, p. 72.

<sup>19</sup> Council Decision (CFSP) 2017/1385, *amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA)*, of 25 July 2017, in OJ L194, 26 July 2017, p. 61.

<sup>20</sup> 10 July 2018.



phase (phase 2A), which is currently ongoing, the mission shall board, search, seize and divert on the high seas all the vessels suspected of being used for human smuggling or trafficking. At a later stage (phase 2B), EU ships will conduct the boarding, searching, seizure and diverting activities in the territorial and internal waters of the coastal State concerned (Libya), under an authorization of the UNSC or consent of that State. In a third phase, the Operation will take all necessary measures against a vessel and its assets, disposing of them or rendering them inoperable on the territory of the State concerned, once again as provided by the UNSC or following consent of that State. The four and last phase, finally, will consist of withdrawal of the forces and completion of the Operation.

In June 2016 two more supporting tasks were added to the mandate:<sup>21</sup> first, the mission shall assist in the capacity building of the Libyan Coastguard and Navy and, second, it shall contribute to information sharing and implementation of the UN embargo on the high seas off the coast of Libya, as provided in UNSC Resolutions 2292 (2016) and 2357 (2017). Moreover, as of July 2017, the mandate also includes the setting up of a monitoring mechanism of the long-term efficiency of the training of the Libyan Coastguard and Navy; new surveillance activities and information gathering on illegal trafficking of oil exports from Libya, in accordance with UNSC Resolutions 2146 (2014) and 2362 (2017); and enhancement of the possibility for sharing information on human trafficking with Member States law enforcement agencies, FRONTEX and EUROPOL, as well as with Libyan authorities.<sup>22</sup> These recent modifications, without changing the general objective of the mission, have provided it with a new dimension, which is aimed at helping local authorities to deal with the problem “on their own.”

It is evident that EUNAVFOR MED *Sophia*, when compared with other ongoing CSDP military missions (e.g. the training mission EUTM Mali and the other naval operation off the coast of Somalia, EUNAVFOR *Atalanta*), has a stronger and broader mandate, openly coercive, requiring in many cases the necessary authorization by the UNSC for the implementation of the various tasks. This poses some difficulties under a legal perspective, which will be in part tackled in the next subparagraph.

### 3.2. Applicable International Law

Like all CSDP missions, Operation *Sophia* must be conducted in conformity with international law. Despite its essentially political nature, the European Agenda on Migration has enshrined this concept, stressing – in respect of the overall purpose of Operation *Sophia* – that “[s]uch action *under international law* will be a powerful demonstration of the EU’s determination to act.”<sup>23</sup> Due to the large mandate received,

<sup>21</sup> Council Decision (CFSP) 2016/993, *amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA)*, of 20 June 2016, in OJ L162, 21 June 2016, p. 18.

<sup>22</sup> Council Decision (CFSP) 2017/1385, *amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA)*, cit.

<sup>23</sup> *A European Agenda on Migration*, cit., p. 3 (emphasis added).



applicable international law is quite broad and Decision 2015/778 mentions the duty to respect it a few times,<sup>24</sup> more than Council Decisions regulating other CSDP missions do. The main relevant international obligations – which the same decision lists – stem from:

- The 1982 UN Convention on the Law of the Sea (UNCLOS),<sup>25</sup> to which all Member States, as well as the EU (since 1998), are parties;
- The 2000 Protocols against the Smuggling of Migrants by Land, Sea and Air (the Protocol against the Smuggling of Migrants)<sup>26</sup> and to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children,<sup>27</sup> binding upon all Member States (except for Ireland, which did not ratify the first Protocol) and the EU (since 2006);
- The 1974 International Convention for the Safety of Life at Sea (SOLAS Convention),<sup>28</sup> also binding upon all Member States;
- The 1979 International Convention on Maritime Search and Rescue (SAR Convention),<sup>29</sup> ratified by the vast majority of Member States (except for Austria, Czech Republic and Slovakia);
- The 1976 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention),<sup>30</sup> by which all coastal Member States are bound;
- The 1951 Geneva Convention relating to the Status of Refugees (Refugee Convention),<sup>31</sup> binding upon all Member States, including the principle of *non-refoulement*;
- Human rights law;

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<sup>24</sup> Council Decision (CFSP) 2015/778, *on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED)*, cit., recitals 6 and 7; Art. 1(1); Art. 2(2).

<sup>25</sup> The UNCLOS was signed on 10 December 1982 in Montego Bay (Jamaica), entered into force on 16 November 1994 and has been ratified by 168 States as of 10 July 2018, in *United Nations Treaty Series*, vol. 1833, p. 3.

<sup>26</sup> The Protocol against the Smuggling of Migrants was signed on 15 November 2000 in New York (United States of America), entered into force on 28 January 2004 and has been ratified by 146 States as of 10 July 2018, in *United Nations Treaty Series*, vol. 2241, p. 507.

<sup>27</sup> The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children was signed on 15 November 2000 in New York (United States of America), entered into force on 25 December 2003 and has been ratified by 173 States as of 10 July 2018, in *United Nations Treaty Series*, vol. 2237, p. 319.

<sup>28</sup> The SOLAS Convention was signed on 1 November 1974 in London (United Kingdom), entered into force on 25 May 1980 and has been ratified by 164 States as of 10 July 2018, at <<http://www.imo.org/en/About/Conventions/Pages/Home.aspx>>.

<sup>29</sup> The SAR Convention was signed on 27 April 1979 in Hamburg (Germany), entered into force on 22 June 1985 and has been ratified by 111 States as of 10 July 2018, at <<http://www.imo.org/en/About/Conventions/Pages/Home.aspx>>.

<sup>30</sup> The Barcelona Convention was signed on 16 February 1976 in Barcelona (Spain) and then amended by the Contracting Parties at the Conference of Plenipotentiaries held in Barcelona from 9 to 10 June 1995. The amendments entered into force on 9 July 2004. It has been ratified by 22 States as of 10 July 2018, at <[https://planbleu.org/sites/default/files/upload/files/Barcelona\\_convention\\_and\\_protocols\\_2005\\_eng.pdf](https://planbleu.org/sites/default/files/upload/files/Barcelona_convention_and_protocols_2005_eng.pdf)>

<sup>31</sup> The Refugee Convention was signed on 28 July 1951 in Geneva (Switzerland), entered into force on 22 April 1954 and has been ratified by 145 States as of 10 July 2018, in *United Nations Treaty Series*, vol. 189, p. 137.

- Customary international law.

We can see that the EU, as an independent legal entity endowed with (international) legal personality,<sup>32</sup> is party to some of the agreements mentioned. That means that the obligations therein contained also apply to the EU itself (in addition to those deriving from customary international law), and their possible violation could theoretically entail the EU international responsibility.<sup>33</sup> In this paper, we will first focus, albeit in a non-exhaustive manner, on the various measures that EU ships can take to fulfil the mandate of *Sophia* in accordance with UNSC authorization and the resultant international norms applying, and then on the *non-refoulement* obligation. We assume that these are two of the most interesting aspects both from a factual and a legal perspective.

### 3.2.1. The Content of the UN Security Council Authorization to Fight the Migrant Smuggling

Council Decision 2015/778 generally provides the execution of boarding, search, seizure and diversion activities on suspected vessels on the high seas, relating to applicable international law for the specific conditions of implementation. In this regard, it is necessary to analyze UNSC Resolution 2240 (2015)<sup>34</sup> – adopted under the agenda item “Maintenance of international peace and security”<sup>35</sup> – which establishes the measures for countering the crime of smuggling of migrants, providing the necessary legal basis. The authorization to implement the various measures set in the Resolution in question has been renewed annually, with the most recent Resolution 2380 (2017) having been adopted on 5 October 2017.<sup>36</sup>

In Resolution 2240 (2015) the UNSC acts under Chapter VII of the UN Charter, although none of the situations envisaged by Art. 39 of the Charter,<sup>37</sup> enabling the UNSC to take the relative measures under this Chapter, are mentioned. It seems therefore that the UNSC decided to take action on the premise that the situation in Libya represents a humanitarian tragedy, aggravated by human trafficking and smuggling, and requiring an immediate intervention by the international community. This *modus operandi* is not new in the practice of the UNSC<sup>38</sup> and it reflects a compromise in the case at hand. A draft initially presented by the United Kingdom, in fact, had included references at the situation in Libya as a “threat to the peace,” but that language was deleted upon the insistence of the Libyan government, which probably feared that any

<sup>32</sup> TEU, Art. 47.

<sup>33</sup> On this topic, see E. CARLI, *L'illecito internazionale nella prassi delle missioni di Politica di Sicurezza e Difesa Comune dell'Unione europea*, in A. SPAGNOLO, S. SALUZZO (a cura di), *La responsabilità degli Stati e delle organizzazioni internazionali: nuove fattispecie e problemi di attribuzione e di accertamento*, Milano, 2017, pp. 249-276.

<sup>34</sup> Resolution 2240 (2015), adopted by the UNSC at its 7531<sup>st</sup> meeting, on 9 October 2015, UN Doc. S/RES/2240 (2015).

<sup>35</sup> This topic, instead of “The situation in Libya,” was suggested by the Libyan representatives.

<sup>36</sup> Resolution 2380 (2017), adopted by the UNSC at its 8061<sup>st</sup> meeting, on 5 October 2017, UN Doc. S/RES/2380 (2017).

<sup>37</sup> Threat to the peace, breach of the peace and act of aggression.

<sup>38</sup> One of the first examples is Resolution 661 (1990) in the context of the military invasion by Iraq of Kuwait.

reference to the situation in the country as the direct cause of the migration crisis could foster plans for international interventions in the Libyan territory.<sup>39</sup> Furthermore, other States (Chad, Russia and Venezuela) expressed their disappointment in having recourse to Chapter VII of the UN Charter, for fear of the (too) broad mandate that would have been derived.<sup>40</sup> Hence, on this aspect Resolution 2240 (2015) differs from other UNSC Resolutions, in which the situation in Libya was qualified as a threat to the peace.<sup>41</sup>

With regard to the content of the Resolution, the most interesting elements are set out in paragraphs 5, 7, 8 and 10. In para. 7 the UNSC authorizes, for a period of twelve months and with a view to saving the lives of migrants or of victims of human trafficking, “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 vessels that they have reasonable grounds to suspect are being used for migrant smuggling or 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” (emphases added). Two points should be addressed here: first, the reference to Member States acting through regional organizations clearly includes, among others, the EU Member States acting under Operation *Sophia*. Second, the EU ships, in our case, have to make “good faith efforts” before inspecting the suspected vessels. The provision is rather vague and can be defined, by using contractual terminology, as what a reasonable person would determine is a diligent and honest effort under the same set of facts or circumstances. 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, it seems that an inspection 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.<sup>42</sup> If the authorization is expressly denied by the flag State, it is submitted that the inspection can’t take place or, if already started, should be immediately stopped. Moreover, it should be noted that the authorization given by the UNSC is limited *ratione loci* to the high seas off the Libyan coast, corresponding to the first part of phase two of Operation *Sophia*.

The problem with regard to the migration crisis in the Southern Mediterranean and the resulting human trafficking and migrant smuggling is that, in the vast majority of cases, vessels used for transporting migrants are flagless. In this regard, in para. 5 the Resolution calls upon (an authorization from the UNSC not being necessary in this case) Member States to inspect those vessels (including boats, rafts and dinghies) “as permitted under international law,” i.e. acting in accordance with Art. 110(1)(d)

<sup>39</sup> M. GESTRI, *EUNAVFOR MED: Fighting Migrant Smuggling under UN Security Council Resolution 2240 (2015)*, in *The Italian Yearbook of International Law*, vol. 25, 2016, p. 29.

<sup>40</sup> See *Vote on a Resolution on Human Trafficking and Migrant Smuggling in the Mediterranean*, in *What’s in Blue. Insights on the Work of the UN Security Council*, 8 October 2015, available at <<http://www.whatsinblue.org/2015/10/vote-on-a-resolution-on-human-trafficking-and-migrant-smuggling-in-the-mediterranean.php#>>.

<sup>41</sup> See, e.g., UNSC Resolutions 2213 and 2238 (2015).

<sup>42</sup> GESTRI, *EUNAVFOR MED*, cit., p. 39.

UNCLOS (“Right of visit”). This article provides that a warship is entitled to exercise on the high seas the right of visit of any vessel when there is a reasonable ground for suspecting that the vessel “is without nationality.” More specifically, the right of visit under Art. 110 UNCLOS involves the right to stop the suspected vessel and to send a boat under the command of an officer to check its nationality. If, after having checked the documents, suspicion remains over the lack of nationality of the vessel, the ship “may proceed to a further examination on board the ship” (i.e. a search of the vessel), with all possible consideration. Such a right may be exercised also by another duly authorized ship or aircraft clearly marked and identifiable as being on government service (Art. 110(5) UNCLOS). While the process is described under strictly sequential terms (inspection of papers, then search), in many situations a boarding party may conduct a preliminary security sweep to ascertain that there are no active threats to their safety aboard.<sup>43</sup> Considering this legal framework, EU ships can certainly stop, board, and search a flagless vessel suspected of migrant smuggling or human trafficking. Apparently, the right of visit does not imply itself any further powers of law enforcement beyond those powers of visit, inspection and search contained in Art. 110.<sup>44</sup> It remains therefore controversial if further rights, lacking an authorization by the flag State, can be exercised by EU ships on those vessels, e.g. escorting them to a port and subject them and the people onboard to law enforcement procedures under national law.<sup>45</sup>

In para. 8, Resolution 2240 (2015) authorizes Member States to seize the vessels which were actually being used for human trafficking or smuggling, also affirming that further measures (e.g. their disposal) will be authorized at a later stage. More importantly, in para. 10 Member States are authorized “to use all measures commensurate to the specific circumstances” in carrying out the tasks provided in paras. 7 and 8. This expression is not new in the language of the UNSC referring to inspection activities at sea<sup>46</sup> and we believe that it includes the possibility to use the force, although it is more restrictive than the classical expression “all necessary means” (or “measures”) contained in other Resolutions constituting the legal basis for a CSDP military operation.<sup>47</sup> As aptly noted, the text refers, on the one hand, to the

<sup>43</sup> A. PROELSS (ed.), *United Nations Conventions on the Law of the Sea. A Commentary*, Munich, 2017, p. 770.

<sup>44</sup> *Ibidem*.

<sup>45</sup> On the question of the possible exercise of jurisdiction on the people found onboard vessels see M. VENTRELLA, *The impact of Operation Sophia on the exercise of criminal jurisdiction against migrant smugglers and human traffickers*, in *Questions of International Law*, Zoom-in 30 (2016), pp. 3-18 and E. PAPASTAVRIDIS, *EUNAVFOR MED Operation Sophia and the question of jurisdiction over transnational organized crime at sea*, *ivi*, pp. 19-34.

<sup>46</sup> See, e.g., Resolution 665 (1990), para. 1 (termination of all maritime shipping from and to Kuwait); Resolution 1973 (2011), para. 13 (enforcement of the arms embargo on Libya); Resolution 2146 (2014), para. 5 (termination of illicit export of crude oil from Libya) and Resolution 2182 (2014), para. 16 (enforcement of the arms embargo on Somalia).

<sup>47</sup> See, e.g., UNSC Resolution 1484 (2003), as to Operation *Artemis* in Congo; UNSC Resolution 1671 (2006), as to Operation EUFOR RD Congo; UNSC Resolution 1846 (2008), as to Operation EUNAVFOR Somalia.

proportionality criterion in the use of force (that is the meaning of the word “commensurate”) and, on the other, seems to encompass the necessity requirement, which is present in the usual expression “all necessary means”.<sup>48</sup> In all likelihood, the use of a softer expression is linked to the particular circumstances of the rescue and inspection activities, where saving the lives of the people onboard vessels should be the priority. This appears to be confirmed by the preparatory work, where the initial draft circulated by the United Kingdom – including an authorization to use “all necessary measures” in confronting migrant smugglers or human traffickers – was objected by some UNSC members, which wanted further guarantees that this was not a blanket mandate to use force, finally leading to the adoption of the abovementioned expression. Be that as it may, the formulation is rather unclear and can raise some issues as to the legality of the use of armed force on the part of the EU personnel in specific cases.<sup>49</sup>

### 3.2.2. The Nature of the Principle of *Non-Refoulement* and its Application *Ratione Loci*

Another problematic aspect related to the application of international law in the framework of Operation *Sophia* concerns the obligation of *non-refoulement*.

This norm is codified by primary<sup>50</sup> and secondary EU legislation<sup>51</sup> and, among other universal and regional conventional instruments,<sup>52</sup> by Art. 33 of the Refugee Convention, on which we shall focus here. This provision prohibits the expulsion or

<sup>48</sup> R. CADIN, *La risoluzione 2240 (2015) sul traffico di migranti nel Mediterraneo: il Consiglio di Sicurezza autorizza l'uso... misurato della forza*, in *Ordine Internazionale e Diritti Umani*, 2015, n. 4, p. 700.

<sup>49</sup> The expression was openly criticized in 2015 by the UN Special Rapporteur on the human rights of migrants, François Crépeau, and the Chair of the UN Committee on the Protection of the Rights of Migrant Workers and Members of Their Families, Francisco Carrión Mena, who claimed that it would have been “extremely difficult to imagine how EU member States will take action against smugglers’ vessels without putting at risk the lives of the refugees and migrants on board. It is also not clear how such actions will not amount to ‘push-backs’ or collective expulsions, and how using such force will be compatible with the EU member States’ international human rights and humanitarian law obligations which require that they respect the principle of non-refoulement and allow for proper individual assessments.” See *Statement by the Special Rapporteur on the human rights of migrants, François Crépeau, and the Chair of the UN Committee on the Protection of the Rights of Migrant Workers and Members of Their Families, Francisco Carrión Mena*, 23 October 2015.

<sup>50</sup> TFEU, Art. 78(1) and Charter of the Fundamental Rights of the European Union, of 7 December 2000, in OJ C202, 7 June 2016, p. 390, Art. 19(2). We should also mention Art. 6(3) of the TEU, which provides that “fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.

<sup>51</sup> See Regulation (EU) 2016/399 of the European Parliament and of the Council, *on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification)*, of 9 March 2016, in OJ L77, 23 March 2016, p. 1, Recital 36 and Arts. 3 and 4.

<sup>52</sup> See Art. 3 of the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Art. 7 of the 1966 International Covenant on Civil and Political Rights and General Comment no. 31, CCPR/C/21/Rev.1/Add. 13, of 26 May 2004, para. 12; Art. 22(8) of the 1969 American Convention on Human Rights; Art. 2(3) of the 1969 Organization of African Unity’s Convention Governing the Specific Aspects of Refugee Problems in Africa; Art. 12(3) of the 1981 African Charter of Human Rights and People’s Rights; Art. 45 of the 1949 IV Geneva Convention on Civilians.



return of a *refugee* “in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (para. 1), unless “there are reasonable grounds for regarding [*the refugee*] as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country” (para. 2). The protection offered by *non-refoulement* not only prohibits a State to expel or return a refugee to a country where his (her) life or freedom would be threatened, but also to other States from which there is a risk that the person could be transferred to the first country (indirect or chain *refoulement*).

Furthermore, according to the opinion of the United Nations High Commissioner for Refugees (UNHCR),<sup>53</sup> backed by many authors,<sup>54</sup> the principle at hand is part of customary international law. The content of the customary rule includes not only the prohibition of *refouling* a person to States where (s)he would be persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, but also to escape from torture or inhuman and degrading treatment.<sup>55</sup> It seems that another principle – derived from the European Court of Human Rights (ECtHR) case law regarding Art. 8 of the European Convention on Human Rights (ECHR) (“Right to respect for private and family life”)<sup>56</sup> and from several conventional provisions,<sup>57</sup> according to which States are obliged not to expel a person when the measure would cause a grave, unjustified and disproportionate harm to family unity – is

<sup>53</sup> See UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law, Response to the Questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, available at <<http://www.unhcr.org/home/RSDLEGAL/437b6db64.html>>; UNHCR, *Note on the Principle of Non-Refoulement, EU Seminar on the Implementation of the 1995 EU Resolution on Minimum Guarantees for Asylum Procedures*, 1° November 1997, available at <<http://www.unhcr.org/home/RSDLEGAL/438c6d972.html>>.

<sup>54</sup> See, among others, R. PISILLO MAZZESCHI, G. BARTOLINI, *The right to asylum sixty years after the Universal Declaration of Human Rights*, in G. AGUILAR CAVALLO (ed.), *60 Años despues: enseñanzas pasadas y desafíos futuros. Commemoración de los 60 años de la Declaración Universal de Derechos Humanos y de la Declaración Americana de los Derechos y Deberes del Hombre*, Santiago, 2008, p. 362; F. LENZERINI, *Asilo e diritti umani: l'evoluzione del diritto di asilo nel diritto internazionale*, Milano, 2009, p. 379; J. COPPENS, *Interception of seaborne migrants: the applicability of the non-refoulement principle at sea*, in *German Yearbook of International Law*, n. 56, 2013, p. 452; E. LAUTERPACHT, D. BETHLEHEM, *The scope and content of the principle of non-refoulement: opinion*, in E. FELLER, V. TÜRK, F. NICHOLSON (eds.), *Refugee Protection in International Law*, Cambridge, 2005, p. 87; G. GOODWIN-GILL, J. MCADAM, *The Refugee in International Law*, Oxford, 2007, pp. 345-354; S. TREVISANUT, *The principle of non-refoulement at sea and the effectiveness of asylum protection*, in *Max Planck Yearbook of United Nations Law*, n. 12, 2008, p. 215; F. MORRONE, *L'asilo nel diritto internazionale*, in B.M. BILOTTA, F.A. CAPPELLETTI (eds.), *Il diritto d'asilo*, Padova, 2006, p. 68.

<sup>55</sup> G. GOODWIN-GILL, J. MCADAM, *The Refugee in International Law*, cit., p. 354.

<sup>56</sup> European Court of Human Rights, Chamber, judgment of 18 February 1991, application no. 12313/86, *Moustaquim v. Belgium*, paras. 45-46.

<sup>57</sup> International Covenant on Civil and Political Rights, Art. 23; International Covenant on Economic, Social and Cultural Rights, Art. 10.

also part of customary international law.<sup>58</sup> For some authors, the principle of *non-refoulement* would even amount to a peremptory norm of international law,<sup>59</sup> as also claimed by the UNHCR Executive Committee on several occasions.<sup>60</sup> We think that the obligation of *non-refoulement* is a rule of customary international law, but the state of the art probably still does not allow affirming its peremptory nature. However, it has been aptly noted that it is today more and more necessary to clarify and adapt the core elements of this principle to the contemporary conditions of migration management.<sup>61</sup>

The first issue arising from Art. 33 regards the definition of refugee.<sup>62</sup> Under Art. 1, A(2), of the Refugee Convention (amended by the Protocol relating to the Status of Refugees of 1967<sup>63</sup>), a refugee is a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” Thus, the constitutive elements of the definition are substantially five: the presence of the person outside the country of nationality or of residence; the impossibility or the unwillingness to avail himself of the protection of his State of nationality or of residence; the well-founded fear of persecution; the act of persecution itself; the reasons of the persecution.

We believe that at least part of the people taken onboard of the vessels setting sail from the Northern African coasts, in critical conditions, and aiming to reach European shores, can be qualified – despite some dissenting voices<sup>64</sup> – as refugees under the

<sup>58</sup> R. PISILLO MAZZESCHI, *Strumenti comunitari di prevenzione e di contrasto all'immigrazione clandestina*, in *Il diritto dell'Unione europea*, n. 4, 2004, pp. 759-760.

<sup>59</sup> E. PAPASTAVRIDIS, *The EU and the obligation of non-refoulement at sea*, in F. IPPOLITO, S. TREVISANUT (eds.), *Migration in the Mediterranean. Mechanisms of International Cooperation*, Cambridge, 2015, p. 241; J. ALLAIN, *The jus cogens nature of non-refoulement*, in *International Journal of Refugee Law*, n. 13, 2001, p. 533; H. HONGIU KOH, *The Haitian Centers Council case: reflections on refoulement and Haitian Centers Council*, in *Harvard International Law Journal*, n. 35, 1994, p. 30; F. LENZERINI, *Asilo e diritti umani*, cit., p. 387. See also European Court of Human Rights, Grand Chamber, judgment of 23 February 2012, application no. 27765/09, *Hirsi Jamaa and others v. Italy*, concurring opinion of Judge Pinto de Albuquerque, p. 64.

<sup>60</sup> UNHCR Executive Committee, General Conclusion on International Protection, no. 25 (XXXIII) of 20 October 1982, para. (b); General Conclusion on International Protection, no. 55 (XL) of 13 October 1989, para. (d); General Conclusion on International Protection, no. 79 (XLVII), of 11 October 1996, para. (i).

<sup>61</sup> A. SKORDAS, *The Missing Link in Migration Governance: An Advisory Opinion by the International Court of Justice*, in *Ejil:Talk!*, 11 May 2018, available at <<https://www.ejiltalk.org/the-missing-link-in-migration-governance-an-advisory-opinion-by-the-international-court-of-justice/>>.

<sup>62</sup> On this, see C. FRANCHINI, *Lo status di rifugiato nella Convenzione di Ginevra del 1951*, in C. FAVILLI (ed.), *Procedure e garanzie del diritto di asilo*, Padova, 2011, pp. 73-103.

<sup>63</sup> The Protocol relating to the Status of Refugees was signed on 31 January 1967 in New York, entered into force on 4 October 1967 and has been ratified by 146 States as of 10 July 2018, in *United Nations Treaty Series*, vol. 606, p. 267.

<sup>64</sup> In 2015 the Hungarian Prime Minister, Viktor Orbán, said that the vast majority of migrants in Europe were not refugees, but people seeking better living conditions (then defined as “Muslim invaders” in 2018). His Slovak counterpart, Robert Fico, took a similar position, stating that more than 95% of those individuals were economic migrants. See <<https://www.independent.co.uk/news/world/europe/refugees->



Refugee Convention,<sup>65</sup> and can enjoy the rights hereby contained.<sup>66</sup> However, since those rights should not be predicated upon formal recognition of refugee status,<sup>67</sup> the benefit of *non-refoulement* is enjoyed from the moment when an asylum seeker<sup>68</sup> presents himself or herself for entry and seeks international protection, whether within the State or at its border.<sup>69</sup> Hence, the principle of *non-refoulement* requires States to admit asylum seekers at least temporarily in order to determine their status, while it precludes removal before status determination has been carried out.<sup>70</sup> Furthermore, while the principle at hand is focused on asylum seekers under the Refugee Convention, *non-refoulement* in the human rights law context does not depend on any given status of the individuals at risk or, more importantly, whether these individuals have crossed a border.<sup>71</sup>

The principle of *non-refoulement* can pose some difficulties as regards its application *ratione loci* in the framework of Operation *Sophia*. In particular, it must be determined if its extraterritorial application is conceivable under current international law. In order to do so, we will briefly examine the practice of the UNCHR and of the main international judicial bodies which dealt with this issue.

As declared by the UNHCR, *non-refoulement* applies “wherever a State exercises jurisdiction, including at the frontier, *on the high seas* or on the territory of another

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muslim-invaders-hungary-viktor-orban-racism-islamophobia-eu-a8149251.html> and  
<<https://www.economist.com/blogs/economist-explains/2015/09/economist-explains-4>>.

<sup>65</sup> See also Resolution 2240 (2015), cit., Recital 7.

<sup>66</sup> In Italy, i.e., more than 130,000 applications for international protection were issued in 2017, and almost 7,000 individuals were declared refugees. See <<http://www.asylumineurope.org/reports/country/italy/statistics>>.

<sup>67</sup> The determination of the status of “refugee” has declaratory nature, so that the attribution of this status does not depend on any formal act by the State of destination. Thus, the obligation to protect a refugee arises as soon as the person fulfils the criteria established by Art. 1 of the Refugee Convention and enters the territory, or is within the jurisdiction, of a foreign State, regardless of the formal acknowledgment of this status. See UNHCR, *Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the status of refugees*, December 2011, UN. Doc. HCR/IP/4/Eng/REV.3, para. 28.

In Italy, the decision on the recognition of the status of refugee lies with the Territorial Commission for the Recognition of International Protection. The matter is regulated by the legislative decree no. 251/2007, which implemented Directive 2004/83/CE. If the application for international protection is positively assessed in light of Arts. 3, 4, 5 and 6 of the abovementioned decree and the requirements under Arts. 7 and 8 are satisfied – in the absence of the termination or exception clauses set out in Arts. 9 and 10 – the status of refugee is accorded (Art. 11). The decree of the Territorial Commission, which is a mere act of acknowledgment, does not entail any reference to the factual reasons that led to the decision, since Art. 9, par. 2, of legislative decree no. 25/2008 lays down the obligation to provide factual and legal reasons only when the international protection is denied.

<sup>68</sup> An asylum seeker is a person in search of international protection and whose application has not yet been decided upon by the State with which that application has been lodged. Not all asylum seekers will be recognized as refugees, but all refugees are, at least initially, asylum seekers. See UNHCR-International Maritime Organization (IMO), *Rescue at sea, a guide to principles and practice as applied to migrants and refugees*, 2007, p. 4.

<sup>69</sup> E. PAPASTAVRIDIS, *The EU and the obligation of non-refoulement at sea*, cit., p. 240.

<sup>70</sup> G. GOODWIN-GILL, J. MCADAM, *The Refugee in International Law*, cit, p. 208.

<sup>71</sup> E. LAUTERPACHT, D. BETHLEHEM, *The scope and content*, cit., p. 158.

State”<sup>72</sup> and its extraterritorial application is of paramount importance in an era of restrictive external migration controls.<sup>73</sup> The question of the extraterritorial application of this principle has also been dealt with by the UN Committee against Torture (CAT). The CAT maintained that a certain number of the Torture Convention’s provisions, including the *non-refoulement* rule, apply to the territory under States parties’ jurisdiction which includes “all areas under the de facto effective control of the State party, by whichever *military* or civil authorities such control is exercised”.<sup>74</sup> The extraterritorial application of the principle was also upheld by the Council of Europe.<sup>75</sup>

Although not explicitly regulated by the ECHR, the *non-refoulement* rule has been included in its material scope of application – through the protection *par ricochet* provided by Art. 3 (“Prohibition of torture”) – thanks to the evolutive interpretation of the ECtHR.<sup>76</sup> In this case, the extraterritorial application of the principle at hand directly stems from the reach of Art. 1 of the ECHR (“Obligation to respect Human Rights”), which establishes that the rights and freedoms identified in the Convention shall be secured by States parties “to everyone within their jurisdiction.”

Two cases addressed by the ECtHR are particularly relevant for our analysis because they refer to facts occurred at sea. In *Medvedyev and others v. France*, regarding the seizure of a vessel in international waters and the consequent arrest of the crew members by French authorities, the Strasbourg Court stated that the ECHR provisions apply in situations where people are rescued by military ships or by coastal guard on the high seas, having exercised the State in question “full and exclusive control” on the vessel and on its crew, “at least de facto, from the time of its interception, in a continuous and uninterrupted manner.”<sup>77</sup> In this regard, the judges affirmed that “the special nature of the maritime environment [...] cannot justify an area outside the law where ships’ crews are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction.”<sup>78</sup>

In a later case, *Hirsi and others v. Italy*, regarding the interception by the Italian authorities on the high seas of a boat carrying 200 migrants and the return of those people to Libya without any process of identification or any attempt to determine claims for refugee status, the ECtHR went even further, holding that factual evidence

<sup>72</sup> UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligation under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, par. 24 (emphasis added).

<sup>73</sup> UNHCR, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at <[www.unhcr.org/refworld/docid/438c6d972.html](http://www.unhcr.org/refworld/docid/438c6d972.html)>.

<sup>74</sup> CAT, *Conclusions and recommendations on the Report submitted by the United States of America under Article 19 of the Convention*, 25 July 2006, doc. CAT/C/USA/CO/2, para. 15 (emphasis added).

<sup>75</sup> See resolution 1821 (2011) of the Parliamentary Assembly of the Council of Europe, of 21 June 2011, para. 9.3.

<sup>76</sup> European Court of Human Rights, Plenary, judgment of 7 July 1989, application no. 14038/88, *Soering v. The United Kingdom*, para. 88.

<sup>77</sup> European Court of Human Rights, Grand Chamber, judgment of 29 March 2010, application no. 3394/03, *Medvedyev and others v. France*, para. 67.

<sup>78</sup> *Ivi*, para. 80.

established jurisdiction within the meaning of the ECHR, since “the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities.”<sup>79</sup> The judges considered the fact that the applicants were transferred onto vessels flying Italian flags, thus being under the exclusive *de jure* jurisdiction of Italy on the high seas according to international law (Art. 92 UNCLOS).<sup>80</sup> Moreover, the Court recognized *de facto* jurisdiction based on the exclusive control of the applicants by the Italian military personnel.<sup>81</sup> In this case, the ECtHR explicitly took in consideration the principle of *non-refoulement* as indirectly enshrined in Art. 3 of the ECHR, concluding unanimously that Italy had violated this provision (as well as Art. 4 of Protocol No. 4, prohibiting collective expulsion of aliens) since “when the applicants were transferred to Libya, the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin, having regard in particular to the lack of any asylum procedure and the impossibility of making the Libyan authorities recognise the refugee status granted by UNHCR.”<sup>82</sup>

It can be inferred by these references that *non-refoulement* – as enshrined in the ECHR and in the other treaties which admit its extraterritorial application (e.g. Refugee and Torture Conventions) and intended as an obligation not *to return* – applies when EU ships, acting in the framework of Operation *Sophia*, intercept, inspect and seize suspected vessels on the high seas, provided that the EU exercises a form of authority and control, albeit probably only *de facto*, on the vessels in those circumstances. The inspection process and related measures adopted by EU ships, moreover, seem totally comparable to the factual circumstances of the abovementioned cases decided upon by the ECtHR. The principle of *non-refoulement* (specifically, the obligation not *to expel*) also applies, obviously, when the individuals, once rescued, are transferred to the States, in most cases Italy.<sup>83</sup>

#### 4. Concluding Remarks

According to data dating back January this year,<sup>84</sup> Operation *Sophia* has saved more than 42,000 people at sea, neutralized more than 500 vessels and handed to Italian authorities 137 smugglers.

<sup>79</sup> European Court of Human Rights, *Hirsi Jamaa and others v. Italy*, cit., para. 81. For a comment of the judgment and the extraterritorial application of *non-refoulement*, see F. LENZERINI, *Il principio del non-refoulement dopo la sentenza Hirsi della Corte europea dei diritti dell'uomo*, in *Rivista di diritto internazionale*, 2012, n. 3, pp. 721-761.

<sup>80</sup> European Court of Human Rights, *Hirsi Jamaa and others v. Italy*, cit., para. 77.

<sup>81</sup> *Ivi*, para. 81.

<sup>82</sup> *Ivi*, para. 156.

<sup>83</sup> Unfortunately, we don't know what the rules of engagement for this operation provide for *non-refoulement*, being those specified in a classified document.

<sup>84</sup> These data were provided me in Brussels by one of the spokespersons of Operation *Sophia*, Captain Antonello De Renzis Sonnino.

Nevertheless, national governments<sup>85</sup> and authors<sup>86</sup> have criticized the mission and casted doubts on its actual effectiveness in fighting irregular migration. Broadly speaking, comments point to the alleged controversial double nature of *Sophia*, that of a humanitarian mission on the one hand, and of a military one on the other. As mentioned earlier,<sup>87</sup> *Sophia* is not meant to be a rescue mission,<sup>88</sup> but mainly a military operation aimed at stopping and neutralizing vessels used for illicit traffic of migrants. Other alleged shortfalls, more specifically, deal with the lack of transparency of the mission and the fact that it acts as a “magnet to migrants” and addresses only the symptoms and not the causes of the problem. We think that these criticisms are not fully justified and tend to underestimate both the primary goal of *Sophia* and the severe conditions under which it operates. Moreover, the Operation has undoubtedly gained more and more popularity since its inception, partly as a result of the inclusion of new activities in the original mandate in order to tackle emerging urgencies (training of the Libyan Coastguard and Navy in the first place). It’s no coincidence that criticisms have decreased significantly over the last few months.

Overall, we believe that Operation *Sophia* is an important tool in the framework of the European Agenda on Migration with regard to the management of the migratory flows along the Central Mediterranean route, and it is meeting its objective to systematically identify, capture and destroy vessels used by smugglers, also contributing to saving human lives. The complementary training and capacity building of the Libyan Coast Guard should also be stressed. In September 2017, about 100 candidate trainees provided by the Libyan authorities started the training in Italy.<sup>89</sup> With the positive conclusion of two training courses – one hosted by the Greek Navy and the other organized by Operation *Sophia* with the contribution of Italian Navy trainers – the threshold of 213 Libyan Coastguard and Navy personnel trained by EUNAVFOR Med *Sophia* has been reached.<sup>90</sup> Other training modules ashore are planned in Italy, Spain and other EU Member States in favor of a huge number of trainees.

<sup>85</sup> House of Lords – EU Committee, *Operation Sophia, the EU’s Naval Mission in the Mediterranean: an Impossible Challenge*, 14th Report of Session 2015-16, available at <<https://publications.parliament.uk/pa/ld201516/ldselect/lducom/144/144.pdf>>. See also the comment made in 2016 by the Libyan Head of the coastguard operations, available at <<https://euobserver.com/tickers/133849>>.

<sup>86</sup> See, among others, M. PRICOPI, *EU Military Operation Sophia – Analysing the Shortfalls*, in *Buletin Științific*, no. 2 (42), 2016, available at <[http://www.armyacademy.ro/buletin/bul2\\_2016/PRICOPI.pdf](http://www.armyacademy.ro/buletin/bul2_2016/PRICOPI.pdf)>; M. RIDDERVOLD, R.-L. BOSILCA, *Not so Humanitarian After All? Assessing EU Naval Mission Sophia*, ARENA Working Paper 5/2017, available at <<https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2017/wp-5-17.pdf>>.

<sup>87</sup> *Infra*, § 3.1.

<sup>88</sup> That is, after all, the main objective of Joint Operation *Themis*, the new mission replacing Triton launched by Frontex on 1 February 2018 in the Central Mediterranean.

<sup>89</sup> See Report from the Commission to the European Parliament, the European Council and the Council, *Fifth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration*, COM(2017) 471 final, of 6 September 2017, p. 13.

<sup>90</sup> See *Operation SOPHIA: training activity in progress*, of 10 May 2018, available at <<https://www.operationsophia.eu/operation-sophia-training-activity-in-progress/>>.

The achievements of the Operation have been highlighted in the Communication of March 2018 from the Commission regarding the progress of the European Agenda on Migration, where reference has been made to the effectiveness of the EU's efforts to support the two Libyan Coast Guards and the importance of *Sophia* for crime prevention, investigation and prosecution.<sup>91</sup> Furthermore, the results achieved by the Operation could also be seen as “long term” actions, as to, in particular, the contribution to the reduction of the incentives for irregular migration and to border management.

By way of conclusion, we think that this Operation represents an important “international maturity test” for the EU in order to foster its role and credibility in the maintenance of international peace and security. The strong and broad mandate underlying *Sophia* entails, as we have seen in the present paper, the application of a plethora of international obligations binding both on the EU and its Member States. On the extent of the conformity of the EU action to these international law standards the (positive) outcome of the Operation will also be greatly dependent in the long run.

**ABSTRACT:** In June 2015, the EU launched the military naval operation EUNAVFOR MED *Sophia* under the Common Security and Defence Policy in order to disrupt the business model of human trafficking networks in the Southern Central Mediterranean. The mission can be considered an important operative tool in the framework of the 2015 European Agenda on Migration, as regards in particular its capacity in managing illegal migration into European borders. Yet, the positive outcome of *Sophia* is also greatly dependent upon its conformity to international law standards, of which the implementation of the measures authorized by the UN Security Council for intercepting suspected vessels on the high seas and the respect of the obligation of *non-refoulement* in this maritime zone pose some legal questions.

**KEYWORDS:** Operation EUNAVFOR MED *Sophia* – migrant smuggling and human trafficking – interception on the high seas – principle of *non-refoulement* – refugees.

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<sup>91</sup> Communication from the Commission to the European Parliament, the European Council and the Council, *Progress Report on the Implementation of the European Agenda on Migration*, of 14 March 2018, COM(2018) 250 final, p. 12.