

Julian Dominique Bootz

j.bootz@student.utwente.nl

Irregular migration in the Central Mediterranean area in the light of the proposed rules for FRONTEX operations

Is the upcoming Regulation of the European Parliament and of the Council (COM(2013) 197 final) able to address issues of fundamental rights of irregular migrants in the Central Mediterranean area?

Bachelor's Thesis

Public Administration with spec. Emphasis on European Studies

Double Diploma BA. /BSC.

UNIVERSITEIT TWENTE, ENSCHEDE & WESTFÄLISCHE WILHELMS-UNIVERSITÄT MÜNSTER

UNIVERSITEIT TWENTE
FACULTEIT MANAGEMENT EN BESTUUR
SUPERVISOR:

DR. LUISA MARIN
+31 53 489 3193 / 3260
l.marin@utwente.nl

WESTFÄLISCHE WILHELMS-UNIVERSITÄT
INSTITUT FÜR POLITIKWISSENSCHAFT
SUPERVISOR:

DR. INGO TAKE
+49 251 - 83 29359
itake_01@uni-muenster.de

DATE OF SUBMISSION: 19 FEBRUARY 2014

DATE OF COLLOQUIUM: 27 FEBRUARY 2014

Table of contents

1. Introduction	4
1.1 Outline of the problem	4
1.2 Approach and research question	5
1.3 Structure	8
1.4 Scientific relevance	8
2. Migration in the Central Mediterranean Area	9
2.1 Cooperation between Italy and Libya dealing with irregular migration	10
2.2 FRONTEX engagement in the Central Mediterranean area	11
2.2.1 Joint Operation Nautilus	11
2.2.2 Joint Operation Hermes.....	12
2.3 Questionable surveillance practices and breaches of fundamental rights	12
2.3.1 Breaches of SAR duties	12
2.3.2 Disembarkation to Libya and the case of Hirsi Jamaa and Others v. Italy	13
2.4 The situation of migrants in Libya	14
2.5 Interim findings	15
3. The difficult way to a new legal framework	16
3.1. Council Decision 2010/252/EU	16
3.2 Parliament v Council, Case C-355/10	18
3.3 The 2013 Proposal.....	18
3.4 Intervention by the Mediterranean States during the negotiations	19
3.4.1 Assessment of the allegations	19
3.4.2 Does the EU have the necessary competences to regulate the respective issues?	20
3.3.3 The ‘Implied Powers’ doctrine.....	21
4. Analysis of the legal obligations and fundamental rights	24
4.1 Interception.....	25
4.1.1 Interception and follow-up measures under the law of the flag	25
4.1.2 The right to apply for asylum.....	27
4.1.3 The right to leave one’s country.....	28
4.2 Search and Rescue operations	29
4.2.1 The duty to render assistance and to take responsibility for emergency cases	29
4.2.2 The distinction of emergency states and rescue modalities	30
4.3 Disembarkation	31
4.3.1 Place of safety	32
4.3.2 The applicability of the non-refoulement principle	32
4.3.3 The assessment of personal circumstances prior disembarkation	34
4.3.4 Right to an effective remedy	35
5. Conclusion.....	36
References	39

Abbreviation

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CFREU	Charter of Fundamental Rights of the European Union
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EU	European Union
FRONTEX / the Agency	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
IMO	International Maritime Organization
JO	Joint Operation
LIBE	Committee on Civil Liberties, Justice and Home Affairs
OJ	Official Journal of the European Union
RCC	Rescue Coordination Centre
SAR	Search and Rescue
SBC	Schengen Borders Code
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNLOSC	United Nations Convention on the Law of the Sea

1. Introduction

1.1 Outline of the problem

The Central Mediterranean route¹ is one of the most important, but also one of the most dangerous entry points to the European Union (EU).² Irregular migrants³ on their way from Libya to Italy have been subject to boat tragedies and ill-treatment by the authorities of both countries (Riesbeck, 2013).

While the Arab Spring raised fears of a “biblical exodus” (Haas, 2011), recently rather the questionable border surveillance practices and the diversions of migrants to Libya were in the limelight of both public and political attention and were criticized for breaching fundamental rights (Amnesty International, 2012, pp. 9–11).⁴

With the introduction of the “integrated management system for external borders”⁵ and the establishment of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX),⁶ the EU has considerably influenced the surveillance of this area.

So far, the 'integrated system' lacked a common interpretation of existing obligations, or, as UN Special Rapporteur François Crépeau (2013) noted, revealed a “gap between policy and practice” (p. 10). In order to tackle this issue, the European Council and the European Parliament are currently negotiating a Regulation to set rules for FRONTEX coordinated surveillance operations.⁷ The available draft version clearly broadens the notion of border

¹ For the purpose of this thesis, the term Central Mediterranean applies to the stretch of sea between Italy and Libya, deliberately excluding neighbouring states such as Greece, Turkey, Egypt or Tunisia. While the irregular migration to Malta is not examined in detail, its surveillance practices must be considered to a certain degree due to its geographical location.

² Out of 5 575 migrants which have been saved by units of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) during SAR missions in 2012, 3 391 were rescued on the Central Mediterranean Route (FRONTEX, 2012, p. 52).

³ As there is no universal legal definition of the term migrant, this thesis uses it in an inclusive way, following the argumentation of Frelick (2009, p. 22). The term comprises both refugees in need for international protection and persons who migrate out of other reasons and who are not eligible for asylum.

The legal definition of a refugee is contained in art. 1 Convention Relating to the Status of Refugees, UN General Assembly, 28.06.1951, U.N.T.S. 189 p. 137 [hereinafter Refugee Convention]

⁴ Cf. *Hirsi Jamaa and Others v Italy*, no. 27765/09, ECtHR 2012 [hereinafter *Hirsi*]

⁵ Art. 77(1) (c) Consolidated Version of the Treaty on the Functioning of the European Union, 2008 OJ C 115/47 [hereinafter TFEU]

⁶ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2004 OJ L 349/1 [hereinafter FRONTEX Regulation]

⁷ Proposal for a Regulation of the European Parliament and of the Council 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 Coordination at the External Borders of the Member States of the European Union, COM(2013) 197 final [hereinafter Proposed Regulation]

surveillance as set in article 12(1) of the Schengen Borders Code (SBC),⁸ to include not only the detection but also follow-up steps such as the disembarkation of persons. Furthermore, the draft Regulation includes operational modalities for search and rescue (SAR) measures as a binding element.⁹

While the proposed Regulation is in the process of being adopted,¹⁰ six EU states - among them Italy and Malta - have intervened on two of the most important articles of the draft, calling into question the EU competences on the matter. Furthermore, although the rules have been acknowledged as an improvement compared to the preceding framework¹¹, independent observers fear that some provisions are likely to introduce a misconception of existing law or that they remain silent about fundamental rights obligations (Meijers Committee, 2013, p. 1).¹²

1.2 Approach and research question

Regardless whether they appear in emergency situations or in the form of repatriation to Libya, the major breaches of fundamental rights of migrants are due to the reluctance of Italy and other Member States to take responsibility for persons who try to reach the EU irregularly.

This position results from a number of reasons. Generally, migration is seen as an issue of securitization which can be tackled by deterring irregular migrants from trying to reach the EU (Huysmans, 2000, pp. 756–767).¹³

Secondly, as established in the Dublin II Regulation¹⁴, the country in which the asylum claim is made is also responsible for the further processing of that person. Especially Italy has been

⁸ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), 2006 OJ L 105/1 [hereinafter SBC]

⁹ Point 3 Explanatory Memorandum of Proposed Regulation

¹⁰ Up to the submission of this thesis, the Regulation has not been adopted by the European Parliament. While it has been discussed and amended in numerous informal meetings between the Council, the Parliament and the Commission (Council of the European Union, 2014a) and commented on by the Committee on Civil Liberties, Justice and Home Affairs, the Committee on Foreign Affairs and the Committee on Transport and Tourism (Coelho, 2013b), the analysis of its provisions is limited to the initial draft version as an assessment of the inter-institutional processes is beyond the ambit of this thesis.

¹¹ Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2010/252/EU), 2010 OJ L 111/20 [hereinafter Decision (2010/252/EU)].

¹² Cf. Martin (2013) and Amnesty International, European Council on Refugees and Exiles (ECRE) and International Commission of Jurists (ICJ) (2013)

¹³ This is further illustrated by the fact that the budget of the European Asylum Support Office is nine times smaller than the one of FRONTEX (Hayes & Vermeulen, 2012, p. 6).

complaining about the increasing burden of refugees from Africa, claiming that more financial support is needed to deal with the influx of migrants (Schulte & Jakob, 2013).

Thirdly, as it will be elaborated below, political disputes between the Mediterranean Member States on the areas of responsibility further complicate the situation (Amnesty International, 2009).

An assessment of the political migration regime of Italy, other Member States or the EU as a whole, is beyond the scope of this thesis. Taking the current situation as a starting point, it is however argued that the adoption of a comprehensive framework could prevent the Member States from aiding and abetting breaches of fundamental rights. After all, they are still bound by EU legislation and international law.

The draft regulation contains rules which extensively regulate the surveillance of the sea borders. On the one hand, it lies down provisions for interception¹⁵ and SAR operations while also comprising an article which regulates the adherence with the *non-refoulement* principle¹⁶ when disembarking seized or rescued migrants.

On the other hand, the rules only apply to operations coordinated by FRONTEX. They furthermore still leave the participating Member States room for discretion while also enabling the FRONTEX units to carry out a range of measures which are questionable in terms of international law. Summing up this complex situation, this leads to the question whether the Regulation is able to protect the fundamental rights of irregular migrants.

While this can be theoretically assessed on the basis of existing legal obligations, the impact of the rules becomes much more tangible when the proposed provisions are contrasted with the current situation and the implications in a local context.

In the Central Mediterranean area, a number of relevant factors are present which makes this region particularly interesting as a case study. First of all, it is one of the major entry points to the EU which has been especially important in the recent uprisings in North Africa.

¹⁴ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 2003 OJ L 50/1

¹⁵ There is no internationally accepted definition of the term interception. This thesis therefore follows the definition of the Executive Committee of the United Nations High Commissioner for Refugees' (UNHCR), according to which it encompasses all measures applied by the authorities to stop a vessel in order to prevent or interrupt irregular migration to a state territory (UNHCR, 2000, p.173).

¹⁶ The principle of *non-refoulement* is a major obligation of international refugee law. It describes the commitment not to return persons to a place where "their rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security" (UNHCR, 1997, para. 1) would be threatened.

Secondly, the area has experienced enormous public attention, especially since two tragedies occurred close to the island Lampedusa in 2013,¹⁷ which left hundreds of migrants dead. Thirdly, the former intensive cooperation regarding irregular migration between Italy and Libya led to diversions of migrants to the latter even though the treatment of migrants there suggests that such diversions breach human rights. While the *Hirsi* judgment of the European Court of Human Rights (ECtHR) confirmed this allegation, at least the political bilateral cooperation between the two countries to fight irregular migration continues. Fourthly, the Central Mediterranean area has been the scene of two major FRONTEX operations with more to come, making this area especially interesting to analyse the specific difficulties of such operations. Finally, the relation between Italy and Malta as receiving states adds another dimension to the surveillance operations in this area, as the two countries frequently dispute their roles and obligations with regard to SAR operations and the appropriate place of disembarkation.

While some of those factors are also present in other parts of the Mediterranean Sea, this complex combination enables a detailed illustration of the surveillance issues and reveals the practical difficulties regarding the migrants' fundamental rights in the light of the proposed rules. All in all, this leads me to the question:

Is the upcoming Regulation of the European Parliament and of the Council (COM(2013) 197 final) able to address issues of fundamental rights of irregular migrants in the Central Mediterranean area?

Consequently, by answering this question, the thesis pursues to give a comprehensive overview of the right related issues occurring in the course of maritime border surveillance.

As stated in the SBC, the purpose of the latter is "to prevent unauthorized border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally."¹⁸ While in the context of the Regulation SAR measures and follow-up steps such as disembarkation are covered as well, issues regarding the placement and detention on land, as well as return operations after disembarkation in a Member State, are not addressed by this thesis. Likewise, the processing of asylum claims or the repatriation following the rejection of asylum claims in a Member State, are beyond the scope of this analysis.

¹⁷ In October 2013, a boat with around 500 migrants aboard caught fire and sank before the Italian island, leaving more than 300 people dead. Only nine days later, another boat capsized and more than 30 migrants drowned (The Guardian, 2013).

¹⁸ Art. 12(1) SBC

Lastly, it must be clarified that this thesis does furthermore not seek to assess FRONTEX as an EU agency. On the contrary, it is only concerned with the operational branch of it, namely the Joint Operations (JOs). As the draft Proposal only applies to such operations conducted at sea, any other activities of FRONTEX, as well as internal processes of the Agency, are excluded.

1.3 Structure

The thesis is divided into five parts. The second chapter, after this introduction, gives an overview of the migration in the area of interest, thereby assessing the FRONTEX operations and failures of the border surveillance by Italy and partially Malta. Furthermore, the situation of migrants in Libya is described in order to illustrate whether the local disembarkation of migrants is generally in line with the *non-refoulement* principle.

The following chapter scrutinizes the legal background of the current draft Regulation to clarify its importance. Also, it addresses the intervention of the six Mediterranean states with an emphasis on the issue of competences, in order to investigate whether the adoption of the current draft would be rightful.

In the fourth chapter, the relevant provisions of international and EU law are contrasted with the articles of the draft Regulation to analyse whether the latter are in line with existing obligations and whether they address the fundamental rights of migrants. The thesis finally concludes on the research question.

1.4 Scientific relevance

Migration on an irregular basis is a key issue in the EU, which has led to a great amount of legislation in the last decade (Crépeau, 2013, pp. 23–38). Although there is a range of provisions that protect migrants, their rights are often not met in practice (Weinzierl & Lisson, 2007, p. 78).

The proposed Regulation is containing rules for the surveillance of the external sea borders in FRONTEX operations. Its content and scope is therefore of utmost importance for the future legal and political situation of the integrated border management of the European Union. The adoption of a document with a lack of clarity regarding the adherence of SAR responsibilities, the principle of *non-refoulement* or other relevant issues, could lead to increased breaches of rights in future, which could then be justified on the basis of an ordinary legislated EU document.

While the proposal has been criticized by different organizations on a general basis, a thorough assessment of the possible fundamental rights implications on the basis of a case study has not been conducted yet. By depicting a detailed overview of the current border surveillance in the Central Mediterranean area in combination with both an assessment of the EU competences on the matter and a legal analysis of the draft Regulation, the thesis represents a unique and comprehensive illustration of the complex issues of fundamental rights regarding irregular migration to the EU.

2. Migration in the Central Mediterranean Area

First of all, the overall conditions of irregular migration to the EU in the respective area must be understood. According to FRONTEX estimates, more than 166,000 migrants have entered EU territory irregularly via the Central Mediterranean Route since 2008 (FRONTEX, 2013), whereas especially the Italian islands of Sicily and Lampedusa, the latter lying only 290km off the Libyan coast (Price, 2013), have been popular destinations (Frelick, 2009, p. 25).

The political unrest in North Africa raised the migration flow to a new peak level, bringing both Italy and Malta under increasing pressure. And while the end of the Gaddafi regime temporarily decreased the migratory pressure on this route, the total number of migrants in 2013 was almost as high as in 2011 again (FRONTEX, 2013).

The majority of irregular migrants reaches Italy in mixed flows¹⁹, mostly starting from the area around the Libyan capital Tripoli which serves as a nexus point. Next to persons from Somalia and Eritrea, other sub-Saharan African nationals and recently a growing number of Syrian refugees have been taking this route (FRONTEX Risk Analysis Unit, 2013, pp. 5, 20).

The vast majority of those migrants applies for asylum upon arrival (UNHCR, 2013, p. 2). According to the United Nations High Commissioner for Refugees' (UNHCR) statistics, the asylum approval rates in Italy were at 49% in 2008. In the Trapani district of Sicily, which includes the island of Lampedusa, the rates were even at 78% (Frelick, 2009, p. 11).

Since the migrants are mostly departing from Libya, it must be assessed in what way Italy is cooperating with the former regarding surveillance operations.

¹⁹ The term refers to a group of persons who migrate out of different reasons and motivations and who have different protection needs. Examples would be asylum seekers, women and children, economic migrants or victims of trafficking (EUROMED, 2013, p. 2).

2.1 Cooperation between Italy and Libya dealing with irregular migration

Indeed, the issue of clandestine migration has been a key area in the relations between Italy and Libya since the late 1990s (Paoletti, 2012, p. 2). After a general agreement in 2000, Italy and Libya gradually extended their cooperation,²⁰ culminating in the conclusion of the Treaty of Friendship, Partnership and Cooperation in 2008 (La Repubblica, 2008).

This treaty marked the beginning of the Italian 'push-back' policy²¹ (La Gazzetta del Mezzogiorno, 2009) which led to the immediate repatriation of intercepted migrants to Libya without bringing them to an EU state to assess their eligibility for asylum or need for protection (UNHCR, 2009). The operational details, regulated in an additional Technical-Operational Protocol adopted in 2009, were never made public (UNHCR, 2010b, p. 3).

In February 2011, the further implementation of the Treaty of Friendship was suspended due to the Libyan civil war. Notwithstanding the criticism by NGOs, Italy signed a Memorandum of Understanding with the Libyan National Transitional Council while the conflict was still going on (Frenzen, 2011c).

This document paved the way for a renewed and consolidated cooperation and led to the Declaration of Tripoli in January 2012 which entailed the main provisions of the former Treaty of Friendship (Jacques, Prestianni, & Romdhani, 2012, pp. 35–36). This declaration was followed by the conclusion of the so-called *Processo Verbale*, specially focusing on migration control. The documents were again not made public by the authorities (Paoletti, 2012, p. 2).

In the same year, the ECtHR ruled that the above mentioned diversion operations of 2011 had violated the European Convention of Human Rights (ECHR).

Even though the Italian Government claimed that they would respect the decision and not repeat this policy, and despite the recommendations of UNHCR to pay more respect to the rights of refugees and migrants in the agreements (UNHCR, 2013, p. 16), Italy continued only to include very limited protection safeguards in the agreements (UNHCR, 2013, p. 3).

The UN Special Rapporteur correspondingly concluded that since the former cooperation during the time of Gaddafi, the Italian focus on bilateral cooperation was still exclusively on fighting irregular migration and less on complying with fundamental rights (OHCHR, 2012).

²⁰ Areas of cooperation included common border guard training programmes, the financing of reception centres and deportation schemes (Andrijasevic, 2010, p. 154).

²¹ In this context Italy provided several patrol boats for joint operations in Libyan and international waters (Jacques, Prestianni, & Romdhani, 2012, p. 13).

Having examined the general issue of irregular migration and the bilateral cooperation to fight it, the operational activities of FRONTEX must be assessed. Since the Regulation is limited to surveillance operations coordinated by the Agency, it is of crucial importance to understand the modalities of such operations in the local context.

2.2 FRONTEX engagement in the Central Mediterranean area

With the establishment of the SBC, the EU developed a common approach of external border surveillance to prevent unauthorized crossings. Surveillance should be conducive to “prevent and discourage persons from circumventing”²² the border. FRONTEX, which was assigned to coordinate this surveillance, was empowered to conduct a variety of tasks²³ of which especially the JOs at sea soon became an important instrument.²⁴

2.2.1 Joint Operation Nautilus

The first JO in the Central Mediterranean area, called *Nautilus*, had the objective "to strengthen the control of the Central Mediterranean maritime border" (FRONTEX, 2007) and was hosted by Malta.²⁵ While it proved to be successful in detecting irregular border crossings, the participating states could not agree on where to disembark rescued or intercepted migrants. For the second phase in 2008, Libya refused the diversion of detected migrants back to its shores as it had been formerly planned. After prolonged discussions between Malta and Italy, the rule to take intercepted persons to the closest safe port was ultimately continued in 2009 (Moreno-Lax, 2011, p. 183).

However, the authorities anticipated that the operation would be "beefed up through the launch of joint patrols between Italy and Libya" (Brussels, 2009, para. 10).

Shortly after, Human Rights Watch (HRW) published a report in which it accused FRONTEX of having participated in an operation which had led to the immediate return of migrants back to Libya.²⁶ The Agency itself denied its involvement in the case (FRONTEX, 2009).

²² Art. 12(2) SBC

²³ Art. 1-3 FRONTEX Regulation

²⁴ In 2011, such operations consumed 59% of the total budget (Coelho, 2013a).

²⁵ The operation deployed vessels from Greece, Spain, Malta and aircrafts from Germany and France. Next to border surveillance, the JO also had the purpose to assist the Maltese authorities with the interviews of migrants (FRONTEX, 2007).

²⁶ According to the report, a German helicopter, operating within the JO *Nautilus*, guided the interception of migrants by the Italian coast guard which handed them over to the Libyan authorities (Frelick 2009, p. 37).

2.2.2 Joint Operation Hermes

In February 2011, in the light of the increasing influx of migrants fleeing the Arab Spring, FRONTEX launched JO Hermes with Italy acting as a host state, also providing all maritime vessels for the operation (Frenzen, 2011b).

Prior to the beginning of the mission, Commissioner Cecilia Malmström assured that no 'push-back' operations to third states would be conducted anymore and that all intercepted migrants would be taken to a safe place (Frenzen, 2011a). However, when FRONTEX director Ilkka Laitinen was confronted with reports indicating that the agency is generally still participating in such diversions, he confirmed that there are still up to ten cases per year in which immediate repatriations take place (Stuchlik, 2013).

Next to doubtful return operations by FRONTEX, the surveillance practices by Italy and partially Malta are instructive regarding the poor fundamental rights situation of irregular migrants. They also further reveal the crucial issues that need to be covered when setting rules for FRONTEX operations.

2.3 Questionable surveillance practices and breaches of fundamental rights

2.3.1 Breaches of SAR duties

There are many ways in which border surveillance may fail with respect to irregular migrants. First of all, the issue of emergency situations must be assessed.

While both the national Italian and Maltese authorities as well as FRONTEX units intercept and rescue thousands of migrants each year, there are frequent incidents where migrants are left alone, abandoned to their fate.

In some cases, private vessels are not relieved of the rescued migrants since the authorities dispute their responsibility to receive them.²⁷ This constitutes a disincentive for commercial vessels to render assistance to migrant vessels, leading to other incidents where no help is offered at all.²⁸ In 2007, all passengers aboard a vessel drowned as they were not helped despite numerous timely distress calls and though they had been photographed by a Maltese military plane long before, registering their position (Popham, 2007a).

²⁷ In 2007, migrants in distress weren't helped for several days before their vessel sank even though a number of other vessels passed by. The survivors were then forced to cling on a vessel's tuna net for several days while the Maltese and Italian authorities were discussing on where to disembark them (Popham, 2007b).

²⁸ In 2011, 72 persons fleeing the conflict in Libya were left drifting on the sea despite a distress call. Neither war vessels nor fishing vessels in the ultimate vicinity rendered assistance and again their position was known by the Italian Rescue Coordination Centre (RCC) (Strik, 2012, pp. 2–3).

Next to this, Malta and Italy also frequently accuse each other of sending irregular migrants to the other state's territory. In 2009, Italy claimed that Malta had not rendered assistance in more than 600 cases in preceding years and had thereby indirectly sent up to 40.000 irregular migrants to Italy as the local authorities had to intervene in the Maltese SAR zone (Times of Malta, 2009).²⁹ Summing up, it often appears to be rather a problem of political interest than of technological or personnel capacities when irregular migrants are not rescued in emergency situations (Shenker, 2013).

2.3.2 Disembarkation to Libya and the case of *Hirsi Jamaa and Others v. Italy*

Next to emergency situations, the place of disembarkation is a major issue in maritime border surveillance. The above described Italian practice of immediately 'pushing back' irregular migrants to Libya was conducted in nine operations in the year 2009, leading to hundreds of forced repatriations.³⁰ However, a group of 24 Somalis and Eritreans complained against this before the ECtHR.³¹ As mentioned above, the court delivered its judgment in the case in 2012, ruling that the diversion practice violated the ECHR.³²

The court firstly considered that Italy had exercised control over the applicants, and had therefore been obliged to respect their human rights.³³ Secondly, the court found that the transfer to Libya had exposed them to the risk of ill-treatment³⁴ and arbitrary repatriation.³⁵ It clarified, that the Italians had been responsible to find out about the treatment which the migrants would face after disembarkation.³⁶

²⁹ Indeed, Human Rights Watch (HRW) has interviewed migrants who had been stopped by the Maltese authorities and were provided fuel and water but were then directed towards Sicily. In other cases, the Maltese authorities first offered help but then disappeared when they noticed that the Italian authorities were also reacting to the distress call (Frelick, 2009, pp. 41–43).

³⁰ According to UNHCR estimates, more than 800 intercepted or rescued boat migrants were diverted to Libya between May and November 2009 (Giuffré, 2012, p. 728).

³¹ § 9-12 *Hirsi*. They had been picked up by the Italian Revenue Police on the high sea south of Lampedusa and had been summarily returned to Libya without any further assessment of potential protection claims.

³² European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14 and supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13, Council of Europe, 1950 [hereinafter ECHR]

³³ § 79 *Hirsi*. Italy had described the case as a rescue operation which had been conducted on the high sea. The court nevertheless found art. 1 ECHR violated.

³⁴ Art. 3 ECHR

³⁵ § 158 *Hirsi*

³⁶ § 133 *Hirsi* in conjunction with § 157 *Hirsi*

Thirdly, the court regarded the practice to violate the right to an effective remedy³⁷, as the applicants didn't have the opportunity to consult any legal adviser or interpreter³⁸ and were given no information regarding the place of disembarkation³⁹.

Apparently, the judgment did not change the paradigm of diverting migrants before they reach the European shores, as a de-facto 'push-back' operation in August 2013 suggests.⁴⁰ This is further underlined by a statement by the Maltese Foreign Minister Tonio Borg, stating that there would be "nothing wrong" (Sansone, 2012) if Malta would immediately repatriate migrants back to Libya.

Hence, it is obviously still controversial whether the repatriation of migrants to Libya is in contravention with the *non-refoulement* principle. To deduce whether this is the case, the situation of migrants on site must be considered more closely.

2.4 The situation of migrants in Libya

Due to its geographic location, Libya has attracted migrants from other African countries on their way to Europe for a long time. As a result of its relatively stable economic situation, it had also served as a destination for migrant workers before the civil war (Andrijasevic, 2010, p. 160).

For refugees however, Libya has hardly been a safe haven. Unlike the surrounding countries, Libya has not signed the Convention Relating to the Status of Refugees (Refugee Convention). While it is a Member of the Convention of the Organisation of African Unity (OAU Convention),⁴¹ which in theory applies to an even broader scope of the term refugee,⁴² it appears that in reality asylum law is inexistent (Nita, 2013, p. 7).

UNHCR had only limited access to detention centres before its operations were completely suspended in 2010 (Amnesty International, 2012, p. 9). Besides, HRW has collected reports

³⁷ Art. 13 ECHR in conjunction with art. 3 ECHR

³⁸ § 202 and § 203 *Hirsi*

³⁹ § 204 *Hirsi*

⁴⁰ In this case the Italian authorities reportedly first ordered two commercial vessels to rescue migrants in distress and then subsequently asked them to disembark the survivors in Libya. When the captain of the MT *Salamis*, which was one of the ships, rejected this order, both the Maltese and the Italian authorities refused to accept the migrants. Only after several days, Italy finally agreed the disembarkation to its territory (Frenzen 2013a).

⁴¹ Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 U.N.T.S. 45 [hereinafter OAU Convention]

⁴² Art. 1(2) OAU Convention broadens the scope of the Geneva convention to include "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

which reveal that the state does arrest irregular migrants without any assessment of the personal circumstances (Frelick, 2009, p. 47).

There is evidence of migrants, reporting to HRW (2009) arbitrary detention in Libyan prisons under dreadful conditions, including ill-treatment amounting to torture and both physical and mental abuses. Those reports also suggest that corrupt policemen and smugglers are ruthlessly cooperating to maximise their profits. On the one hand, it seems that the vessels are mostly in unseaworthy conditions and that even fuel and water supplies are removed to overload them with passengers. On the other hand, there are cases where migrants refuse to enter the vessels and are subsequently forced aboard. In addition, refugees from Sub-Saharan African states face a high risk of *refoulement* to their states of origin. Since the outbreak of the civil war, the situation in the country has even worsened, raising xenophobia and violence against migrants (Amnesty International, 2012, pp. 5-6).

2.5 Interim findings

In terms of disembarkation, the *Hirsi* judgment has promoted "the credo that ensuring access to protection to people at sea (therefore without any territorial limitation) is a legal and humanitarian imperative" (Giuffr , 2012, p. 729).

Nevertheless, the renewed cooperation between Italy and Libya, especially with a view to the situation of migrants in the latter, raises doubts about future improvements. So far, the cooperation has been at the expense of the migrants, exposing them to *refoulement* and ill-treatment and denying their right to apply for asylum. At the same time, the above mentioned reports clearly suggest that Libya is not a safe place to disembark migrants.

It hence appears that the political unwillingness to receive and to deal with migrants in combination with the paradigm to discourage and prevent migration by deterrence, outweighs the migrants right to life⁴³ and the obligation to render assistance in emergency situations.⁴⁴

While FRONTEX has so far already conducted two JOs in the area there are certainly more to come.⁴⁵ Especially with a view to the upcoming launch of the European Border Surveillance System (EUROSUR)⁴⁶, clear responsibilities and binding rules are therefore needed both to

⁴³ Art. 2 Charter of Fundamental Rights of the European Union, 2000 OJ C 364/01 [hereinafter CFREU]

⁴⁴ Art. 98 United Nations Convention on the Law of the Sea, UN General Assembly, 10.12.1982, 1833 p. 3 U.N.T.S. 397 [hereinafter UNLOSC]

⁴⁵ Commissioner Malmstr m (2013) has recently called for an extensive FRONTEX operation, covering the whole Mediterranean sea.

⁴⁶ Proposal for a Regulation of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR), COM(2011) 873 final

guarantee the compliance with fundamental rights and to prevent further tragedies. In addition, such a framework is crucial to enhance the integrated management system for external borders.

Based on those findings and after having elaborated the factual situation in the Central Mediterranean context extensively, one needs to turn to the way in which the EU and its Member States are trying to cope with the issue of setting rules for maritime border surveillance in FRONTEX coordinated operations.

3. The difficult way to a new legal framework

The above mentioned SBC distinguishes with regard to border control between border checks and border surveillance.⁴⁷ The latter is defined as "the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks."⁴⁸

While the SBC includes safeguards for refugees⁴⁹ and grants third country nationals the entrance to the territory of a Member State on humanitarian grounds or due to international obligations,⁵⁰ it does not lay down any specific rules for the surveillance of the external borders.⁵¹ It allows, however, the adoption of additional rules governing this issue, as long as such rules do not modify the essential provisions of the SBC Regulation.⁵²

In this context, there has already been an attempt to regulate FRONTEX coordinated operations at the maritime borders, which has to be elaborated as it serves as a basis for the current draft Regulation.

3.1. Council Decision 2010/252/EU

Already in 2007, a study by the Commission had called for practical guidelines to enhance the effectiveness of FRONTEX operations and to ensure "a certain degree of predictability"

⁴⁷ Art. 2(9) SBC

⁴⁸ Art. 2(11) SBC

⁴⁹ Art. 3(b) SBC lays down that the regulation shall apply without prejudice to "the rights of refugees and persons requesting international protection, in particular as regards non-refoulement."

⁵⁰ Art. 5(4) (c) SBC

⁵¹ Annex VI Point 3.1.1 SBC only refers to border checks at the sea borders. Such checks may be carried out upon "arrival or departure, on board ship or in an area set aside for the purpose, located in the immediate vicinity of the vessel. However, in accordance with the agreements reached on the matter, checks may also be carried out during crossings or, upon the ship's arrival or departure, in the territory of a third country."

⁵² Art. 12(5) SBC in conjunction with art. 33(2) SBC.

(Commission of the European Communities, 2007, p. 6) in the border surveillance carried out by the Agency.

In 2009, the Council invited the Commission to draft a proposal, establishing clear common operational procedures for operations at sea, while taking into account existing international law (Council of the European Union, 2009, p. 12). This request was repeated in the Stockholm Programme in 2010⁵³ and the Council consequently adopted a Decision supplementing the SBC⁵⁴ as an implementing measure by using the regulatory procedure with scrutiny.⁵⁵

Just as the current draft Regulation, the Decision aimed at tackling the diverging interpretations and practices of the Member States to ensure the effective functioning of the FRONTEX coordinated border surveillance.⁵⁶ Next to a preamble and two articles, the instrument consisted of an annex which was divided into two parts: the first contained binding rules on general principles and interception measures. Unlike the draft Regulation, the Decision did not distinguish between measures following interception on the basis of the zone where the interception takes place.⁵⁷ Part II contained non-binding guidelines on SAR situations and disembarkation issues, thereby giving preference to disembarkation in the respective third country.⁵⁸

The European Parliament opposed the Decision, arguing that the instrument introduced new essential elements into the SBC and that it altered elements of both the SBC and the Frontex Regulation.⁵⁹ Besides, it added that the Decision exceeded the territorial scope of border surveillance as set in the SBC.⁶⁰ The Parliament claimed that the framework therefore could not have been adopted as an implementing measure⁶¹ and the case subsequently came up before the court.

⁵³ Point 5.1 of the Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, 2010 OJ C 115/1

⁵⁴ Decision (2010/252/EU)

⁵⁵ Art. 5a Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (2006/512/EC), 2006 OJ L 200/11

⁵⁶ Recital 2 Decision (2010/252/EU)

⁵⁷ Annex Part I 2.4 Decision (2010/252/EU)

⁵⁸ Annex Part II 2.1 Decision (2010/252/EU)

⁵⁹ § 47-49 Parliament v Council, Case C-355/10, 2012 (delivered September 9, 2012) [hereinafter Annulment of Decision]

⁶⁰ § 51 Annulment of Decision

⁶¹ § 50 Annulment of Decision

3.2 Parliament v Council, Case C-355/10

The European Court of Justice (ECJ) consequently annulled the Decision in September 2012. The court found that the framework indeed went beyond the scope of additional measures within the meaning of article 12(5) of the SBC, making the ordinary legislative procedure necessary.⁶² In addition, it clarified that the adopted rules interfered with the fundamental rights of persons in such a way that EU legislature was necessary.⁶³

Hence, the ECJ required the adoption of new rules within a reasonable time. To guarantee the functioning of the border surveillance in the meantime, the effects of the Decision were maintained.⁶⁴

In April 2013, the Commission eventually proposed a Regulation to be adopted by the ordinary legislative procedure.

3.3 The 2013 Proposal

The draft Regulation was prepared by the Commission under consultation with the Member States. It was agreed that the scope should remain the same as in the former Decision and that the rules should become part of every operational plan of a FRONTEX operation.⁶⁵

Unlike the former framework, the current draft Regulation does not distinguish between binding and non-binding rules anymore but equally includes all provisions in the main body. Next to the recent jurisdiction which has been elaborated above, the instrument purportedly takes into account the amendments to the FRONTEX Regulation.⁶⁶

While the Agency was formerly only allowed to launch JOs proposed by the Member States, the amended FRONTEX Regulation enables it to carry them out on its own initiative.⁶⁷ Besides, FRONTEX is now assigned to provide technical assistance to Member States in situation with increased need for it,⁶⁸ reflecting the growing role of SAR operations in the

⁶² § 84 Annulment of Decision

⁶³ § 77 Annulment of Decision

⁶⁴ § 90-91 Annulment of Decision

⁶⁵ Point 2 Explanatory Memorandum of Proposed Regulation

⁶⁶ Point 5.1.2 Explanatory Memorandum of Proposed Regulation

⁶⁷ Art. 3(1) Regulation No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2011 OJ L 304/7 [hereinafter Amended FRONTEX Regulation]

⁶⁸ Art. 8(1) Amended FRONTEX Regulation

course of the surveillance of the external borders.⁶⁹ Furthermore, operational plans are now required for all FRONTEX operations.⁷⁰

Despite this, the Proposal remains similar in scope to the former Decision. Surprisingly, after the first reading of the proposal by the Council Working Party in September 2013, the Greek, Spanish, French, Italian, Cyprus and Maltese delegations submitted a note in which they opposed the articles on SAR operations and disembarkation. While their blockade first of all meant a delay in the negotiations, the intervention also illustrates the delicate character of this policy field. As the Mediterranean states rejected essential parts of the Regulation, their reasons for the intervention must be scrutinized.

3.4 Intervention by the Mediterranean States during the negotiations

According to the six states, rules on SAR and disembarkation measures are "unacceptable for legal and practical reasons" (Council of the European Union, 2013a, p. 1), thereby calling for a revision of the articles. In the following paragraph it is assessed whether their line of argumentation is on solid ground.

3.4.1 Assessment of the allegations

First of all, the six Mediterranean states claim that both SAR and disembarkation issues are sufficiently regulated by international law, which would be undermined by the provisions of the Regulation. They fear that additional rules for operations coordinated by FRONTEX might create "an EU regime that runs in parallel with the international regime" (Council of the European Union, 2013a, p. 3), creating difficulties in distress situations and counteracting the necessary flexibility to develop area specific procedures.

While the fourth chapter of this thesis is dedicated to the obligations of international law, the above described current practices in the Central Mediterranean area already reveal that the existing framework is in particular insufficient to protect irregular migrants in emergency and disembarkation situations. It therefore exists an urgent need to clarify the responsibilities and to adopt binding rules, which is the very reason why the Regulation was proposed. Hence, the first objection can be rejected.

⁶⁹ The Agency claims to have conducted about 900 SAR cases in total between 2011 and 2013, helping about 50.000 people in distress (FRONTEX, 2013).

⁷⁰ Art. 3a Amended FRONTEX Regulation

A second claim of the intervening states is that the EU has no competence to legislate SAR and disembarkation matters as they are at the competence of Member States (Council of the European Union, 2013a, p. 2).

The Rapporteur of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) on the other hand argues that the ECJ has, by maintaining the effects of the former Decision until the adoption of a new framework, and since the provisions of the current proposal are not going beyond the ones currently in place, indirectly confirmed the competences in its action for annulment (Coelho, 2013b, p. 26).

This view is furthermore shared by the Council Presidency, who is also referring to the ECJ judgment which had stated that the non-binding guidelines on SAR and disembarkation, contained in Part II of the annex, had in fact binding character as well (Council of the European Union, 2013b, p. 2).⁷¹ The intervening states nevertheless argue that this "cannot [...] be considered as automatic confirmation that such competence exists" (Council of the European Union, 2013a, p. 2). To clarify this matter, first of all the general conferment of competences in this regard must be examined.

3.4.2 Does the EU have the necessary competences to regulate the respective issues?

Considering the amended FRONTEX regulation, it is obvious that in general the Member States at the external borders are also responsible for the surveillance of the latter:

While considering that *the responsibility for the control and surveillance of external borders lies with the Member States*, the Agency [...] shall facilitate and render more effective *the application of existing and future Union measures* relating to the management of external borders [...]. It shall do so by ensuring the coordination of the actions of the Member States [...], thereby *contributing to an efficient, high and uniform level [...] of surveillance of the external borders of the Member States*.⁷²

Hence, the EU may adopt measures to promote the management of the external borders, while FRONTEX should ensure the consistent surveillance of the latter. While those objectives are clearly linked, nevertheless the EU treaties have to be scrutinized to examine whether such

⁷¹ § 81-82 Annulment of Decision

⁷² Art. 1(2) Amended FRONTEX Regulation, emphasis added

measures may also include provisions on SAR and disembarkation, as contested by the intervening states.

The surveillance of the external borders is part of the area of freedom, security and justice.⁷³ The Treaty on the Functioning of the European Union (TFEU) lays down that for matters regarding this area, the Union shares the regulatory competences with the Member States.⁷⁴ As the TFEU further clarifies, the Union is assigned to create a policy on external border control based on "solidarity between Member States, which is fair towards third-country nationals."⁷⁵ This includes "any measure necessary for the gradual establishment of an integrated management system for external borders"⁷⁶ which is adopted by the ordinary legislative procedure. It is however controversial, how far reaching steps this provision allows with a view to FRONTEX operations (Rijpma, 2009, p. 141), especially since the issues of SAR and disembarkation are not mentioned in this context. However, the EU might nonetheless have the competence to regulate those issues since they might constitute implied powers.

3.3.3 *The 'Implied Powers' doctrine*

The implied powers doctrine originates from public international law and results from a teleological interpretation of law. Even though implied powers are unwritten, they underlie the principles of proportionality and subsidiarity,⁷⁷ as they refer to existing competences (Sloot, 2005, pp. 182–183).

Concerning their applicability it can be distinguished between two different definitions. The first one applies a tight scope, according to which implied powers mean EU competences which are not explicitly conferred to it, but which are necessary to guarantee a reasonable execution of other conferred powers. The second applies a broader meaning: implied powers in this sense mean competences which do not relate to other competences, but which are necessary to accomplish general aims and objectives of the EU treaties (Sloot, 2005, p. 8).

In the present context, the first definition can be deployed since the above mentioned aim to establish an integrated management system, laid down in article 77(2) (d) TFEU, already provides a related competence which is conferred to the EU.

⁷³ Art. 3(2) Consolidated Version of the Treaty on European Union, 2008 OJ C 115/13 [hereinafter TEU]

⁷⁴ Art. 4(2) (j) TFEU

⁷⁵ Art. 67(2) TFEU

⁷⁶ Art. 77(2) (d) TFEU

⁷⁷ Art. 5(1) TEU

In EU law, the doctrine was applied for the first time in the *ERTA* case⁷⁸ regarding external community competences (Devuyst, pp. 13–14).⁷⁹ While it is still mainly discussed in this context, the ECJ has also indirectly confirmed the application of the principle for internal competences in a number of areas (Sloot, 2005, pp. 137–138).

In the present enquiry, especially the judgment on the *Erasmus* case⁸⁰, dealing with the competences of the EU to regulate education matters, is enlightening.

In this context, the ECJ stated that "the fact that the implementation of a common [...] policy is provided for [in what is now article 167 TFEU - author's note] precludes any interpretation of that provision which would mean denying the Community the means of action needed to carry out that common policy effectively."⁸¹

Transferring this reasoning to the present case, in which the EU has the competence to implement an integrated management system for the external borders, it depends whether SAR and disembarkation rules are needed to carry out this aim effectively. The considerations set out above however suggest this. Correspondingly, Peers (2013, pp. 3–4) argues that the contested provisions form an integral part of the surveillance of the external sea borders.

Following the line of argumentation of the *Erasmus* case, it can hence be argued that restricting related rules in FRONTEX operations and leaving the modalities to the Member States would hinder the EU to effectively carry out the establishment of the integrated management system. Accordingly, the competence on SAR and disembarkation issues could be deduced from the general competence of article 77(2) (d) TFEU.

A second case which indicates that the issues could be considered as implied EU competences is the judgment on *Kreil*⁸².

In this case, the ECJ argued that the Union aim of promoting gender equality between men and women is also applicable to national defense policies⁸³ despite the competence of the

⁷⁸ Commission v. Council (*ERTA*), Case 22/70, 1971 E.C.R. 263. From this landmark judgment it derives that whenever the Union adopts a provision, laying down a common framework, the Member States can no longer take any action which would affect the rules contained therein or alter the scope of it (Devuyst, 2000, p. 13).

⁷⁹ Opinion 1/76, 1977 E.C.R. 741. After *ERTA*, the ECJ added that the Union has the power to enter into international engagements only whenever the internal competences for a specific purpose are conferred to it and when the engagement is necessary to obtain it. § 24 Opinion 2/94, 1996 E.C.R. I-01759 later demonstrated the limits of the implied powers theory by stating that the "principle of conferred powers must be respected in both the internal action and the international action of the Community", the ECJ demonstrates the limitation of the implied powers theory (Devuyst, 2000, p. 13).

⁸⁰ Commission v Council, Case 242/87, 1989 (delivered May 30, 1989)

⁸¹ § 9 Commission v Council, Case 242/87, 1989 (delivered May 30, 1989)

⁸² *Kreil v Bundesrepublik Deutschland*, Case C-285/98, 2000 (delivered January 11, 2000) [hereinafter *Kreil*]

⁸³ § 18 *Kreil*

Member States "to ensure their internal and external security, to take decisions on the organization of their armed forces."⁸⁴

Certainly, SAR and disembarkation issues are much more interlinked with border surveillance than national defence is connected to gender equality. In addition, it has been shown above that the present issues are both relevant in terms of protecting fundamental rights, as laid down in article 67(1) TFEU, and in terms of ensuring solidarity among the Member States, as stated in article 67(2) TFEU. This further corroborates the assumption of EU competences on the matter.

What is more, as Peers (2013, p. 3) adds, FRONTEX is entirely financed by the EU. Therefore, the Union might set rules and conditions for its operations - especially since the contested provisions do not impose any obligations on the Member States apart from operations coordinated by FRONTEX.

When regarding the matters from a right-based perspective, the judgment on *tobacco advertising*⁸⁵ is furthermore interesting. In this case the ECJ considered "obstacles to trade [...] which bring about different levels of protection and thereby prevent the product or products concerned from moving freely within the Community"⁸⁶ as an appropriate legal basis to ban the advertising and sponsorship of tobacco products, though there is no general competence of the EU to legislate on public health matters.

While it already became clear above that the existing obligations in the context of SAR and disembarkation are interpreted inconsistently (Moreno-Lax, 2011, p. 176), it would not be comprehensible why the implementation of an integrated border management system should not be an appropriate legal basis to protect the lives and fundamental rights of migrants in the course of border surveillance.

Summing up, it can be argued that the regulation of such issues in the framework of operations coordinated by FRONTEX, adopted by the ordinary legislative procedure as required by the TFEU⁸⁷, can be regarded as implied in article 77(2) (d) TFEU.

The scope of this thesis does not let room for a detailed assessment of the proportionality and subsidiarity of the provisions. However, when setting rules regarding the surveillance at sea in operations coordinated by FRONTEX, which is an EU agency, the inclusion of SAR and

⁸⁴ § 15 *Kreil*

⁸⁵ *Germany v Parliament and Council*, Case C-380/03, 2006 (delivered December 12, 2006) [hereinafter *Tobacco advertising*]

⁸⁶ § 41 *Tobacco advertising*

⁸⁷ Art. 77(2) TFEU

disembarkation measures is a corollary. This is especially true since other provisions of the draft Regulation, such as an article on *non-refoulement*, would be deprived of their meaning without them (Peers, 2013, pp. 3–4).

Nonetheless, the Member States have demanded the revision of the respective articles, denoting their position as "a red line" (Council of the European Union, 2013a, p. 3). As an alternative draft, they have proposed to include only references to the respective obligations in international law, leaving the regulation of the modalities to the operational plan of each and every FRONTEX operation.

The Council Presidency has subsequently intensified the efforts to find a compromise as both the Parliament and the LIBE Rapporteur have urged to adopt the final version of the proposal before the Parliament elections in May 2014 (Council of the European Union, 2013b, p. 4).

While the official forecast of the European Parliament presently indicates 14 April 2014 for the first reading in the Parliament (European Parliament Legislative Observatory, 2014), a note from the Council Presidency to the Permanent Representatives Committee from 12 February 2014 suggests that the six delegations have given up their resistance against the provisions and that the informal meetings could reach an agreement on a compromise text (Council of the European Union, 2014b).

The final outcome of this process however remains to be seen until the adoption of the Regulation.

4. Analysis of the legal obligations and fundamental rights

After having outlined the situation in the Central Mediterranean area and the legal and political context of the currently discussed framework, it is now necessary to analyse the provisions of the draft Regulation with regard to existing norms.

Both EU and international law establish a number of obligations concerning the surveillance of sea borders. Although the proposed Regulation itself refers to most of them in the recitals,⁸⁸ it remains to be scrutinized whether the provisions are indeed in line with the fundamental rights of irregular migrants. First of all, however the structure of the instrument must be introduced.

⁸⁸ Recitals 4,5 and 11 of the Proposed Regulation refer to numerous international conventions, the respect for fundamental rights and the principle of *non-refoulement*.

The current version consists of a preamble with eighteen recitals and a main body divided into eleven articles. The latter are further grouped by four chapters: the first entails the general provisions on the scope and the definitions. Chapter two contains the general rules which includes an article each on the safety at sea and the *non-refoulement* principle.

Chapter three covers specific rules. Those include an article on detection and three articles on interception which are subdivided into measures taken in the territorial sea⁸⁹, the contiguous zone⁹⁰ or on the high seas. Furthermore, an article each on SAR situations and disembarkation is incorporated. The fourth chapter, named the final provisions, contains an article on the entry into force.

The following analysis does not work through this structure but is based on the order in which the respective issues turn up in the course of border surveillance. Consequently, first of all the matters of interception and SAR operations are dealt with, followed by disembarkation concerns and accordingly the principle of *non-refoulement*.

4.1 Interception

4.1.1 Interception and follow-up measures under the law of the flag

The issue of interception is not directly regulated in the international law regime, but rather comprises of several elements in different frameworks (Papastavridis, 2010, p. 82). Out of those, first of all the United Nations Law of the Sea Convention (UNLOSC) has to be reviewed. Next to the freedom of navigation,⁹¹ it also establishes the law of the flag.⁹² In this context, warships on the high sea enjoy the right of approach and, under certain circumstances, the right of visit.⁹³ Those rights are nowadays considered to be customary law (Papastavridis, 2010, p. 82).

⁸⁹ Art. 3 United Nations Convention on the Law of the Sea, United Nations General Assembly 10.12.1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. The territorial sea might be established up to 12 miles from its coast.

⁹⁰ Art. 33 UNLOSC. The contiguous zone, which may extent to a maximum of 24 miles from the coast, is adjacent to the territorial waters and in principle part of the high seas. States may however exercise the necessary control to prevent certain infringements.

⁹¹ Art. 87(1) UNLOSC

⁹² Art. 92 UNLOSC in conjunction with art. 91 UNLOSC and art. 90 UNLOSC. Every vessel shall be registered in a state and shall therefore fly its flag, taking over the nationality of the flag state. Vessels without a flag or such vessels which fly more than one flag shall be considered as stateless.

⁹³ Art. 110(1) UNLOSC. States have the right of visit when a vessel is suspected of being involved in piracy, slave trade, unauthorized broadcasting or of having no nationality or of refusing to show its flag despite being of the same nationality as the warship.

Similarly, the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol)⁹⁴ establishes the right to board and search vessels and take appropriate measures, provided there are “reasonable grounds to suspect that vessel is engaged in the smuggling of migrants by sea”⁹⁵ The authorization of any measure, following the proof of such a suspicion, remains with the flag state of the vessel or with the interdicting state in case of stateless vessels.⁹⁶

In the contiguous zone and in the territorial sea, the right of innocent passage⁹⁷ applies accordingly.⁹⁸ In the latter, vessels carrying irregular migrants are nevertheless excluded from this right, enabling states to prosecute the persons aboard.⁹⁹ In the contiguous zone, states may only exercise the control necessary to prevent breaches of their migration laws. They may also punish the infringement of laws committed within their territory or territorial sea.¹⁰⁰

As mentioned above, the draft Regulation consequently distinguishes between the place where the interception takes place. Article 6: Interception in the territorial sea, states: "the participating units shall take one or more of the following measures when there are reasonable grounds to suspect that a ship is carrying persons intending to circumvent checks at border crossing points or is engaged in the smuggling of migrants by sea". Accordingly, article 7: Interception on the high seas, and article 8: Interception in the contiguous zone, require the existence of reasonable grounds of suspicion concerning the presence of irregular migrants on a vessel. Interestingly, article 6(1) as well as article 7(1) furthermore enable the participating units not only to request information and board and search the vessel, but also to apprehend persons and take them either to the host state of the operation, another participating Member State or a coastal Member State which does not take part in the JO.

While those provisions are in accordance with UNLOSC in respect of the territorial sea, it is questionable whether any measure besides approaching, searching and identifying the

⁹⁴ Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, United Nations General Assembly 15.11.2000, adopted by General Assembly Resolution 55/25 [hereinafter Smuggling Protocol]

⁹⁵ Art. 8 Smuggling Protocol

⁹⁶ Art. 8(5) Smuggling Protocol in conjunction with art. 8(7) Smuggling Protocol

⁹⁷ Art. 18 UNLOSC defines innocent passage as the "continuous and expeditious" crossing of the territorial sea of a state. Stopping and anchoring are allowed if they are "incidental to ordinary legislation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."

⁹⁸ Art. 17 UNLOSC in conjunction with art. 33UNLOSC

⁹⁹ Art. 19(1) UNLOSC limits the right of innocent passage to cases which are not prejudicial to the peace, good order or security of the coastal State. According to art. 19(2) (g) UNLOSC, the unloading of persons contrary to the immigration laws of the respective state is however prejudicial to this. Vessels with irregular migrants aboard therefore forfeit their right of innocent passage.

¹⁰⁰ Art. 33(1) UNLOSC

passengers aboard the vessel would be rightful in the contiguous zone. Indeed, unless the improbable case that a vessel carrying irregular migrants has entered the territorial sea of a Member State beforehand,¹⁰¹ no immigration laws have been breached and therefore no crime has been committed. Hence, no coercive measures such as apprehending the persons aboard would be justified (Weinzierl & Lisson, 2007, p. 34).

This is obviously the case on the high seas, for which neither one of the mentioned legal frameworks allow any such measure apart from pirate vessels¹⁰². Quite the reverse, article 5 Smuggling Protocol states: "Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 [among others the smuggling of persons - author's note] of this Protocol." Furthermore, the Smuggling Protocol explicitly includes safeguards to protect fundamental rights.¹⁰³

It can therefore be subsumed that the apprehension of persons beyond the territorial sea, solely on the basis of potential irregular immigration, is not in line with international law (Papastavridis, 2010, p. 85). Precisely, this would contravene the fundamental right to liberty as enshrined in the Charter of Fundamental Rights of the European Union (CFREU).¹⁰⁴

4.1.2 The right to apply for asylum

Article 6: Interception in the territorial sea, states: "ordering the ship to modify its course outside of or towards a destination other than the territorial sea or the contiguous zone"¹⁰⁵ as a possible interception measure. Furthermore, also "conducting the ship or persons on board to the host Member State or to another Member State participating in the operation, or to the coastal Member State"¹⁰⁶ is a possible option.

Both measures also apply to interceptions in the contiguous zone or on the high seas.¹⁰⁷

Regarding the latter, this clearly seems to violate the freedom of navigation. In the contiguous zone however, at least the order to modify the course appears to be a legitimate measure to

¹⁰¹ Concerning such a case art. 111(1) UNLOSC states that "the hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within [...] the territorial sea or the contiguous zone".

¹⁰² Art. 105 UNLOSC

¹⁰³ Art. 9 Smuggling Protocol in conjunction with art. 16(1) Smuggling Protocol and art. 19 Smuggling Protocol

¹⁰⁴ Art. 6 CFREU

¹⁰⁵ Art. 6(1) (e) Proposed Regulation

¹⁰⁶ Art. 6(1) (f) Proposed Regulation

¹⁰⁷ Art. 7(1) Proposed Regulation for interception on the high seas and art. 8(1) Proposed Regulation for interception in the contiguous zone.

prevent the ensuing infringement of immigration rules. Still, the measure could also breach the *non-refoulement* principle as will be elaborated below.

First of all, the compatibility of those measures with the fundamental right to apply for asylum, as regulated in article 18 CFREU, must be assessed.

According to article 3(1) of the recast Asylum Procedures Directive¹⁰⁸, this right also applies to claims made in the territorial waters. Hence, when ordering migrants who are potentially eligible for asylum, to leave those waters, this clearly deprives them of their right to even seek for it.

The Asylum Procedures Directive furthermore regulates that when an applicant is located in a Member State and applies for asylum to the authorities of another Member State, the authorities of the state, in which the application is made, is also responsible for the further assessment of the claim.¹⁰⁹ Accordingly, when applicants are conducted to another participating Member State, as envisaged by the draft Regulation, this might lead to conflicts with the asylum *acquis*.

4.1.3 *The right to leave one's country*

On the high seas, next to the issue of free navigation and the right to apply for asylum, the fundamental right to leave any country must be considered.¹¹⁰ According to the International Covenant on Civil and Political Rights (ICCPR), the departure of a country may be only limited due to certain exceptions provided by law¹¹¹ which appear to be irrelevant in the case of irregular migrants. While this right was formerly mainly restricted by states of origin, it is now increasingly curbed by countries of destination. In the present context, this is especially important in the case of bilateral cooperation and joint patrols as in the Central Mediterranean area. However, as Weinzerl & Lisson (2007, pp. 67–68) argue, this field has not been clarified by any court so far.

¹⁰⁸ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 2013 OJ L 180/60 [hereinafter Asylum Procedures Directive]. The Directive sets common standards for the procedures of the Member States for granting or withdrawing refugee status.

¹⁰⁹ Art. 4(5) Asylum Procedures Directive

¹¹⁰ Art. 12(2) International Covenant on Civil and Political Rights, UN General Assembly, 16.12.1966, U.N.T.S. vol. 999 p. 171 [hereinafter ICCPR]. The right to leave both one's own and foreign country is an important provision in international law. It is, among others, contained in, art. 2(2) ECHR and art. 13(2) Universal Declaration of Human Rights.

¹¹¹ Art. 12(3) ICCPR. Such exceptions are allowed for necessary grounds to protect the state's security, order, health, morals or rights and freedoms of others.

The focus is therefore rather on the adherence of the *non-refoulement* principle. This is especially important since article 7: Interception on the high seas, establishes the option to: "conducting the ship or persons on board to a third country or otherwise handing over the ship or persons on board to the authorities of a third country"¹¹²

As this has to be analysed in conjunction with the article on disembarkation, the legal background of the contested SAR rules must be assessed first.

4.2 Search and Rescue operations

4.2.1 *The duty to render assistance and to take responsibility for emergency cases*

The duty to rescue persons in distress at sea is inscribed in the UNLOSC¹¹³ and is regarded as a norm of customary law (Coppens & Somers, 2010, p. 377). Next to the obligation to render assistance regardless of nationality or status, vessels are bound to proceed to the scene of the emergency as quickly as possible.¹¹⁴

Furthermore, states should operate and maintain a national SAR service.¹¹⁵ This duty is further expanded in the International Convention on Maritime Search and Rescue (SAR Convention)¹¹⁶, which requires state parties both to establish national rescue coordination centres (RCCs)¹¹⁷ and to agree on the division of the high seas into contiguous SAR zones,¹¹⁸ for which the respective states must take the primary responsibility.¹¹⁹

In the draft Regulation, article 9: Search and rescue situations, states: "during a sea operation, participating units shall render assistance to any ship or person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found". Next to the general duty, this article also takes into account the SAR infrastructure by stating: "the participating unit shall forward as soon as possible all available information to the Rescue Coordination Centre responsible for the search and rescue region in which the situation occurs."

¹¹² Art. 7(f) Proposed Regulation

¹¹³ Art. 98(1) (a) UNLOSC

¹¹⁴ Art. 98(1) (b) UNLOSC

¹¹⁵ Art. 98 (2) UNLOSC

¹¹⁶ Annex point 2.1 in conjunction with annex point 2.2 International Convention on Maritime Search and Rescue, International Maritime Organization, 27.04.1979, U.N.T.S. 1403 as adopted by MSC.70 (69) and MSC.155 (78) [hereinafter SAR Convention]

¹¹⁷ Annex point 2.3 SAR Convention

¹¹⁸ Annex point 2.1.3 SAR Convention

¹¹⁹ Annex point 2.1.9 SAR Convention

However, it has been shown above that those general obligations are insufficient to prevent situations in which no state takes responsibility, especially since Libya has not defined - and is therefore not maintaining - its rescue zone (Commission of the European Communities, 2007, p. 4).

Article 9(9) of the Proposed Regulation clarifies this responsibility issue by stating that "where the Rescue Coordination Centre of the third country responsible for the search and rescue region does not respond to the [...] participating unit, the latter shall contact the Rescue Coordination Centre of the host Member State unless another Rescue Coordination Centre is better placed to assume coordination of the search and rescue situation."

While awaiting further instructions, article 9(7) requires the participating units to "take all the appropriate measures to ensure the safety of the persons concerned." Even though this still leaves room for discretion and does not prevent the RCCs or respective Member States from rejecting responsibility, it is at least in line with the Guidelines on the Treatment of Persons Rescued At Sea, developed by the International Maritime Organization (IMO Guidelines).¹²⁰

4.2.2 The distinction of emergency states and rescue modalities

Both the SAR Convention¹²¹ and the draft Regulation¹²² distinguish between three different states of emergency situations: uncertainty, alarm and distress. The SAR convention lies down follow-up measures according to the state¹²³ and regulates, that in situations involving more than one country, each party must take responsibility according to its operational plans.¹²⁴

The current draft Regulation, on the other hand, defines what the participating units must take into consideration for their assessment.¹²⁵ In this context, especially article 9(8) is important, stating that "the existence of a distress situation shall not be exclusively dependent on or determined by an actual request for assistance."

So far, the proposal therefore complements the SAR Convention with regard to the special circumstances of vessels carrying irregular migrants.

¹²⁰ Point 5.1.4 International Maritime Organization (IMO), Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued At Sea, 2004 [hereinafter IMO Guidelines]

¹²¹ Annex point 4.4 SAR Convention

¹²² Art. 9(3-5) Proposed Regulation

¹²³ Annex point 4.5 in conjunction with annex point 4.1 SAR Convention

¹²⁴ Annex point 4.6 SAR Convention

¹²⁵ Art. 9(6) Proposed Regulation

However, according to the SAR convention, the definition of the term 'rescue' includes the obligation to “provide for [the persons' - author's note] initial medical or other needs, and deliver them to a place of safety.”¹²⁶

While the latter is dealt with in the following part on disembarkation, it must be noted that the proposed Regulation does not refer to the presence of any medical staff aboard the participating units, which appears to be a severe deficiency with regard to the long travels and the bad conditions the migrants often face on the vessels.

4.3 Disembarkation

The issue of disembarkation is of great importance when considering the fundamental rights of irregular migrants. Article 10: Disembarkation, states: "In the case of interception in the territorial sea or the contiguous zone [...] disembarkation shall take place in the host Member State or in the participating Member State in whose territorial waters or contiguous zone the interception takes place." As added in article 10(2) in conjunction with article 6(4) or article 8(2), disembarkation may furthermore happen in another Member State that is not participating in the operation but in whose territory or contiguous zone the interception has taken place, again subject to the prior authorization of that state.

Concerning persons intercepted on the high seas, article 10(3) however states: "Subject to the application of Article 4, in the case of interception on the high seas [...] disembarkation may take place in the third country from which the ship departed."

Furthermore, persons taken up in the course of a rescue operation may be disembarked to a third country as article 10(4) simply states: "In the case of search and rescue situations [...] the participating units shall cooperate with the responsible Rescue Coordination Centre to provide a suitable port or place of safety [...] and to ensure their rapid and effective disembarkation."

While the *non-refoulement* principle applies equally in both cases as a fundamental right, first of all the notion of a place of safety¹²⁷ has to be scrutinized.

¹²⁶ Annex point 1.3.2 SAR Convention

¹²⁷ Art. 2(11) Proposed Regulation defines a place of safety as "a location where rescue operations are considered to terminate and where the survivors' safety of life including as regards the protection of their fundamental rights is not threatened, where their basic human needs can be met and from which transportation arrangements can be made for the survivors' next destination or final destination."

4.3.1 Place of safety

As mentioned above, the obligation to deliver rescued persons to such a place is inscribed in the SAR Convention.¹²⁸ The state, in whose SAR zone the incident happens, is primarily responsible to ensure that the disembarkation to a place of safety occurs "as soon as reasonably practicable."¹²⁹

The responsible RCC is entrusted to "initiate the process of identifying the most appropriate place(s),"¹³⁰ taking into account the IMO Guidelines and the circumstances of the case.¹³¹

So far, the proposed Regulation is in line with international law. Article 10(4) states that "the host Member State and the participating Member States shall as soon as possible ensure that a port or place of safety is identified taking into account relevant factors, such as distances to the closest ports or places of safety, risks and the circumstances of the case."

Furthermore, the same article even regulates that "where the participating unit is not released of its obligation [...] as soon as reasonably practicable, taking into account the safety of the rescued persons and that of the participating unit itself, it shall be authorised to disembark the rescued persons in the host Member State."¹³²

This is obviously not clarifying the responsibilities in general, as the obligation to consider relevant factors is rather vague. The latter provision is nevertheless a positive development since it prevents rescued migrants from becoming a plaything of political disputes.

The IMO Guidelines oblige both the shipmaster¹³³, the responsible governments and the respective RCCs to ensure that the disembarkation does not happen to a place where "the lives and freedoms of those alleging a well-founded fear of persecution would be threatened"¹³⁴, thereby referring to asylum-seekers and refugees. This leads back to the general principle of *non-refoulement*.

4.3.2 The applicability of the non-refoulement principle

The principle is a universal norm which has, due to its wide acceptance as a fundamental right, gained the status of a customary international law (UNHCR, 1994, para. 1).

¹²⁸ Annex point 1.3.2 SAR Convention

¹²⁹ Annex point 3.1.9 SAR Convention in conjunction with point 6.3 IMO Guidelines

¹³⁰ Annex point 4.8.5 SAR Convention

¹³¹ Annex point 3.1.9 SAR Convention

¹³² Art. 10(4) Proposed Regulation

¹³³ Point 5.1.6 IMO Guidelines

¹³⁴ Point 6.17 IMO Guidelines

Firstly enshrined in the Refugee Convention, it establishes the obligation not to return any refugee to a place where "his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."¹³⁵

Since then, the principle has been included in a number of other legal frameworks, such as the CFREU¹³⁶, the Convention against Torture (CAT)¹³⁷ or the Smugglers Protocol.¹³⁸

It has furthermore been construed as implicit in the general prohibition of torture and inhuman treatment, as e.g. contained in the ECHR¹³⁹ and ICCPR¹⁴⁰, therefore applying to all persons who must fear such treatment (Papastavridis, 2010, p. 103).

As has been mentioned above, unlike the previous Council Decision the draft Regulation does not directly give priority to the disembarkation in third countries and keeps this option furthermore limited to persons interdicted or rescued on the high seas. Being outside the EU territory does however not imply that the migrants cannot invoke their rights guaranteed under the conventions signed by the Member States and the EU.

On the contrary, it follows from the *Hirsi* judgment that the interdicting state bears responsibility when it exercises power over the intercepted persons. Similarly, Wouters and den Heijer (2010) argue that "the assertion of physical control over vessels and/or their passengers is sufficient to engage the 'controlling' State's human rights obligations" (p. 10).

Therefore, when the migrants are detained or conducted to a third country, the control is sufficient to engage all human rights obligations, including *non-refoulement*. And while the degree of control is generally very limited when a vessel is ordered to modify its course on the high seas, such an order might still breach the *non-refoulement* principle as the vessel is in fact sent back to the state of departure.

Indeed, the draft Regulation includes an extensive definition of the principle as article 4: Protection of fundamental rights and the principle of *non-refoulement*, states: "No person shall be disembarked in, or otherwise handed over to the authorities of a country where there is a serious risk that such person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment or from which there is a serious risk of

¹³⁵ Art. 33 Refugee Convention

¹³⁶ Art. 19 CFREU

¹³⁷ Art. 3 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly, 10.12.1984, U.N.T.S. 1465 p. 85 [hereinafter CAT]

¹³⁸ Art. 19 Smugglers Protocol

¹³⁹ Art. 3 ECHR

¹⁴⁰ Art. 7 ICCPR

expulsion, removal or extradition to another country in contravention of the principle of non-refoulement."¹⁴¹

Article 4(2) subsequently requires the participating units to "take into account the general situation [of the respective - author's note] third country" before disembarking there. If they "are aware or ought to be aware"¹⁴² of factors contravening the principle, repatriation to this state is not possible.¹⁴³

However, article 10(3) states that "if that [disembarkation to a third state - author's note] is not possible, disembarkation shall take place in the host Member State." The proposed regulation thereby indirectly gives priority to the disembarkation in third countries even though the introduction of such a hierarchy is not justified from a legal perspective (Amnesty International, ECRE, ICJ, 2013, p. 14). On the contrary, regardless whether the persons are intercepted or rescued, they should always be brought to the closest place without prejudice to the principle. In this context, also the assessment of the individual circumstances prior to the disembarkation is of crucial importance to protect concerned persons from *refoulement*.

4.3.3 *The assessment of personal circumstances prior disembarkation*

Next to the prohibition of *non-refoulement*, the ECHR¹⁴⁴ and the CFREU¹⁴⁵ also entail the proscription of collective expulsions. This provision prohibits any measure which would result in the expulsion of a group of aliens from a country without an individual assessment of the circumstances of every person (European Court of Human Rights Press Unit, 2013, p. 1). This principle was also found to be breached in the *Hirsi* case.¹⁴⁶

Nevertheless, the proposed Regulation does not explicitly refer to collective expulsions but article 4(3) only states: "the participating units shall identify the intercepted or rescued persons and assess their personal circumstances to the extent possible before disembarkation." While this formulation is not directly contrary to the international law regime, it has nevertheless raised critique by Amnesty International, ECRE and ICJ (2013) as it implies that the thorough assessment of irregular migrants is not a binding fundamental right but is

¹⁴¹ Art. 4(1) Proposed Regulation. Special regard should furthermore be given to the needs of certain vulnerable groups, as art. 4(4) Proposed Regulation states: "The participating units shall address the special needs of children, victims of trafficking, persons in need of urgent medical assistance, persons in need of international protection and other persons in a particularly vulnerable situation throughout the sea operation."

¹⁴² Art. 4(2) Proposed Regulation

¹⁴³ Art. 4 (2) Proposed Regulation

¹⁴⁴ Art. 4 Protocol 4 ECHR

¹⁴⁵ Art. 19(1) CFREU

¹⁴⁶ § 185 *Hirsi*

depending on the situation (p. 8). In fact, it must however always be addressed prior the decision for disembarkation is made.

Furthermore, UNHCR has argued that the assessment on a ship is inappropriate in general and only practical for initial profiling. A full procedure of protection claims is not possible on a maritime vessel due to the complex nature of the process and the gamut of facilities an asylum applicant requires (UNHCR, 2010a, p. 15).

4.3.4 *Right to an effective remedy*

Another consideration in this context is the right to an effective remedy. Being inscribed in a number of legal instruments,¹⁴⁷ this fundamental right entitles every person who alleges that his or her rights have been violated, to have a fair and public hearing before a national authority. This includes the availability of legal assistance and representation¹⁴⁸ (UNHCR, 2010a, p. 15).

Despite the judgment in the *Hirsi* case, which found this right to be violated during the Italian 'push-back' operations,¹⁴⁹ the proposal does not include any provision regarding a remedy. Instead, article 4(3) simply states that the participating units "shall inform the intercepted or rescued persons of the place of disembarkation in an appropriate way and they shall give them an opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of *non-refoulement*."

The existence of an effective remedy is however of utmost importance for irregular migrants to claim breaches of their fundamental rights on time. As Giuffré (2012) states, it is difficult for migrants to lodge asylum claims or take legal action after being returned, thereby referring to the *Hussun v Italy*¹⁵⁰ case, in which migrants brought an action before the ECtHR which was struck out of the list as the representatives had lost contact with all of the applicants concerned (p. 743).

After having analysed the draft Regulation with regard to all relevant obligations of EU and international law, the results now have to be presented with a view to the Central Mediterranean area.

¹⁴⁷ Among others, this right is contained in art. 13 ECHR, art. 2(3) ICCPR, art. 47 CFREU and art. 13 in conjunction with art. 14 CAT.

¹⁴⁸ Art. 47 ECHR

¹⁴⁹ § 202-204 *Hirsi*

¹⁵⁰ *Hussun and Others v Italy*, nos. 10171/05; 10601/05; 11593/05; 17165/05, ECtHR 2006

5. Conclusion

Coming back to this thesis' research question, the findings must be distinguished on the basis of the issues which are addressed by the draft Regulation.

Firstly, the results for the interception modalities are twofold. While it must be acknowledged that the authorization to conduct intercepted migrants back to third states is restricted to the high seas (Meijers Committee, 2013, p. 2), such a measure still entails the risk that Italy moves on to further extraterritorialize the surveillance during FRONTEX operations instead of bearing their responsibility for irregular migrants (Gammeltoft-Hansen, 2008, p. 28). Furthermore, the participating units are empowered to conduct a number of measures which potentially breach the fundamental rights of freedom and asylum.

While the draft Regulation does not sufficiently reflect the EU asylum *acquis*, the above mentioned numbers suggest that at least half of the migrants in the Central Mediterranean area are entitled for international protection. Refusing such persons by indirectly or directly sending them back to Libya is a severe violation of their fundamental rights, as it has been shown above that they are likely to fear persecution and ill-treatment there.

Secondly, apart from the absence of a rule regarding the presence of medical staff aboard the units, the provisions on SAR operations are in line with international law and additionally useful to improve the situation of irregular migrants on the Central Mediterranean route. They also cover a lot of recommendations formulated by the Parliamentary Assembly of the Council of Europe on this issue.¹⁵¹ Especially the binding character and the general affirmation of SAR obligations are great improvements when looking at incidents in which distress signals were simply ignored. Also, the clarification regarding the existence of emergency calls implies an obligation on FRONTEX units to take active measures instead of denying responsibility. This opinion is shared by the Meijers Commission (2013) which "welcomes the more extensive provisions [...] which embody a much wider understanding of situations of distress and concomitant duties" (p. 2).

With a view to the place of safety, there is however still too much room for discretion. As Moreno Lax (2011) states, the "effective implementation [of existing obligations - author's note] is limited by the manner in which they are being interpreted" (p. 174). Hence, due to the

¹⁵¹ Among other things, the Parliamentary Assembly recommended to "fill the vacuum of responsibility for an SAR zone left by a State which cannot or does not exercise its responsibility for search and rescue [...], ensure that there are clear and simple guidelines, which are then followed, on what amounts to a distress signal [...], avoid differing interpretations of what constitutes a vessel in distress" (Strik, 2012, p. 3).

political disputes between Italy and Malta it can be argued that even more restrictive rules would be necessary to protect the migrants fundamental right to live (Amnesty International, ECRE, ICJ, 2013, p. 2).

Thirdly, when compared to the previous framework, the detailed inclusion of the *non-refoulement* principle has to be acknowledged as it contains procedural guarantees to avoid breaches of the same (Meijers Committee, 2013, p. 2). However, those safeguards are too general and do neither reflect the recent jurisdiction, nor measure up to the above assessed legal obligations.

Hence, it is likely that Italy, as well as other participating Member States, will retain the practice to divert intercepted migrants to their country of departure as quickly as possible without an appropriate screening of their circumstances. Without an effective remedy, many cases are likely to remain undocumented.

Consequently, when looking at the local situation of irregular migrants in Libya, the fundamental rights, including the *non-refoulement* principle, will only be obeyed if the disembarkation to third countries is completely prohibited. If adopted in the current version, the Regulation might become a "vehicle to legitimize 'push-back' operations" (Amnesty International, ECRE, ICJ, 2013, p. 17).

Fourthly, the final outcome of the proceedings remains to be seen as the proposal has not yet passed the first reading in the European Parliament and the Council. It has been elaborated above that the argumentation of the intervening states can be rejected. Especially since some of the incidents in the Central Mediterranean area happened after the prior Council Decision came into force, it "is disingenuous to argue that [...] further clarification is not necessary" (Frenzen, 2013b). Indeed, facing the current situation, the regulation of modalities of SAR and disembarkation measures in FRONTEX operations must not be left to the Member States.

Summing up, the upcoming legal framework is not able to address issues of fundamental rights of irregular migrants in the Central Mediterranean area. While binding rules for FRONTEX operations are certainly a step towards a more right-based approach with a view to the increasing importance of JOs coordinated by the Agency, the current draft version of the Regulation leaves room for future breaches of international obligations.

Anyway, rules applying solely to FRONTEX operations are insufficient as neither Italy nor Malta are bound by them during their own surveillance activities. In order to address the fundamental rights of migrants effectively, the rules would not only have to be more

restrictive but also apply to all border surveillance operations. As Jacques Barrot, Vice-President of the European Commission, clarified in a letter to the ECtHR, "border surveillance activities conducted at sea, whether in territorial waters, the contiguous zone [...] or on the high seas, fall within the scope of application of the SBC."¹⁵² This could consequently be a way to address issues of fundamental rights more effectively and at the same time prevent the adoption of differing regimes.

In the end, it is however the political way of thinking that must change. Instead of considering irregular migration a matter of securitization (Leonard, 2010, pp. 31–33), the Member States, regardless whether acting alone or in the framework of FRONTEX coordinated operations, must incorporate fundamental rights in their maritime operations (Moreno-Lax, 2011, p. 220). To end with a quote of the joint briefing of Amnesty International, ECRE and the ICI (2013) on the draft framework: "an EU Regulation dealing with interception and rescue at sea should be concerned first and foremost with the protection of lives and human rights, not with their denial" (p. 17).

¹⁵² Hirsi § 34

References

- Amnesty International (2009). *Document - Italy/Malta: Obligation to Safeguard Lives and Safety of Migrants and Asylum Seekers*. Retrieved from <http://www.amnesty.org/en/library/asset/EUR30/007/2009/en/2160ea44-ba9c-4b70-a3e4-48a5c0e5cb1f/eur300072009en.html>
- Amnesty International (2012). *S.O.S. Europe - Human Rights and Migration Control*. London: Amnesty International. Retrieved from http://www.amnesty.eu/content/assets/S_O_S_Europe_Report_Web_02.pdf
- Amnesty International, European Council on Refugees and Exiles, International Commission of Jurists (2013). *Joint Briefing on the Commission Proposal for a Regulation of the European Parliament and of the Council 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*. Retrieved from http://www.ecre.org/index.php?option=com_downloads&id=778
- Andrijasevic, R. (2010). Deported: The Right to Asylum at EU's External Border of Italy and Libya. *International Migration*, 48(1), 148–174. doi:10.1111/j.1468-2435.2009.00554.x
- Brussels, I. C. (2009, April 26). Rescued immigrants to disembark at the 'closest safe port': Frontex will cover all the expenses related to this year's mission. *Times of Malta*. Retrieved from <http://www.timesofmalta.com/articles/view/20090426/local/rescued-immigrants-to-disembark-at-the-closest-safe-port.254379#.Utk9bhCIXIV>
- Coelho, C. (2013a). *Working Document 1 on 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 Members States*. European Parliament - Committee on Civil Liberties, Justice and Home Affairs. Retrieved from <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONGML%2bCOMPARL%2bPE-516.595%2b01%2bDOC%2bPDF%2bV0%2f%2fEN>
- Coelho, C. (2013b). ****I Draft Report on the proposal for a Regulation of the European Parliament and of the Council 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 Members States of the European Union (COM(2013)0197 – C7-0098/2013 – 2013/0106(COD))*. European Parliament - Committee on Civil Liberties, Justice and Home Affairs. Retrieved from <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-516.895&format=PDF&language=EN&secondRef=02>

- Commission of the European Communities (2007). *Commission Staff Working Document: Study on the international law instruments in relation to illegal immigration by sea* (No. SEC(2007) 691). Retrieved from http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/pdf/irregular-immigration/sec_2007_691_en.pdf
- Coppens, J. & Somers, E. (2010). Towards New Rules on Disembarkation of Persons Rescued at Sea? *The International Journal of Marine and Coastal Law*, 25(3), 377–403. doi:10.1163/157180810X571006
- Council of the European Union (2009). *Brussels European Council 29/30 October 2009 Presidency Conclusions, Brussels European Council 29/30 October 2009: Cover Note from Presidency to Delegations* (No. 15265/1/09).
- Council of the European Union (2013a). *Proposal for a Regulation of the European Parliament and of the Council 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 - Position on Articles 9 and 10: Note from Greek, Spanish, French, Italian, Cyprus and Maltese delegations to Working Party on Frontiers/Mixed Committee (EU-Iceland/Liechtenstein/Norway/Switzerland)* (No. 14612/13).
- Council of the European Union (2013b). *Proposal for a Regulation of the European Parliament and of the Council 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: Note from Presidency to Strategic Committee on Immigration, Frontiers and Asylum/Mixed Committee (EU-Iceland/Liechtenstein/Norway/Switzerland)* (No. 14753/13).
- Council of the European Union (2014a). *Proposal for a Regulation of the European Parliament and of the Council 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: Note from Presidency to Delegations* (No. 5822/14).
- Council of the European Union (2014b). *Proposal for a Regulation of the European Parliament and of the Council 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 - Approval of the final compromise text with a view to an agreement at first reading: Note from Presidency to Permanent Representatives Committee/Mixed Committee* (No. 6269/14).
- Crépeau, F. (2013). *Report of the Special Rapporteur on the human rights of migrants, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*. UN General Assembly, Human Rights Council (No. A/HRC/23/46). Retrieved from <http://www.refworld.org/docid/51a743124.html>

- Devuyst, Y. (2000). The European Union's Constitutional Order - Between Community Method and Ad Hoc Compromise. *Berkeley Journal of International Law*, 18(1).
- EUROMED (2013). *EUROMED Migration III Project, Irregular Migration First Peer-to-Peer Meeting. The Management of Mixed Migration Flows in the last decade: Lessons learnt and options for the future*. Retrieved from http://www.euromed-migration.eu/uploads/tx_euromedhelper/130528_IR_Budapest_strategic_overview_EN_01.pdf
- European Court of Human Rights Press Unit (2013). *Factsheet Collective expulsions of aliens*. Retrieved from http://www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf
- European Parliament Legislative Observatory (2014). *Procedure file 2013/0106(COD): 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 Members States*. Retrieved from <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/0106%28COD%29>
- Frelick, B. (2009). *Pushed back, pushed around: Italy's forced return of boat migrants and asylum seekers, Libya's mistreatment of migrants and asylum seekers*. New York: Human Rights Watch. Retrieved from http://www.hrw.org/sites/default/files/reports/italy0909web_0.pdf
- Frenzen, N. (2011a). *Frontex Operation Hermes to Begin on Sunday, 20 Feb.–Push-Back Practice Prohibited*. Retrieved from <http://migrantsatsea.wordpress.com/2011/02/19/FRONTEX-operation-hermes-to-begin-on-sunday-20-feb-%E2%80%93push-back-practice-prohibited/>
- Frenzen, N. (2011b). *FRONTEX JO Hermes Update*. Retrieved from <http://migrantsatsea.wordpress.com/2011/02/22/FRONTEX-jo-hermes-update/>
- Frenzen, N. (2011c). *Memorandum of Understanding Between Italy and Libyan NTC*. Retrieved from <http://migrantsatsea.wordpress.com/2011/06/20/memorandum-of-understanding-between-italy-and-libyan-nct/>
- Frenzen, N. (2013a). *Italy Conducted De Facto Push-Back of Migrants By Ordering Cargo Ship to Rescue and Transport Migrants to Libya*. Retrieved from <http://migrantsatsea.wordpress.com/2013/08/13/italy-conducted-de-facto-push-back-of-migrants-by-ordering-cargo-ship-to-rescue-and-transport-migrants-to-libya/>
- Frenzen, N. (2013b). *Details (and Document) Regarding EU Mediterranean States Opposition to Proposed FRONTEX Sea Borders Regulation*. Retrieved from <http://migrantsatsea.wordpress.com/2013/10/16/details-and-document-regarding-eu-mediterranean-states-opposition-to-proposed-FRONTEX-sea-borders-Regulation/>

- FRONTEX (2007). *Joint Operation Nautilus 2007 - The end of the first phase*. Retrieved from <http://frontex.europa.eu/news/joint-operation-nautilus-2007-the-end-of-the-first-phase-AECBNJ>
- FRONTEX (22.09.2009). *Frontex is not involved in diversion activities to Libya*. Warsaw: FRONTEX. Retrieved from <http://appablog.wordpress.com/2009/09/22/FRONTEX-is-not-involved-in-diversion-activities-to-libya/>
- FRONTEX (2012) *General Report 2012*. Warsaw: FRONTEX. doi: 10.2819/32341
- FRONTEX (2013). *Update on Central Mediterranean Route*. Retrieved from <http://www.FRONTEX.europa.eu/news/update-on-central-mediterranean-route-5wQPyW>
- FRONTEX Risk Analysis Unit (2013). *FRAN Quarterly Quarter 2: April - June 2013*. Retrieved from http://frontex.europa.eu/assets/Publications/Risk_Analysis/FRAN_Q2_2013.pdf
- Gammeltoft-Hansen, T. (2008). *The Refugee, the Sovereign and the Sea: EU Interdiction Policies in the Mediterranean*. DIIS Working Paper no 2008/6 No. 6. Copenhagen: Danish Institute for International Studies. Retrieved from <http://www.econstor.eu/bitstream/10419/44650/1/560120990.pdf>
- Giuffré, M. (2012). Watered-Down Rights on the High Sea: *Jamaa and Others v Italy*. *International and Comparative Law Quarterly*, 61(03), 728–750. doi: 10.1017/S0020589312000231
- Haas, H. (2011). *Speculations on a 'biblical exodus' from Libya are wrong and dangerous*. Retrieved from <http://heindehaas.blogspot.de/2011/02/speculations-on-biblical-exodus-from.html>
- Hayes, B. & Vermeulen, M. (2012). *Borderline - The EU's New Border Surveillance Initiatives: Assessing the Costs and Fundamental Rights Implications of EUROSUR and the "Smart Borders" Proposals*. Retrieved from <http://www.boell.de/en/content/borderline-eus-new-border-surveillance-initiatives>
- HRW (2009). *Full Transcript of Statement of "Tomas," a 24-year-old Eritrean: Interviewed in a shelter in Rome, May 20, 2009*. Retrieved from <http://www.hrw.org/news/2009/06/08/full-transcript-statement-tomas-24-year-old-eritrean>
- Huysmans, J. (2000). The European Union and the Securitization of Migration. *Journal of Common Market Studies*, 38(5), 751–777. doi:10.1111/1468-5965.00263
- Jacques, G., Prestianni, S., & Romdhani, M. (2012). *Libya - The Hounding of migrants must stop*. Retrieved from <http://www.fidh.org/IMG/pdf/libyemigrantsuk-ld.pdf>
- Rijpma, J. J. (2009). EU Border Management after the Lisbon Treaty. *Croatian Yearbook of European Law & Policy*, 5. Retrieved from: <http://hrcak.srce.hr/file/98771>

- La Gazzetta del Mezzogiorno (2009, May 14). Libya 'can process asylum seekers': Ambassador takes patrol boats, rebuts UN criticism. *La Gazzetta del Mezzogiorno*. Retrieved from http://www.lagazzettadelmezzogiorno.it/GdM_economia_NOTIZIA_02.php?IDNotizia=234671&IDCategoria=2687
- La Repubblica (2008, June 30). Firma per risarcimento Italia-Libia "Saremo uniti sull'immigrazione". *La Repubblica*. Retrieved from <http://www.repubblica.it/2008/05/sezioni/esteri/libia-italia/berlusconi-gheddafi/berlusconi-gheddafi.html>
- Leonard, S. (2010). *FRONTEX and the Securitization of Migrants through Practices: Paper to be presented at the Migration Working Group Seminar, European University Institute, Florence, 9 February 2011*. Retrieved from <http://akela.eui.eu/Documents/RSCAS/Research/MWG/201011/SLeonardpaper.pdf>
- Malmström, C. (2013). *Commissioner Malmström's intervention on Lampedusa during the Home Affairs Council press conference*. Retrieved from http://europa.eu/rapid/press-release_MEMO-13-864_en.htm
- Martin, M. (2013). "If at first you don't succeed"... *European Commission proposes new rules on interception and disembarkation during FRONTEX sea operations*. London: Statewatch. Retrieved from <http://www.statewatch.org/analyses/no-224-frontex-sea-operations.pdf>
- Meijers Committee (2013). *Note on the Proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by FRONTEX (COM(2013) 197 final): To European Parliament Civil Liberties, Justice and Home Affairs Committee (No. CM1308)*. Utrecht: Meijers Committee. Retrieved from <http://www.statewatch.org/news/2013/may/meijers-committee-note-surveillance-external-sea-borders.pdf>
- Moreno-Lax, V. (2011). Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea. *International Journal of Refugee Law*, 23(2), 174–220. doi:10.1093/ijrl/eer005
- Nita, S. (2013). *Regional Responses to Forced Migration: The Case of Libya*. Migration Policy Centre. Retrieved from <http://www.migrationpolicycentre.eu/docs/ASN2013-03.pdf>
- OHCHR (2012). *UN Special Rapporteur on the human rights of migrants concludes his third country visit in his regional study on the human rights of migrants at the borders of the European Union: Italy*. Retrieved from <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12640&LangID=E>
- Paoletti, E. (2012). *Migration Agreements between Italy and North Africa: Domestic Imperatives versus International Norms*. Middle East Institute. Retrieved from <http://www.mei.edu/content/migration-agreements-between-italy-and-north-africa-domestic-imperatives-versus>

- Papastavridis, E. (2010). 'Fortress Europe' and FRONTEX: Within or Without International Law? *Nordic Journal of International Law*, 79(1), 75–111.
doi:10.1163/157181009X12581245929640
- Peers, S. (2013). *EU rules on maritime rescue: Member States quibble while migrants drown*. London: Statewatch. Retrieved from <http://www.statewatch.org/analyses/no-243-eu-search-and-rescue.pdf>
- Popham, P. (2007, May 25). Doomed to drown: the desperate last calls of the migrants no one wanted to rescue. *The Independent*. Retrieved from <http://www.independent.co.uk/news/world/europe/doomed-to-drown-the-desperate-last-calls-of-the-migrants-no-one-wanted-to-rescue-450300.html>
- Popham, P. (2007, May 28). Europe's shame. *The Independent*. Retrieved from <http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=463ef21123&id=465bbfd78>
- Price, M. (2013, October 11). Migrant boat capsizes leaves 27 dead in Mediterranean. *BBC*. Retrieved from <http://www.bbc.co.uk/news/world-europe-24499890>
- Riesbeck, P. (2013, October 26). Flüchtlingsdrama Lampedusa: Nach Lampedusa ist vor Lampedusa. *Frankfurter Rundschau*. Retrieved from <http://www.fr-online.de/politik/fluechtlingsdrama-lampedusa-nach-lampedusa-ist-vor-lampedusa,1472596,24791658.html>
- Sansone, K. (2012, June 23). Sending migrants back is 'not wrong'. *Times of Malta*. Retrieved from <http://www.timesofmalta.com/articles/view/20120623/local/Sending-migrants-back-is-not-wrong-.425553#.U11celC-2Sp>
- Schulte, U., & Jakob, C. (2013, October 24). Flüchtlingspolitik der EU: Bloß keine Zugeständnisse. *taz*. Retrieved from <http://www.taz.de/!126102/>
- Shenker, J. (2013, October 3). Mediterranean migrant deaths: a litany of largely avoidable loss. *The Guardian*. Retrieved from <http://www.theguardian.com/world/2013/oct/03/mediterranean-migrant-deaths-avoidable-loss>
- Slot, L. (2005). *Die Lehre von den implied powers im Recht der Europäischen Gemeinschaften. Berichte aus der Rechtswissenschaft*. Aachen: Shaker.
- Strik, T. (2012). *Lives lost in the Mediterranean Sea: who is responsible?* Parliamentary Assembly of the Council of Europe: Committee on Migration, Refugees and Displaced Persons. Retrieved from http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf
- Stuchlik, S. (2013). *FRONTEX drängt Flüchtlinge in Drittstaaten*. WDR. Retrieved from <http://www.tagesschau.de/ausland/frontex-monitor100.html>

- The Guardian (2013, October 12). Death toll of African migrants rises after boat disaster near Lampedusa: 34 dead and at least 221 rescued by Italian and Maltese ships after boat capsizes in Mediterranean. *The Guardian*. Retrieved from <http://www.theguardian.com/world/2013/oct/12/african-migrants-boat-lampedusa-capsizes-mediterranean>
- Times of Malta (2009, April 21). Maroni claims Malta sent 40,000 migrants to Italy. *Times of Malta*. Retrieved from <http://www.timesofmalta.com/articles/view/20090421/local/moroni-claims-malta-sent-40-000-migrants-to-italy.253757#.UtlMTBCIXIV>
- UNHCR (1994). *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*. Retrieved from <http://www.refworld.org/docid/437b6db64.html>
- UNHCR (1997). *UNHCR Note on the Principle of Non-Refoulement*. Retrieved from <http://www.refworld.org/docid/438c6d972.html>
- UNHCR (2000). Interception of Asylum-Seekers and Refugee: The International Framework and Recommendations for a Comprehensive Approach: EC/50/SC/CPR.17. *Refugee Survey Quarterly*, 19(4), 171–179. Retrieved from <http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDF.pdf?docid=4aa660c69>
- UNHCR (2009). *UNHCR deeply concerned over returns from Italy to Libya*. Retrieved from <http://www.unhcr.org/4a02d4546.html>
- UNHCR (2010a). *Protection Policy Paper. Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*. Retrieved from <http://www.refworld.org/docid/4cd12d3a2.html>
- UNHCR (2010b). *UNHCR intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy* (No. Application no. 27765/09). Retrieved from <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4b97778d2>
- UNHCR (2013). *Recommendations on Important Aspects of Refugee Protection in Italy*. Retrieved from <http://www.refworld.org/docid/522f0efe4.html>
- Weinzierl, R. & Lisson, U. (2007). *Border Management and Human Rights: A study of EU Law and the Law of the Sea*. Retrieved from <http://www.statewatch.org/news/2008/feb/eu-study-border-management.pdf>
- Wouters, K., & Den Heijer, M. (2010). The Marine I Case: a Comment. *International Journal of Refugee Law*, 22(1), 1–19. doi:10.1093/ijrl/eep031