# `Fortress Europe` and the vilification of refugees

*by* Ana Claudia Cataldi Milward De A


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# ‘FORTRESS EUROPE’ AND THE VILIFICATION OF REFUGEES

Research dissertation presented in partial fulfilment of the requirements for the degree of

LLM in International Law

(QQI)

Law School, Griffith College Dublin

Ana Claudia Cataldi Milward de Andrade

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**CANDIDATE DECLARATION**

**Candidate Name:** Ana Claudia Cataldi Milward de Andrade

I certify that the dissertation entitled: 'Fortress Europe' and the vilification of refugees, submitted for the degree of LLM in International Law is the result of my own work and that where reference is made to the work of others, due acknowledgment is given.

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To all my friends here and back in Brazil, thanks for keeping me sane, entertained and for making my experience in Ireland so special, whether you participated from afar or closely.

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## LIST OF ABBREVIATION

CJEU – Court of Justice of the European Union

ECHR – European Convention on Human Rights

EEZ – Economic Exclusive Zone

EU – European Union

FAL – Facilitation Committee

FRONTEX – European Agency for the Management of Operations Cooperation at External Borders

ICJ – International Court of Justice

IMO – International Maritime Organisation

IOM – International Organisation of Migration

MSC – Maritime Safety Committee

NGO – Non-governmental organisations

PCIJ – Permanent Court of International Justice

SALVAGE – International Convention on Salvage

SAR – International Convention on Maritime Search and Rescue

SOLAS – International Convention for the Safety of Life at Sea

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNCLOS – United Nations Convention for the Law of the Sea

UNHCR – United Nations Refugee Agency

UK – United Kingdom

UNICRI – United Nations Interregional Crime and Justice Research Institute

UNODC – United Nations Office on Drugs and Crime

UNTOC – United Nations Convention against Transnational Organised Crime

## ABSTRACT

The migratory flow of migrants in search for a better life has intensified in the recent years and has become a topic of debate around the world, therefore, such study is paramount. Migration is not a new phenomenon and the sea is the most used route in the search for a better life or for the protection from persecution or other threats to life. With a special focus on the European Union, due to the increasing number of shipwrecks, disappearances, and deaths, this study will examine the maritime operations in the Mediterranean Sea as well as demonstrate several human rights violations towards refugees. The protection of refugees is subjected to different migration policies with respect to domestic law, concerning international protection, there are several treaties dealing with the topic. Nevertheless, the lack of a united European framework in relation to the theme, make the political solutions more difficult to solve. Thus, this study aims to verify whether the concept of securitisation coincides with the treatment received by refugees in Europe, conducting a study of refugee rights and making critical analysis of European border control.



**Keywords:** Refugees; Migrants; Migration; Rescue Mission; Mediterranean Sea; Europe; Transnational Organised Crime; Refugees' Rights; State Sovereignty.

# CHAPTER 1
# INTRODUCTION

## 1.1 Refugee Rescue Mission

Centuries of bloody religious, ideological, and political wars around the world have caused continents, such as Europe, to face large numbers of migration flows. Today, these movements are repeated intensely, with the European Union being signatory to a wide range of international agreements and treaties protecting refugees.[1] In addition, its Members States have, in local laws, provisions that in theory demonstrate concern for the safeguarding of human rights for those seeking asylum in their jurisdictions. The International Protection Act 2015, which came into force in Ireland in 2016, is an example of domestic law proving international protection for refugees as well as for those who are eligible for subsidiary protection, being consider a great development in the field of international protection.[2]

In contrast, refugees still seem to cause much anxiety within the European community. Statistics from important organisations, such as the United Nations and the International Organisation for Migration, show a high rate of shipwrecks, disappearances, and deaths in European territory, its borders, and on its way, mainly due to the crossing of the Mediterranean Sea.[3] Additionally, several complaints from non-governmental organisations, and research into tangible practical cases indicate the existence of degrading treatments, forced returns and other violations to those seeking for asylum in Europe.[4]

The migratory flow of migrants in search for a better life has intensified in the recent years and has become a topic of debate around the world. Therefore, the need to study refugee rights is paramount. With a special focus on the European Union which is being responsible for several maritime operations in the Mediterranean Sea and been target of criticism and denunciations for numerous human rights violations. The present dissertation is justified in view of the

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[1] 'Common European Asylum System - Migration And Home Affairs - European Commission' (*Migration and Home Affairs - European Commission*, 2020) <www.ec.europa.eu/home-affairs/what-we-do/policies/asylum_en> accessed 14 July 2020.

[2] (*Ipo.gov.ie*, 2017) <www.ipo.gov.ie/en/IPO/InfoBookletNew.pdf/Files/InfoBookletNew.pdf> accessed 14 July 2020.

[3] United Refugees, 'UNHCR Global Trends 2019' (*UNHCR*, 2020) <www.unhcr.org/5ee200e37/> accessed 14 July 2020.

[4] 'Statewatch | EU: Greece: Chios: NGO Complaints About The Treatment Of Refugees To The European Commission And Their Response' (*Statewatch.org*, 2018) <www.statewatch.org/news/2018/february/eu-greece-chios-ngo-complaints-about-the-treatment-of-refugees-to-the-european-commission-and-their-reponse/> accessed 14 July 2020.

urgency and relevance of the theme, in addition to the need to expand the theoretical framework on the rights of refugees, and to problematise the constant violations of which these individuals are victims.

## 1.2 Research Topic

Migration is not a new phenomenon and the sea is the most used route in the search for a better life or for the protection from persecution or other threats to life. International law, such as the United Nations Convention for the Law of the Sea (UNCLOS), the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention on Maritime Search and Rescue (SAR), safeguards the right to be rescued from distress at sea. Therefore, refugees and migrants are protected by those provisions. However, in the recent years, there are some reluctance to allow their disembark, especially if they entered into the cost of the territory in clandestine boats or other irregular way.

Everyone has the right to be rescued in distress at sea and to be delivered to a safe place, however, regarding refugees and migrants, legal complexities and different interests tend to arise. The uncertainty persists in relation to their disembarkation, reason why several States are refusing their disembarkation, making them to stay on board at the sea, even with the bad conditions of the boats. Such situation is leading to more and more deaths at sea.

International relations treat the theoretical framework of securitisation as the process by which state actors classify certain matters as national security, which, in practice, should not cause such fear to the population. In this respect, extraordinary precautionary measures arise within the States, with the aim of urgently remedy alleged breaches in public security, often giving rise to possible abuses and violations of rights.

Thus, the general purpose of this dissertation is to verify whether the concept of securitisation coincides with the treatment received by refugees in Europe, conducting a study of refugee rights and making critical analysis of European border control.

### 1.2.1 Research Question

The research question in this dissertation aims to answer: ‘How effective are international laws of the sea and on refugee protection in protecting refugees at sea from coastal States` national security measures?’

### 1.2.2 Research Objective

The aim of this dissertation is to examine the background of refugees and migrants rescue at sea, considering the research question: 'How effective are international laws of the sea and on refugee protection in protecting refugees at sea from coastal States` national security measures?' It will be analysed the protection of these vulnerable people, encompassing the norms under the International Law of the Sea, International Refugee Law and International Law against Transnational Organised Crime. The study will be illustrated by relevant cases and events, such as the Salvini law.[5]

This study will be divided into six chapters in order to provide a detailed and coherent examination of the issue in question. Chapter One introduces the overall problem and objectives of the study. Chapter Two will consider the legal framework for the rescue of refugees and migrants at sea, identifying norms and obligations involving those peoples. It will be taken into consideration where, when, and how States may exercise authority over ships as well as the legal norms related to the rescue at sea.

Chapter Three will bring the definition of refugees focusing on the State authority to decide who enters and remains into its territory. Also, will deal with the right to asylum under international law and the main protection mechanism of international refugee law, which is the principle of *non-refoulement*.

Chapter Four will analyse the UN Convention against Transnational Organised Crime since it is deemed the main instrument related to this matter, which the purpose is the prevention and combat of transnational and organised crime. The focus will be on smuggling of migrants and trafficking in persons regarding the situation involving refugees and migrants at sea.

Chapter Five analyses the rescue mission in the Mediterranean Sea as well as its criminalisation by European countries, focusing on the Italian government which has approved a law criminalising the operation of the non-governmental organisations in the Mediterranean Sea. The Salvini Law is imposing fines up to €50.000 (fifty thousand euro) to anyone who attempt to render assistance to migrant rescue boats. As a result, public international law is being

[5] Matteo Salvini, the leader of the right-wing La Lega (The League) party, proposed a new law in 2018 criminalising the operation of the non-governmental organisations in the Mediterranean Sea, imposing fines up to €50.000 for those who breach the law. Furthermore, the law includes abolishing humanitarian protection, creating a new system that limits the eligibility to people seek asylum. The Italian government approved it on the grounds to make Italy safer.

breached, since is sending the asylum seekers away from the Italy coast, denying their rights to seek for asylum from persecution, increasing their chances of shipwrecked and, consequently, their death in the sea.[6] Thereby, the accountability of States in face of human rights violations will be addressed demonstrating where refugees can seek access to justice to repair damages and guarantee their rights. Chapter Six will conclude the research with a discussion of the findings and a conclusion.

### 1.3 Research Methodology

This essay will be sustained by three frames (doctrinal analysis, historical analysis, and socio-legal methodology) and the analysis of selected secondary materials from accredited authors, international organisations and United Nations' agencies that form this study's body.

The doctrinal method will be used to outline the rights and protection granted to migrants, refugees, and asylum seekers under international law as well as under domestic legislation. International treaties regarding the theme will be also assessed. This analysis is essential to the research since a clear understanding of the law is crucial to comprehend the protection offered to these vulnerable people and State sovereignty under the law. A historical analysis will be conducted in order to examine the law trough history, considering also court cases and reports, towards the assessment of the violations suffered by refugees, as well as their access to justice.

Finally, this paper will employ the socio legal methodology to illustrate the law as embedded in the society. Its flaws and exclusions will be assessed trough the current data and information given by agencies responsible for the statistical record of flow of migrants, as well as death and disappearances of refugees in the Mediterranean Sea. Furthermore, articles from international journals and NGOs, that works towards the international protection of human rights, carrying out a literary review of doctrinal works in relation to International Refugee Law, International Human Rights Law, and International Maritime Law, will be studied with the purpose of critically examine the law in action as opposed to in theory.

### 1.4 Literature Review

For the theoretical framework, numerous articles, books, and other scholarly texts was studied to support this dissertation. These theoretical frames will set a clear structure and a line of

[6] 'Everything You Need To Know About Human Rights In Italy' (*Amnesty.org*, 2019) <www.amnesty.org/en/countries/europe-and-central-asia/italy/report-italy/> accessed 15 July 2020.

thinking of how International Law of the Sea and International Refugee Law directly affects migrants, refugees, and asylum seekers, answering the research question. In the doctrinal thesis written by Martin Ratcovich: 'International Law and the Rescue of Refugees at Sea'[7] it was illustrated the struggle of migrants, refugees, and asylum seekers in the Mediterranean Sea, examining the concept of 'place of safety'. The doctrinal thesis details the issues regarding those individuals, focusing on International Law of the Sea, International Refugee Law, International Human Rights Law, and International Law against Transnational Organised Crime. Ratcovich also draws attention to the transnational organised crimes and the definition of 'place of safety'. I find this text interesting because the author examines every field covered by this study in a very detailed and straightforward manner, revealing important limitations of international law.

In the context of the International Maritime Law, Donald R. Rothwell and Tim Stephens 'The International Law of the Sea'[8] provide a detailed explanation of the regulation, management and governance of the ocean spaces, by critically analysing the United Nations Convention on the Law of the Sea. Moreover, it addresses to all the main areas of the law of the sea, including foundations and sources of law, the nature and extent of the maritime zones, and the delimitation of maritime boundaries. The United Nations Convention for the Law of the Sea is well explained, demonstrating an outstanding attention to details. The relevance of the book is in the wealth of information it contains, making it a very handy reference tool. Nevertheless, taking into account that Africa plays a major role within the topic, the book slightly addresses to an African audience and, when it does, it does in a distorted manner, being one of the most disappointing aspects of the work.

Thomas Gammeltoft-Hansen 'Access to Asylum: International Refugee Law and the Globalisation of Migration Control'[9] highlights the migration flow along with the refugee protection and the principle of *non-refoulement*. This book provided guidance towards the chapter three, identifying the legal ambiguity in relation to jurisdiction, showing the principle of *non-refoulement* as core element of the refugee law which must be respected by all States. Furthermore, Gammeltoft-Hansen shed a light into powerful governments which explores this ambiguity, distancing themselves from refugees. The author is an associated legal expert to the

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[7] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).
[8] Donald R Rothwell and Tim Stephens, *International Law Of The Sea* (1st edn, Hart Publishing 2010).
[9] Thomas Gammeltoft-Hansen, *Access To Asylum: International Refugee Law And The Globalisation Of Migration Control* (Cambridge University Press 2011).

European Council for Refugees and Exiles, therefore, he is very much aware of the true reality of migration control, explaining in details the logic behind the employment of procedures concerning migrants and refugees, how they function in reality and its consequent effects.

In relation to transnational organised crimes, especially trafficking in person and smuggling of migrants, 'Human Trafficking: A Global Perspective' written by Louise Shelley[10], broadly delineates the forms of human trafficking globally, an issue that is been addressed in this paper, in a historical and comparative perspective. Dr Shelly examines the trends of human trafficking outlining the financial gains over the practice of such crime. Moreover, demonstrate how this business operates and its variations in different regions of the world. Her work is very well-researched, revelling an impeccable level of details, citing from personal conversations, media release, governmental and non-governmental documents, and work of academic scholarship. Alternatively, Paolo Campana in his article 'Explaining criminal networks: Strategies and potential pitfalls'[11], critically analyses the criminal networks, illustrating different forms of such organisations, and discussing their potential pitfalls. He focuses on the issue of the trafficking and smuggling within Europe in a broader manner giving an overview of the organised forms of criminality. Nevertheless, he does not pay the necessary attention towards asylum seekers and migrants, which are the main point of this paper.

Lastly, with respect to human rights violations against migrants and refugees at Europe's borders and State's accountability, 'The Human Cost of Fortress Europe: Human Rights Violations against Migrants and Refugees at Europe's Borders' published by the Amnesty International[12] enshrines the grave abuses of human rights suffered by those individuals by the EU and its Member States. The text elucidates the investment of surveillance, security forces and detention centres by the EU in order to construct an impenetrable fortress, describing the EU's migration policies and how it is performed, addressed in the chapter five. The report is very complete, directing to the flawed migration policies of the European Union, which is protecting its external borders from irregular migration at the expense of human suffering.

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[10] Louise Shelly, *Human Trafficking* (Cambridge University Press 2010).
[11] Paolo Campana, 'Explaining Criminal Networks: Strategies And Potential Pitfalls' (2016) 9 Methodological Innovations.
[12]'The Human Cost Of Fortress Europe: Human Rights Violations Against Migrants And Refugees At Europe's Borders' (*Amnesty.org*, 2014) <www.amnesty.org/en/documents/eur05/001/2014/en/> accessed 15 July 2020.

### 1.4.1 Contribution to Existing Academic Literature

The existing academic literature provides a comprehensive explanation of the causes and consequences of human rights violations, especially in relation to refugees, migrants, and asylum seekers, as well as its relationship with the law and accountability of States. Nevertheless, since the prohibition of rescue mission in the Mediterranean Sea is a new scenario, it is still largely unexplored.

In this respect, this dissertation will discuss not only those violations, but also the criminalisation of the rescue mission as such, a topic that has been largely under researched. In addition, will analyse the Italy new policy that is refusing the disembarkation of those individuals in its territory, breaching obligations under International Human Rights Law, International Refugee Law, and International Maritime Law.

Furthermore, it will be demonstrated how other European countries are following Italy's trend in criminalising solidarity, by creating laws providing that the actions of the non-governmental organisations towards rendering assistance to migrant rescue boats is a criminal offence.

## 1.5 Dissertation Findings

This study will draw a parallel between the rights of refugees in the Mediterranean Sea and the role of the European Community in this area, demonstrating their failed attempts to enter Europe in recent years in consequence of the European Union's and its Member States' posture towards the migration flow. It addresses the visible European priority of obstructing its borders, strengthening surveillance, and reaching agreements with third countries to prevent the entry of migrants, in contrast to the low investment in the protection of refugees. Figures and statistics on the deaths, accidents and disappearances of migrants and refugees are also shown, mainly with respect to the Mediterranean Sea.

Moreover, this dissertation will study a theme scarcely explored and yet very important, considering the maritime space as place of intercommunication, social mobility, global trade, and dynamic inter-personal relationships. For this reason, it is essential to understand its rules, mechanism, and legal system, so that it can carry out a cutting-edge interpretation of the world and of the relationship between people and States.

Lastly, this study will address the accountability of States in the face of the human rights violations with respect of refugees, demonstrating the courts where refugees can seek access to justice to repair damages and guarantee their rights, and presenting cases in which these violations were brought to trial. Recommendations will be given to deal with the gaps and inconsistencies that exist within the law, as well as to help eliminate the criminalisation and violation of refugees, migrants and asylum seekers, emphasising the importance of the overall protection of human rights.

## CHAPTER 2
## INTERNATIONAL LAW OF THE SEA

The international law of the sea is considered one of the oldest and newest bodies of international law at the same time.[13] From the beginning of times, the history of human integration between people took place precisely in the ocean, which, in the most remote historical records, served as a dynamic space for cultural interaction, commerce, conquest, pacification, and wars.[14]

The development of the law of the sea is linked to the civilisation itself, considering that it was throughout the sea that ancestral people achieved their greatest victories, as well as the world expanded and globalisation began, slowly and gradually.[15] Although the maritime space has always accompany the relationship between peoples in history, namely: commerce, conquest, or cultural and social interaction, the construction of norms regarding the sea had a late regulation, considering its importance and use by the ancient civilisations.[16]

For a long time, the law of the sea was mostly customary until the rise of the United Nations Convention on the Law of the Sea (UNCLOS) in 1982.[17] Then, gradually, after States established the concept of territorial sea, the construction of the baselines started to develop. For example, an early method of measuring the extent of the territorial sea was by reference to the 'cannon shot'. However, the range of cannons fluctuated and increased as the time went by, therefore, there was no need to determine a baseline point to limit the width of such space.[18]

Later it was understood that that the territorial sea would be three nautical miles- because with the technological improvement of weapons the prior distance measure became obsolete – therefore, the rest of the ocean would not be reached by any State jurisdiction.[19] Consequently, started to be established a domain zone of absolute control by the Coastal State, and the

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[13] 'Chapter 1: International Law, Adoption Of The Law Of The Sea Convention – Law Of The Sea' (*Sites.tufts.edu*) <sites.tufts.edu/lawofthesea/chapter-one/> accessed 25 July 2020.
[14] 'The Human Cost Of Fortress Europe: Human Rights Violations Against Migrants And Refugees At Europe's Borders' (*Amnesty.org*, 2014) <www.amnesty.org/en/documents/eur05/001/2014/en/> accessed 15 July 2020.
[15] Donald Rothwell and others, *The Oxford Handbook Of The Law Of The Sea*.
[16] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).
[17] 'Chapter 1: International Law, Adoption Of The Law Of The Sea Convention – Law Of The Sea' (*Sites.tufts.edu*) <sites.tufts.edu/lawofthesea/chapter-one/> accessed 25 July 2020.
[18] Thomas Gammeltoft-Hansen, *Access To Asylum: International Refugee Law And The Globalisation Of Migration Control* (Cambridge University Press 2011).
[19] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).

freedom of navigation beyond such zone had become subjected of unilateral appreciation of States, based on their sovereignty without a common understanding.[20]

However, it was an arduous path until the codification of the law, dating back to the League of Nations.[21] There had been several attempts to create a single body of rules, until UNCLOS managed to regulate all matter related to the law of the sea. Hence, the standardization of the law of the sea was only possible due to the leadership and perseverance of the United Nations (UN), and the conferences it promoted until the United Nations Convention on the Law of the Sea arouse as the legal framework concerning oceanic spaces.

The Convention is deemed universal, with a unified character; is fundamentally closed to amendments; consists in a unified system of rules and principles. As a result, it is hard to modify it, despite the law being always open to developments and modifications.[22] Establishes a detailed legal framework to regulate the entire space of the ocean, its uses and resources, containing disciplinary rules on the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone and the high seas.[23]

Furthermore, the UNCLOS consolidated principles and international customary law that must be observed by States in the joint use of maritime spaces, such as freedom of the sea, the exercise of the domestic jurisdiction of States within its limits, and the characterisation of the continental shelf.[24]

Among the purposes that can be found in the Convention, the most important is the peaceful use of the seas since it is the connecting space between people and States. According to this concept, the sea must be used as a dynamic space for interaction between peoples, not exclusive, but democratic and open.[25] Moreover, it is an instrument that establishes security within international relations, which start to develop in a predictable and statutory manner as a result of a long debate with wide acceptance.[26]

By establishing the objective of the peaceful use of the sea, the UNCLOS ruled out practices directed at its misuse or sovereign position based on power relations. For instance, precluded

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[20] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).
[21] Donald Rothwell and others, *The Oxford Handbook Of The Law Of The Sea*.
[22] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).
[23] Hugo Caminos, *Law Of The Sea* (Ashgate Publishing Company 2001).
[24] Ibid.
[25] Ibid.
[26] Ibid.

the use of the ocean space for nuclear tests or independent military manoeuvres, or for any activity that can potentiate possible conflicts.[27]

In proposing objectives, the Convention is committed to pursuing goals to be achieved with the implementation of its own use. Such objectives serve as a parameter for constant evaluation of the effectiveness of the rules of the Law of the Sea, as well as being constituted as reference elements for legally interpretations.[28] These goals are basic instruments for progressive development of the law and for the strengthening of peace, security, cooperation, and friendly relations between all nations, in line with the objectives of the United Nations.

Furthermore, there are principles recognised and consolidated as instruments of inspiration for guiding the normative rules. Good faith, sovereign equality, non-intervention, self-determination of peoples, respect for human rights, the peaceful settlement of disputes and non-aggression, or use of force are principles of international law that guide the understanding of the Law of the Sea.[29] The regulation of maritime spaces and its delimitation, although enshrined by the Convention, still is subject of unclear disputes and legal relationships, containing margin of discretion for interpretation practices, as the exercise of the jurisdiction over the territorial sea. For example, the Coastal State may suspend the right of innocent passage within its waters claiming state security. That is what Iran did for a period of time in 1987.[30] However, despite the challenges, the rise of the United Nations Convention on the Law of the Sea was an important step towards establish a normative legal framework that regulates the use of the seas among peoples.

### 2.2 International waters

The United Nations Conventions on the Law of the Sea 1982 (UNCLOS) is an international treaty that resulted from the third United Nations Conference on the Law of the Sea, which took place in the city of Montego Bay in Jamaica. The Convention was signed by 159 States

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[27] 'Overview - Convention & Related Agreements' (*Un.org*) <www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm> accessed 25 July 2020.
[28] Ibid.
[29] UNCLOS, art 1.
[30] Anne Bardin, 'Coastal State Coastal State's Jurisdiction O S Jurisdiction Over Foreign Vessels' (2002) 14 Pace International Law Review <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1188&context=pilr> accessed 8 June 2020.

and ratified by more than 140,[31] and has created six maritime zones: internal waters, territorial sea, contiguous zone, exclusive economic zone (EEZ), continental shelf, and high sea.[32]

The Convention is organised into 320 articles and nine annexes, which complement and fill normative gaps. Although there is no conception and structural organisation, it does have circumstantial devices that expresses fundamental concepts, or concepts that delimit and assist the interpretation of its normative devices.[33]

One of the main advantages is the establishment of maritime space between States, establishing a common understanding of international boundaries, its use, and the extent of States' responsibility in its peaceful use. Regulation of the extent of the territorial sea, the size of the continental shelf and the contiguous zone, and establishment of the rules over the exclusive economic zone, as well as recognition of the freedom of navigation on the high seas, and the consideration of the area as a common heritage of humanity.[34]

### 2.2.1 Internal Waters

Internal waters refer to the landward side of the baseline of the territorial sea, such as lakes, ports, rivers, and canals. Domestic legislation has jurisdiction over such spaces as much as they have within its mainland, therefore, the Coastal State can make laws concerning to its internal waters as well as regulate its use. In this sense, there is no right of innocent passage, and the absence of such right is what differentiates the internal waters from the territorial sea.[35]

### 2.2.2 Territorial Sea

The territorial sea goes from the beach up to 23km into the sea, and is considered territory for the purpose of sovereignty of the Coastal State, therefore, all the rights a sovereign State has, can be exercised there, namely: exclusive economic exploitation, navigation, military manoeuvre.[36] The definition is important to establish the legal limit for the exercise of full powers of jurisdiction of the State and its domain, in which it could freely exercise its role of

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[31] '20 Years Of The United Nations Convention On The Law Of The Sea' (*Un.org*, 2012) <www.un.org/depts/los/convention_agreements/convention_20years/Montego%20Bay.htm> accessed 31 May 2020.
[32] Donald R Rothwell and Tim Stephens, *International Law Of The Sea* (1st edn, Hart Publishing 2010).
[33] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).
[34] 'Chapter 2: Maritime Zones – Law Of The Sea' (*Sites.tufts.edu*) <www.sites.tufts.edu/lawofthesea/chapter-two/> accessed 7 June 2020.
[35] Donald R Rothwell and Tim Stephens, *International Law Of The Sea* (1st edn, Hart Publishing 2010).
[36] Ibid

police, guard, and security, enforce its law, and execute award orders. Also, to define the exploratory limits of marine resources without any intervention by another State or international community.[37]

Thus, if a ship from another State intends to enter another's territorial sea, it must request authorisation from the Coastal State. Nevertheless, there is one exception called: innocent passage, which is the right to navigate the territorial sea from another State without anchoring the ship.[38] UNCLOS provides such right as a fundamental guarantee, prescribing that only the Coastal State may adopt laws and regulations disciplining the passage without imposing fees, or administrative difficulties.[39]

In the same way that it establishes the right of innocent passage, the Convention also defines offensive passage as being acts that threaten State peace, order, and security, classifying the acts as practices committed by vessels during its passage, in accordance to the Article 19(2).[40]

For instance, a Uruguayan ship going to the United States can pass through Brazilians waters, without any authorization, in order to get there faster. Nevertheless, the coastal State need to notify about the innocent passage. Additionally, the Coastal State has the right to establish routes for the boat to pass. The same right applies to submarines, however, to exercise its right is necessary emerge into the water and show its flag.

Regarding ships used for irregular migration, they are deemed stateless and, therefore, they are subjected to the Coastal State jurisdiction. Thus, the Article 19(1)(g) of the Convention does not cover ships that do not engage in the loading and unloading of persons.[41]

### 2.2.3 Contiguous Zone

The contiguous zone is located 12 nautical miles after the end of the territorial sea, not exceeding 24 nautical miles. The zone is not a territory of the Coastal State for the purpose of sovereignty, though, has rights ensured by the Convention, such as to prevent or punish breaches of custom, fiscal, immigration or sanitary legislation. [42] Thus, in order to protect its

[37] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).
[38] Ibid
[39] Ibid.
[40] UNCLOS, art 19(2).
[41] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).
[42] Ibid.

territorial sea, the Coastal State has the right of patrolling and inspection, aiming to curb human, drug and weapon trafficking, and piracy, for example.

### 2.2.4 Exclusive Economic Zone

The exclusive economic zone is a maritime zone which is not deemed territory for the purposes of State sovereignty, yet the Convention guarantees exclusive economic exploitation rights, therefore, only the Coastal State can explore. The limit is 200 nautical miles from the baseline of the cost.[43]

### 2.2.5 Continental Shelf

The continental shelf is the seabed and the subsoil which the exclusive economic zone overlaps. The shelf goes up to 200 nautical miles and has minerals, oil, lobster, and pre-salt.[44] Hence, the Coastal State's exclusive exploitation limit is up to 200 nautical miles, consequently, if another State desire to explore, an authorisation is required.

### 2.2.6 High Seas

The high seas start 200 nautical miles from the continental shelf, unless it is extended, and is a non-jurisdictional area. Nowadays, prevail the understanding that the high seas are *'res communis'*, meaning that is a kind of international condominium, and any costal or non-coastal State can economically explore, therefore, there are no restrictions nor rules.[45] Notwithstanding, every country has the right of capture, therefore, if any boat is committing an unlawful act on the high seas, any official can exercise this right, despite being a non-jurisdiction area.[46]

Since it is a common space for all States and peoples, the UNCLOS established some rights and duties that must be observed, that is, although the classification as common space, all nations have specific rights and duties regulated by the Convention.

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[43] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).
[44] Ibid.
[45] Ibid.
[46] Ibid.

In this respect, it is worth mentioning the creation of the International Tribunal for the Law of the Sea which is a specialised judicial body with detailed system of dispute and prerogatives based on the Montego Bay Convention and, in a set of agreements formulated by the States.[47]

### 2.1 Jurisdiction over ships

For decades, States are competing over interests, in the case of maritime spaces, some has favoured the freedom of navigation of one group, and encouraged protection from invasion, while others reserved their waters for fishing, or sought to practice fishing beyond its territorial sea.[48]

In this regard, the UNCLOS created a legal framework to establish the authority over the sea. On one side, States are divided in groups according to its activities and interests in the sea, mostly Coastal States and Flag States. On the other side, the ocean is divided into several zones where States have different authorities over it.[49]

Concerning the internal waters, apart from sovereign immune vessels, every ship is subjected to domestic legislation - criminal and civil law - that is, the sovereignty is equal to that one exercised over its territory.[50] The same occurs with the territorial sea, the sovereignty goes beyond its terrestrial land and internal waters, going up to the territorial sea, including the air space as well as the seabed and subsoil.[51]

With regard to ships exercising its right of innocent passage, the legislative competence of the Coastal State is limited to certain matters concerning international law of the sea, such as safety of navigation, fishing, and pollution. Nevertheless, the right is reciprocal, that is, it limits the sovereignty of the Coastal State in order to protect navigational rights of others.[52]

Regarding the contiguous zone, the Coastal State may take the necessary enforcement measures to prevent breaches of customs, tax, immigration or health laws and regulations withing its territory or its territorial sea, according to Article 33 of the Convention on the Law of the Sea.[53]

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[47] 'Www.Itlos.Org: The Tribunal' (*Itlos.org*) <www.itlos.org/the-tribunal/> accessed 7 June 2020.
[48] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).
[49] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] UNCLOS, art 33.

However, it is not a requirement, it is just an allowance to exercise its jurisdiction within the zone.

In the exclusive economic zone, the Coastal State has jurisdiction over natural resources and related jurisdictional rights. Moreover, is the location where other nations exercise its right of freedom of navigations as well as its right of overflight and of the laying of submarine cables and pipelines.[54]

Pursuant the Article 86 of the Montego Bay Convention, high seas are understood as all maritime zones 'not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State'. As aforementioned, Public International Law has as its main guideline the freedom of the high seas, nevertheless, minimum standard of conduct must be satisfied by States.

The high seas are no '*res nullius'*, that is, something without owner, or something subjected to the appropriation by some State. It is considered of free and common use, destinated for the benefit of the whole international society, which excludes the right to use, enjoy and dispose.[55]

Hence, according to the principle of territoriality, a State cannot exercise authority beyond its territory. Consequently, in the high seas, all vessels can sail freely without having to submit itself to the laws of any flag other than its own; freedom of fishing is an inherent right of al States as well as the right to carry out subsea cable and pipeline installations.[56]

According to Article 2 of the Convention on the High Seas, since the high sea is open to all nations, no State can legitimately claim sovereignty. Thus, the rules and conditions regarding its use are set out in this Convention and other rules and instruments of international law.[57]

In this sense, it is worth mentioning the *Lotus case*, concerning a boat crash between the French Lotus and the Turkish Boz-Kourt, resulting in the sinking of the latter, causing eight deaths. After rescuing the crew survivors, the Lotus arrived in Istanbul, causing the arrest, prosecution, and conviction on criminal charges of manslaughter of its Master. France protested the action and the case went to the Permanent Court of International Justice (PCIJ) that upheld:

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[54] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).
[55] Ibid.
[56] Ibid.
[57] UNCLOS I, art 2.

> Jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention. It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.[58]

Hence, it was established that no State has jurisdiction over the high seas, nevertheless, the Court observed that Turkey had the right to prosecute the French Master due to the effects produced on the Turkish vessel which took place in an assimilated territory to Turkey, in this sense the application of Turkish criminal law could not be challenged . The decision was highly criticised at the time.[59]

When using official vessels, State`s authorities have the right of visit, which allows them to stop any merchant, warship or official ships of any kind, in order to exercise police power and investigation, provided it has reasonable ground to suspect unlawful acts. Such provision can be extended due to specific treaties to which States are party.[60]

The institute of immunity refers to the prerogative of not being demanded or subjected to the jurisdiction of any other State. In this sense, it is worth mentioning that foreign State vessels and warships have the right of innocent passage in the territorial sea of another State, as well as recognised its immunity even if used for non-commercial purposes. [61]

It is important to note that States have duties on the high seas as well, such as: exercise jurisdiction over its own ship; ensure safety at sea; assist any person in distress at sea; take measures to prevent slave transportation; cooperate in repressing piracy.[62]

### 2.3 International maritime rescue law

Legal relationships among the humanity can be built in terrestrial, maritime, aerial, and outer space. However, what is relevant is the human condition of life, not the space where legal relations are created.[63] The topic regarding human rights and the law of the sea is referred to instances of States` sovereignty in the context of the premises of Public International Law.

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[58] *Lotus Case* [1927] PCIJ (PCIJ).
[59] Donald R Rothwell and Tim Stephens, *International Law Of The Sea* (1st edn, Hart Publishing 2010).
[60] Ibid.
[61] Francis Ngantcha, *The Right Of Innocent Passage And The Evolution Of The International Law Of The Sea* (Pinter Publishers 1990).
[62] Donald R Rothwell and Tim Stephens, *International Law Of The Sea* (1st edn, Hart Publishing 2010).
[63] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).

One of the most important legal instruments dealing with humanitarian issues is that of assistance to people in danger or lost at sea, being addressed in several international treaties.[64] Humanitarian assistance at sea represents a legal principle designed, eminently, to save human life, corroborating with the fundamental values of human rights and demonstrating that the formation of the law of the sea was also centred on strengthening the protection of life, the right to dignity, and individual integrity.

International treaties, such as the UNCLOS, Safe of Life at Sea Convention (SOLAS), International Convention on Maritime Search and Rescue (SAR), and the International Convention on Salvage(SALVAGE), are considered the reflection of general practices of the international maritime society on the fundamental obligation to provide assistance to people or vessels in distress at sea, being elementary conditions for individuals and society.[65]

The obligation to rescue and render assistance by States established by the international maritime rescue law is open to discussion. That point ends up being disregarded by various maritime humanitarian assistance policies, including disembarking people and handing them over to a safe place, linked to the right of innocent passage and access to a safe port.[66]

In this regard, it is important to differentiate maritime assistance from maritime rescue. The first refers to an obligation of the ship`s captain, and the latter is a maritime obligation, therefore, it is an imposition for the Coastal and Flag States.[67] Thus, the duty to render maritime assistance is related to the conduct of human life towards a safe place, usually regarding Coastal States. On the other hand, maritime rescue is related to the conduction of human life on board, which may be allowed to disembark from the ship, assisting in specific situations such as hijacking, maritime piracy and so on.

With this in mind, the interconnection between human rights and UNCLOS became clear. Even though at a first glance the Convention seems largely to be about natural resources and the environment, it is also concerned with human rights, protecting individual liberties and procedural due process.[68] The good faith, sovereign equality, non-intervention, self-

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[64] Donald R Rothwell and Tim Stephens, *International Law Of The Sea* (1st edn, Hart Publishing 2010).
[65] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).
[66] Ibid.
[67] Ibid.
[68] Bernard H. Oxman, 'Human Rights And The United Nations Convention On The Law Of The Sea' [1997] University of Miami School of Law Institutional Repository <www.repository.law.miami.edu/cgi/viewcontent.cgi?article=1404&context=fac_articles> accessed 25 July 2020.

determination of peoples, respect for human rights, the peaceful settlement of disputes and non-aggression, and the use of force are principles of international law that guide the understanding of the law of the sea. As a result, the UNCLOS provides that States must adopt appropriate measures, regulations and procedures that are in line with the Universal Declaration of Human Rights and with the various treaties that touch upon the matter.[69]

Furthermore, in rendering assistance, States must observe the principle of non-discrimination, that is, pursuant Article 98(1) of the UNCLOS, any person found at distress at sea shall be rescue, regardless their nationality or status.[70] The principle, therefore, links the duty to render assistance at sea and international human rights law, and it is deemed customary international law, also enforced by the International Maritime Organization (IMO), the United Nations Refugee Agency (UNHCR) and the International Organization of Migration (IOM), which contends as being 'essential to preserve the integrity of maritime search-and-rescue services'.[71]

Article 98 of the UNCLOS states:

> 1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
> (a) to render assistance to any person found at sea in danger of being lost;
> (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
> (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.
> 2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.[72]

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[69] Bernard H. Oxman, 'Human Rights And The United Nations Convention On The Law Of The Sea' [1997] University of Miami School of Law Institutional Repository <www.repository.law.miami.edu/cgi/viewcontent.cgi?article=1404&context=fac_articles> accessed 25 July 2020.
[70] UNCLOS, art 98(1).
[71] UNCLOS, art 2.
[72] UNCLOS, art 98.

Nevertheless, in some situations, it is necessary to invoke the use of power or forcible means in order to rescue people in distress at sea, for example, in situations involving refugees or migrants this is really common.

Regarding the obligation to provide assistance and rescue, the main case reported is the *Tampa case*. In this incident, Australia refused a Norwegian vessel entering its territorial waters, denying the right of innocent passage and access to port for the disembark of the rescued people.[73]

This situation led to diplomatic negotiations between Norway and Australia, leading to the differentiation between the obligation of assistance and the obligation of rescue. In this case, quite intriguing, the Secretary General of the IMO, William O`Neil, decided in 2001 that would be interesting to review the legal framework due to the consequences of the Tampa case, and the repercussions of the SAR Convention system.[74]

With that, the IMO was designated to deal with the issue of refugees at sea, looking for the precise meaning of the term 'safe place' and 'disembarkation' as provided in the SOLAS and SAR Conventions.[75] In the same year, the IMO General Assembly adopted the resolution A 920(22) reviewing the measures and procedures for the treatment of persons rescued at sea. The idea was to instruct the IMO Maritime Safety Committee (MSC) and the Facilitation Committee (FAL) in reassessing the regulations, identifying gaps, inconsistences, duplication, and overlaps in the rules created by the organisation.[76]

The purpose of such normative review was to guarantee appropriate actions in relation to the law of the sea, such as: render aid to all people found in distress at sea, regardless their nationality; ships that rescue people in distress at sea are allowed to delivered the survivors to a safe place; and survivors, regardless of their nationality or circumstances in which they find themselves, including undocumented migrants, asylum seekers, refugees, and illegal immigrants, will be treated on board in the manner prescribed by IMO regulations, and in

[73] Sanford Silverburg, *International Law* (Routledge 2019).
[74] Ibid.
[75] Ibid.
[76] Ibid.

accordance with the international law, human rights law as well as humanitarian maritime traditions.[77]

The *Tampa case* showed several loopholes regarding humanitarian assistance in respect of the maritime search and rescue under the international law of the sea. Consequently, the IMO and the law of the sea on the protection of human life in the maritime environment has been strengthening in order to build a maritime human right law. In this sense, both SOLAS and SAR conventions were amended to address the aforementioned issues.[78]

[77] Rafiqul Islam and Jahid Hossain Bhuiyan, *An Introduction To International Refugee Law* (Martinus Nijhoff 2013).
[78] Ibid.

## CHAPTER 3
## INTERNATIONAL REFUGEE LAW

International Refugee Law as well as the International Law of the Sea is a branch of international law dealing with the status and rights of the refugees. Mostly protected by the Refugee Convention which entails two treaties: the Convention Relating to the Status of Refugees 1951 and the Protocol Relating to the Status of Refugees 1967.[79]

The outbreak of the Second World War gave rise to the promotion of the human rights due to the expressive violation of the fundamental rights caused by the war and, consequently, the international community sought to establish internationally the inviolability of the human rights, culminating in the Universal Declaration of Human Rights (UDHR) in 1948.[80] Influenced by this declaration, in 1951 the Geneva Convention on the Protection of Refugees arouse emphasizing the protection of the refugees, mentioning in its preamble the wording of the Article 14 of the UDHR, recognising the right of persons to seek asylum from persecution in other countries.[81]

The original focus of the Convention was the protection of persons fleeing within Europe due to incidents occurring before 1951. However, because of several conflicts that took place around the world after the establishment of such Convention, culminating in forced migration, for example, became imperative to extend its guarantees to later events, and for that purpose in 1967 was promulgated the Protocol to the Status of Refugees, broadening the territorial scope of the Convention and ensuring protection to all refugees, regardless of the date of the events that gave them cause.[82] Moreover, the first paragraph of the Article 1 of the Protocol states that all contracting parties must obey to all norms specified in the text, so that there are no divergencies in its compliance, being States free to ratify it even if they are not a party of the 1951 Convention.[83]

The Convention was signed by 145 States and has created rights and obligations as well as established the definition of refugee as being everyone who is afraid to be persecuted due to

[79] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).
[80] UDHR, preamble.
[81] 1951 Refugee Convention, art 1.
[82] 1967 Protocol.
[83] Ibid.

race, colour, religion, nationality, membership of a particular social group, and political opinions.[84] Therefore, those who fit in this concept have the right to apply for asylum.

With the great flow of refugees around the world as a consequence of the aftermath of the Second World War, the United Nations General Assembly created in 1950 the High Commissioner of the United Nations for Refugees (UNHCR), which is a humanitarian organisation that aims to protect all refugees without discrimination and regardless of the reason that made he or she a refugee.[85] Thus, the UNHCR works with the support of the UN focusing on the physical and moral integrity of refugees, seeking solutions envisaging the construction of a normal life in a normal environment. It is a dual goal: to provide protection and to promote the implementation of durable solutions to this issue. The UNHCR operates with three durable solutions strategies: local integration, voluntary repatriation, and resettlement.[86] Local integration consists in the adaptation of the refugee into the society, task that often counts with the participation of the civil society along with non-governmental organisation that deals with refugees.[87]

Voluntary repatriation refers to the return of the refugee to his or her country of origin after the causes that forced them to leave have ceased. This solution is currently seen as ideal, as it does not deprive the individual of their roots.[88] It should be noted that such repatriation must be voluntary, that is, the rights of the refugee to remain in the host country and not be returned to their home state against their will are protected.[89] Resettlement, in its turn, can be understood in two approaches: at the beginning the UNHCR's endeavour was the effective transfer of a refugee from one State to another, however, nowadays performs the transfer of individuals, already recognised as refugees, but who still have protection problems or have serious integration issues in the destination country, to another State, called third country, best suited to the needs of these individuals.[90]

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[84] United Nations, ' Convention And Protocol Relating To The Status Of Refugees' *(UNHCR, 2010)* <cms.emergency.unhcr.org/documents/11982/55726/Convention+relating+to+the+Status+of+Refugees+%28signed+28+July+1951%2C+entered+into+force+22+April+1954%29+189+UNTS+150+and+Protocol+relating+to+the+Status+of+Refugees+%28signed+31+January+1967%2C+entered+into+force+4+October+167%29+606+UNTS+267/0bf3248a-cfa8-4a60-864d-65cdfece1d47> accessed 14 June 2020.
[85] United Refugees, 'About Us' (*UNHCR*, 2020) <www.unhcr.org/en-ie/about-us.html> accessed 14 June 2020.
[86] Frances Nicholson and Judith Kumin, *A Guide To International Refugee Protection And Building State Asylum Systems* (UNHCR 2017) <www.unhcr.org/3d4aba564.pdf> accessed 5 July 2020.
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] Ibid.

Nevertheless, the mechanisms for implementing the refugee law, which the UNHCR is largely responsible for, have little effectiveness. There is no doubt that violations of fundamental rights demand a more incisive response that the use of unsuccessful mechanisms such as periodic reporting system, for example. On the other hand, it is possible to find human rights treaties whose effectiveness far exceeds that of 1951 Convention.[91] As an example, the European Convention on Human Rights (ECHR), adopted in 1950 by the Council of Europe, is a treaty of a great practical effectiveness, since European Union Member States agreed to create the European Court of Human Rights, guaranteeing respect for human rights in the territorial scope of Western Europe. The international protection of refugees has two aspects: one related to the recognition of refugee status in accordance with the 1951 Convention, and one concerning the rights ensured after the status recognition.[92]

Regarding the first aspect, the UNHCR seeking to prevent restrictive interpretations or inadequate applications which causes damage to the international protection of the refugees, presented a strategy for updating the rules of the law in order to make it more adapted to the current reality. As a result, the Convention Plus was born as an international effort initiated and coordinated by the UNHCR aiming to improve the protection of refugees and to facilitate the problem solving through special multilateral agreements.[93]

The Convention Plus stems from the 1951 Convention and the 1967 Protocol, but in a way to modernise them in face of the biggest challenges tackled by International Refugee Law: durable solutions and the division of responsibility in accepting and protecting refugees. The Convention Plus focus on three main priorities: 'the strategic use of resettlement as a tool of protection', 'more effective targeting of development assistance', and 'clarification of the responsibilities of States in the event of irregular secondary movement'[94], that is, the irregular transfer of a refugee from the destination State to another.[95] Although the results cannot be measured in view of the small time lapse of the Convention Plus proposal, it is contended that such initiative is relevant given that the legal framework of international refugee law is at least

[91] Corinne Lewis, 'UNHCR And International Refugee Law: From Treaties To Innovation' [2010] London School of Economics and Political Science.
[92] Ibid.
[93] Ibid.
[94] *Convention Plus At A Glance* (UNHCR) <www.unhcr.org/403b30684.pdf> accessed 10 July 2020.
[95] Ibid.

60 years old, therefore adapting them to the new need imposed by the international scenario is essential in order to maintain the effectiveness of refugee protection.

### 3.1 Territorial Sovereignty

While the borders are, for some people, an open gate, for others is a padlock recreated and reinforced at each step taken. In times where identities are negotiated, the sovereign power seeks to regulate the difference between peoples by deciding upon their lives, upon their dignity pending on exclusions and inclusions.[96] Borders can be seen as a space of power that permeates identities, creating them and created by them. Thus, carrying a passport is carrying a citizenship, a sovereign representation that interferes within an individual's relationships. Not carrying a passport is to be exposed to emptiness, to a lack of guarantees, limbo, and vulnerability. Even with the globalisation facilitating the flow of capital, information, and people, yet there are individuals who are left out.[97] The asylum application process poses several obstacles for the applicant, new frontiers to overcome, and identity issues related to the concept of sovereignty.

In terms of international mobility, sovereignty can be observed in its territorial aspect as the authority over a territory and a group of individuals: a sovereignty that is experienced at the border by separating, excluding, and classifying peoples.[98] The concept resides within the territorial State, seeking to control a population day by day, and it is constituted by its borders, delimitating the scope of authority and the space of identity.

Anthony Anghie believes that sovereignty requirements are based on European premises, which largely excluded African and Asian societies. In this context, the only objective was to give an air of legality to colonial plunder, previously justified by means of international treaties riddled with consent biases.[99] African and Asian nations, in the face of a redefinition and consequent exclusion of the uncivilised from the international protection system, were left out from the law.[100] This framework paved the way for the European countries, gathered during the Berlin Conference of 1884-1885, to conceptualise the notion of sovereignty in new terms,

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[96] Thomas Gammeltoft-Hansen, *Access To Asylum: International Refugee Law And The Globalisation Of Migration Control* (Cambridge University Press 2011).
[97] Ibid.
[98] Ibid.
[99] Antony Anghie, *Imperialism, Sovereignty And The Making Of International Law* (Cambridge University Press 2011).
[100] Ibid.

which would, under the aspect of a civilising mission, justify the division and the colonial exploitation of sub-Saharan Africa.[101] Anghie also affirms that the concept of sovereignty, due to its colonial heritage, makes its exercise at an international level to reproduce the inherent inequalities of its redefinition, due to the flexibility of being an instrument that can be used for the purposes of the civilising mission - term commonly used at the time.[102]

Furthermore, the author considers that the concept of sovereignty underpins the theoretical paradigm of current international law, which can be traced back to the 19th century with a redefinition of the concept of sovereignty that concealed a core of racial discrimination for a conceptualisation of the term, during the inter-war period, which would also encompass inequalities. Additionally, the current international law serves, according to Anghie, to expand the possibilities of intervention.[103] Nevertheless, the control and decision regarding the entrance and the remaining of a person within a territory is under State's power. However, such authority is not absolute, for instance, in the *Corfu Channel Case* the International Court of Justice (ICJ) upheld that a country cannot permit acts contrary to right of others within its borders.[104] However, territorial sovereignty is what enables States to regulate migration and control their borders, allowing them to banish persons from their land. The Report of the International Law Commission shed a light in this matter:

> The right of a state to expel an alien from its territory … is uncontested ... The right to expel is not conferred on a state by some external rule; it is an inherent right of the state, flowing from its sovereignty.[105]

Consequently, State sovereignty is a challenge for asylum seekers, refugees, and migrants due to its entitlement to stop them in its borders as well as expel them from its territory, having just a few exceptions, such as the principle of *non-refoulement*.

For Giorgio Agamben, sovereignty is the power to include or except, that is, some people will be incorporated into the bios (political life) while other will be excluded. In his work he

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[101] Matthew Craven, 'Between Law And History: The Berlin Conference Of 1884-1885 And The Logic Of Free Trade' (*Oxford Academic*, 2015) <academic.oup.com/lril/article/3/1/31/2413101> accessed 26 July 2020.
[102] Antony Anghie, *Imperialism, Sovereignty And The Making Of International Law* (Cambridge University Press 2011).
[103] Matthew Craven, 'Between Law And History: The Berlin Conference Of 1884-1885 And The Logic Of Free Trade' (*Oxford Academic*, 2015) <academic.oup.com/lril/article/3/1/31/2413101> accessed 26 July 2020.
[103] Antony Anghie, *Imperialism, Sovereignty And The Making Of International Law* (Cambridge University Press 2011).
[104] *Corfu Chanel* [1949] ICJ (ICJ).
[105] *Draft Articles On The Expulsion Of Aliens, With Commentaries* (UN 2014) <www.legal.un.org/ilc/texts/instruments/english/commentaries/9_12_2014.pdf> accessed 9 July 2020.

analyses the identity construction through sovereignty, which some individuals are considered citizens, and some are left to 'bare life', having no rights, such as the refugees.[106] From this perspective, sovereignty would be defined as the capability to differentiate between valuable lives, such as the citizens, and the home sacer, such as the refugees. In this context, being labelled as home sacer means to be an individual that can be killed without cost, that is, a non-grievable person.[107]

With this in view, the 'state of exception', also known as refugee camps, is initiated. Therefore, labelling and resigning an individual to bare life, which is commonly practiced by several European States cooperating with the power of exception, being mostly manifested through the European Agency for the Management of Operations Cooperation at External Borders (FRONTEX), is using its authority to permit or refuse a person's legitimacy and right to life.[108]

The Refugee Convention, for instance, does not establish a responsible body for its interpretation, leaving it to the national courts of each State the role of solving controversies arising from its interpretation, although in practice UNHCR releases guidelines for it.[109] Consequently, strengthens the sovereignty of States with regard to the asylum procedures, and at the same time that it does not encourage a homogeneous interpretation and application.

On the one hand, the space occupied by refugees within the contemporary international law context is delimited by the classic notion of States in relation to its autonomy, and on the other hand, is built around the purpose of solidarity derived from the principles of international law. Hence, sovereignty has been the core element regarding refuge procedures, the normative adjustment fluctuates between State behaviour inclined to grant protection and the prevalence of sovereignty and domestic interests.

The outlook for the future is that the number of people who wish to leave their countries or those who are forced to leave, will continued to exceed the number that countries are willing to receive.[110] Since the phenomenon of forced migration is often seen by States as a potential threat to national security, it is expected that sovereignty will not acquiesce to the unrestricted

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[106] Clara Voyvodic Casabó, 'Security And Self: Identity Construction From Above And Below In The Refugee Crisis In Europe' Belonging and Inclusion University of Glasgow.
[107] Ibid.
[108] Ibid.
[109] *Handbook On Procedures And Criteria For Determining Refugee Status Under The 1951 Convention And The 1967 Protocol Relating To The Status Of Refugees* (UNHCR 1979) <www.unhcr.org/4d93528a9.pdf> accessed 8 July 2020.
[110] Myron Weiner, *International Migration And Security* (Westview Press 1993).

granting of asylum as well as the seek for permanent solutions. The effort to implement binding obligations between the State and the individual may, therefore, appear to be in vain.

In this sense, the international cooperation as a way of dividing responsibilities – burden sharing – complying with solidarity among countries seems to be better suited to a political and normative reality that is not yet able to establish a core of obligations that override the sovereignty. While national interests prevail when States have to deal with mass displacement at their borders, must be bearded in mind that States embrace international cooperation as a way to achieve their goals. In sum, State's interests, from a sovereignty perspective, commonly prevails. Article 14 of the UNHCR, for example, establishes the general right to escape from political, ideological, or racial persecution, nevertheless, does not provide an obligation to the State to grant asylum.[111]

### 3.2 Right to Asylum

The right to asylum is regulated, at an international level, by the 1951 Refugee Convention and the 1967 Protocol, assuring to some people, due to certain circumstances, the refugee status. Such status is given to any person who is being persecuted in his or her country of origin because of race, nationality, religion, political opinion, or membership of a particular social group.[112]

Persecution, well-founded fear, and extraterritoriality are essential elements to the definition of refugee. However, persecution, despite being an essential element, is not defined by international diplomas, being a problematic fact in assessing the application. In contrast, well-founded fear refers to the fear that persecution is likely to occur. Lastly, the third element is the fact that the applicant needs to be located outside his or her country of origin, also known as alienage. In recent times, however, there has been an attempt to reduce the relevance of extraterritoriality in view of the closure of borders of several States for the asylum seekers, because if it remained the protection provided by the Refugee Law could become useless or superfluous. Although, it turns out that in practice, extraterritoriality remains an essential element of the procedure, which can be evidenced by the fact that the number of refugees in the world is decreasing, and at the same time the number of internally displaced person has

[111] *Handbook On Procedures And Criteria For Determining Refugee Status Under The 1951 Convention And The 1967 Protocol Relating To The Status Of Refugees* (UNHCR 1979) <www.unhcr.org/4d93528a9.pdf> accessed 8 July 2020.
[112] Ibid.

been increasing.[113] The reasons listed for the recognition of the status are enshrined in several treaties that deals with the matter, establishing minimum standards of protection. Nevertheless, the effectiveness of this protection is within States hands. The UNHCR establish in its Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees a guideline regarding the refuge procedure, it has no indisputable biding force.

Pursuant Article 14 of the Universal Declaration of Human Rights:

> (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
> (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.[114]

Notwithstanding, despite of the existence of the right to seek asylum, States have no obligation, under public international law, to grant it. The UDHR ensures the right, however, do not establish any obligation towards States. Following this trend, the ICJ stated that the act of granting asylum is 'the normal exercise of the territorial sovereignty'.[115]

As a matter of law, it should be noted that UDHR is soft law, therefore, is not legally binding. Furthermore, the 1951 Refugee Convention as well as other treaties adopted on the basis of UDHR does not refer to the right of asylum in any operational way.[116] Overall, it is simply provided that everyone has the right to leave any country, however, it is not provided a general right to enter another country besides their own.[117] The issue is regulated by the aforementioned Convention along with the 1967 Protocol, ensuring the refugee status for some people in certain circumstances, aiming their protection in order to guarantee the minimum requirements of life and dignity throughout its humanitarian character. Nevertheless, it is a product of States prerogatives, human rights, politics, and law.[118]

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[113] 'Global Trends - Forced Displacement In 2018 - UNHCR' (*UNHCR Global Trends 2018*, 2018) <www.unhcr.org/globaltrends2018/> accessed 20 June 2020.
[114] UDHR, art 14.
[115] *Asylum* [1950] ICJ, 266 (ICJ).
[116] Frances Nicholson and Judith Kumin, *A Guide To International Refugee Protection And Building State Asylum Systems* (UNHCR 2017) <www.unhcr.org/3d4aba564.pdf> accessed 5 July 2020.
[117] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).
[118] Thomas Gammeltoft-Hansen, *Access To Asylum: International Refugee Law And The Globalisation Of Migration Control* (Cambridge University Press 2011).

Additionally, Article 18 of the Charter of Fundamental Rights of the European Union states the following:

> The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.[119]

As opposed to the UDHR, such charter is binding and reaffirms some rights enshrined by other bodies of law. However, the general right to asylum is also merely set forth on those treaties, including the 1951 Refugee Convention, without establishing any obligation towards States to grant it.[120] Therefore, it is understood that only the right to seek asylum is guaranteed, but there is no guarantee that the State will grant it. For instance, the wording of the Article 14(1) of the UDHR makes clear that everyone is entitled to seek asylum, nevertheless, it is a State prerogative to give it or not.[121]

On the one hand, a State which is open to refugees, allowing them to remain within its territory as if they were its own citizens, is embraced by the international community. On the other hand, a State that closes its borders, repelling those in need, denying access to asylum, still need to process their application in order to avoid a breach of its own obligation under the treaties they are party, such as the Refugee Convention.[122] Therefore, it is assumed that States are forced to access asylum application in order to fulfil its obligations, however, they are free to dispense such request. Consequently, there is a need to require from States internal measures concerning the full implementation of the right to seek asylum, protecting, and assuring the fundamental rights and freedoms of the asylum seekers, without discrimination.[123]

### 3.3 *Non-Refoulement*

The principle of *non-refoulement* is an essential postulate for the legal protection of the refugee: if the forced return to the country of origin or to a third country implies injury or threat of injury to fundamental rights, then the refugee cannot be expelled from the country where he or she is.[124] There is no possibility of a comprehensive international protection for the human being

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[119] ECHR, art 18.
[120] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).
[121] UDHR, art 14(1).
[122] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).
[123] Ibid.
[124] Thomas Gammeltoft-Hansen, *Access To Asylum: International Refugee Law And The Globalisation Of Migration Control* (Cambridge University Press 2011).

without the recognition of this principle, which is why qualifies as a *jus cogens* norm. The wording of the Article 33 of the 1951 Refugee Convention enshrines the importance of the principle:

> 1) 'No Contracting State shall expel or return (*'refouler'*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
> 2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'[125]

The concept of *non-refoulement* is, therefore, the core element of all refugee rights, meaning that the asylum seeker or refugee cannot be returned to the territory in which their life or physical integrity is in danger.[126] As opposed to that is given to this person protection, a new home, a new country, a new opportunity to live. The principle emerged shortly after the Second World War – because during the conflict the practice of refoulement was very common, for instance, two million Soviets prisoners of war were expelled through a decision approved by the Yalta Conference.[127] From then on, a customary rule emerged prohibiting the expulsion of those vulnerable persons, influencing international organisations to focus on resettlement and repatriation.

The relevance of its effects makes its content go beyond the borders of international protection of refugees and the UNHCR interests, the prohibition of the extradition proves to be of great value in the context of treaties against torture, for example. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishing of 1984, provides in its Article 3 the following:

> 1. No State Party shall expel, return ("*refouler")* or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a

[125] 1951 Refugee Convention, art 33.
[126] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).
[127] Phil Orchard, 'Refugees And The Evolution Of International Cooperation' [2006] International Conference on Refugees and International Law: The Challenge of Protection.

> consistent pattern of gross, flagrant or mass violations of human rights.[128]

Thus, no State can expel, under any pretext, a person who is at risk of torture in the country of origin because the expulsion would imply complicity with the degrading treatment, which is inadmissible, and whose prohibition has a *jus cogens* nature.[129]

In relation to the application of the principle of *non-refoulement* in the event of the adoption of barriers at the maritime borders of a coastal State, the UNCLOS considers the territorial sea as part of the State's territory, therefore, States can exercise its sovereignty and jurisdiction.[130] Thus, the observance of the principle regarding the admission of asylum seekers in the territorial sea of the destination country follows the same reasoning as the admission of those at the territorial borders: at least temporarily, for the purpose of accessing fair and effective procedures for formal determination of refugees status or other lasting solution.[131] Even though the passage of vessels carrying immigrants with the intention of illegally entering the territorial sea of the destination country, which may be considered not innocent due to the violation of the domestic migration legislation, their passage cannot be prevented due to the presence of refugees or asylum seekers on board, and pursuant Article 31(1) of the 1951 Convention the penalisation of asylum seekers who enter or remain irregularly in the State of destination is prohibited.[132] Additionally, in view of the relativization of the principle of state sovereignty, the right of control over the territorial sea is limited by observance of the *non-refoulement* obligation.[133]

Hence, it is not possible to have effective protection against refoulement without access to the landing ports of the destination country and, consequently, to its territory, since the procedure for formal recognition of refugee status can only be fair and effective if conducted within the territory.[134] In the case of the contiguous zone, when exercising its migratory control powers by intercepting and redirecting a ship in that area, the State must consider whether such act will put passengers in risk of refoulement, even if their internal migration rules are disrespected.[135]

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[128] OHCHR, art 3.
[129] *Advisory Opinion On The Extraterritorial Application Of Non-Refoulement Obligations Under The 1951 Convention Relating To The Status Of Refugees And Its 1967 Protocol* (UNHCR).
[130] J. A Frowein, R Wolfrum and C. E Philipp, *Max Planck Yearbook Of United Nations Law. Volume 5, 2001* (BRILL 2002).
[131] Ibid.
[132] 1951 Refugee Convention, art 31(1).
[133] J. A Frowein, R Wolfrum and C. E Philipp, *Max Planck Yearbook Of United Nations Law. Volume 5, 2001* (BRILL 2002).
[134] Ibid.
[135] Ibid

Finally, regarding the exercise of migratory control on the high seas, despite the principle of freedom of navigation be in force, it is limited by the principle of safeguarding human life, and, therefore, follows the duty to render assistance to any person or vessel in danger at sea that must be respected at all times.[136]

Notwithstanding, this duty of assistance is only fulfilled after the rescued persons are in a safe place, and in the case of rescuing refugees or asylum seekers at sea, safe disembarkation corresponds to the *non-refoulement* principle. According to the UNHCR's position, this disembarkation must occur in the coastal territory closest to the rescue site.[137] With regard to the admission of asylum seekers rescued on the high seas, albeit temporarily, and the guarantee of access to fair and effective refuge procedures, UNHCR attributes to the coastal States neighbouring to the rescue area the responsibility of accepting their disembarkation and to offer them temporarily protection, allowing access to the procedures for determining their status, or to another lasting solution with respect to *non-refoulement*.[138]

In this sense, the practice of interception of vessels violates the principle of *non-refoulement* and even the right of asylum seekers rescued at sea to seek protection, as it acts as a barrier to access to the territory of the destination State, or any other safe State, preventing them from having access to the necessary measures for determining their status and also exposing them to the danger of being forcibly redirected to a territory where their life, physical integrity, and freedom are threatened.[139] Thus, due to the extraterritorial scope of application of the *non-refoulement*, the principle must be applied regardless of whether the action of the intercepting State occurred or not outside its national territory and may give rise to international accountability of that State if breached.[140]

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[136] J. A Frowein, R Wolfrum and C. E Philipp, *Max Planck Yearbook Of United Nations Law. Volume 5, 2001* (BRILL 2002).
[137] *Rescue At Sea: A Guide To Principles And Practice As Applied To Refugees And Migrants* (UNHCR) <www.unhcr.org/450037d34.pdf> accessed 8 July 2020.
[138] Ibid
[139] J. A Frowein, R Wolfrum and C. E Philipp, *Max Planck Yearbook Of United Nations Law. Volume 5, 2001* (BRILL 2002).
[140] Ibid.

## CHAPTER 4

## TRANSNATIONAL ORGANISED CRIME

Transnational organised crime is a complex phenomenon, whose definition depends on the occurrence of various characteristics. According to the Article 3(2) of the United Nations Convention against Transnational Organised Crime (UNTOC) a crime is deemed transnational when:

> 2. For the purpose of paragraph 1 of this article, an offence is transnational in nature if:
> (a) It is committed in more than one State;
> (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
> (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
> (d) It is committed in one State but has substantial effects in another State.[141]

Nevertheless, there is no consensus among scholars on the subject regarding the definition of organised crime. Crimes committed by criminal organisations varies over time as local and global conditions change. Each organisation has specific characteristics and there is no way to generalise them.[142] However, some efforts have been made to reach, at least, a partial definition of it.

Organised crime presents peculiarities in relation to other forms of crime. Those peculiarities that make it so difficult to be visualised and analysed, since its activities are usually covered by appearance and its operations are carried out by apparently suitable people.[143] Gained prominence after the end of the Cold War along with the flow of movement of goods and people across borders, reaching unprecedented levels. Inspection, in its turn, has decreased. Criminals, armed with new communication technologies and information, had created logistics designed to commercialise their products – ranging from drugs, small arms, to people and elements for building nuclear weapons. Human trafficking was one of these modalities that gained strength in the 1990s, and according to Louise Shelley: 'Human Smuggling and trafficking have been among the fastest growing forms of transnational crime because current world conditions have created increased demand and supply'.[144] The fall of the Berlin Wall,

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[141] UNTOC, art 3(2).
[142] Paolo Campana, 'Explaining Criminal Networks: Strategies And Potential Pitfalls' (2016) 9 Methodological Innovations.
[143] Ibid
[144] Louise Shelly, *Human Trafficking* (Cambridge University Press 2010).

the civil wars in the Balkans and Africa, economic crisis, among other events, in addition to greater mobility, contributed to the generation of this supply and demand for illicit services and products.[145] Hence, it was realised that human trafficking could not remain restricted to the field of human rights protection, consequently, it was promoted to the category of crime to be combated under the Convention against Transnational Organised Crime, and the debate surrounding the topic gain new outlines.

In 2010, the UNTOC made a study on transnational organised crime – The Globalisation of Crime: A Transnational Organised Crime Assessment – in which reported to the definition of organised group given by the Convention and concluded:

> Today, organized crime seems to be less a matter of a group of individuals who are involved in a range of illicit activities, and more a matter of a group of illicit activities in which some individuals and groups are presently involved. If these individuals are arrested and incarcerated, the activities continue, because the illicit market, and the incentives it generates, remain.[146]

Hence, more important than understanding and pursuing the criminal groups is understanding how the illicit market works. The organised crime exists due to the demand for its services and/or products, and even if criminal groups are identified and, consequently, eliminated, if there is still demand and/or business opportunities, others will take their place. Thus, the definition of transnational organised crime would cover all criminal activities motivated by financial gain having international implications.

International law against transnational crime, as well as the international law of the sea and international refugee law, is part of the legal basis for irregular maritime immigration. In this sense, it is important to assess every situation involving rescue of asylum seekers, refugees, and migrants at sea.

The UNTOC, also known as Palermo Convention, was the first global instrument created to combat transnational crime, emerging to fill a gap within international law. It is estimated that such crimes leave countless victims and generates at least 870 billion dollars per year.[147] Until its entry into force, there was only treaties concerning specific criminal issues, such as drug

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[145] Louise Shelly, *Human Trafficking* (Cambridge University Press 2010).
[146] *The Globalization Of Crime A Transnational Organized Crime Threat Assessment* (UNODC 2010).
[147] 'UN Convention Against Transnational Organized Crime Celebrates 10 Years' (*Unodc.org*) <www.unodc.org/lpo-brazil/en/frontpage/2013/10/16-un-convention-against-organized-crime-celebrates-10-years.html> accessed 20 June 2020.

trafficking and money laundering. Organised crime, however, became transnational and the cooperation between countries to combat it, in all forms, developed a necessity.[148] The Convention, that came into force in 2003, demonstrates the commitment of the international community to face this challenge, encompassing almost all criminal actions motivated by profit and committed by organised groups, involving more than one country.[149]

Palermo Convention and its protocols had great acceptance by the international community due to two main factors. First, the international demand for an instrument that outlines concrete guidelines for international cooperation towards organised crime. Second, the language used in the document, more suggestive than prescriptive, was well accepted, in terms of sovereignty, even by the most conservative countries. In an effort to educate and explain the phenomenon at a global level, the United Nations Office on Drugs and Crime (UNODC) launched in 2012 a campaign against transnational organised crime that illustrated its different forms, such as illicit drug trafficking, smuggling of migrants, trafficking in persons, money laundering, counterfeiting, environmental crime and illegal arms trafficking.[150]

With almost a universal character, the Convention is a milestone that offers 178 Member States a cooperation framework to combat this problem. States that ratify the treaty commit themselves to several rules, including the typifications of domestic crimes – participation in organised criminal groups, money laundering, corruption, and obstruction of justice -, adoption of extradition frameworks, mutual legal assistance, and police cooperation. In addition, promotes training and technical assistance for building or improving the necessary capacity of national authorities.[151] Notwithstanding, UNTOC is not the only instrument addressing the issue of transnational crimes, there are also protocols targeting specific forms of such crime, namely: Smuggling of Migrants Protocol, the Trafficking in Person Protocol, and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.[152]

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[148] Louise Shelly, *Human Trafficking* (Cambridge University Press 2010).
[149] 'United Nations Convention Against Transnational Organized Crime' (*United Nations: Office on Drugs and Crime*) <www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> accessed 20 July 2020.
[150] 'New UNODC Campaign: Transnational Organized Crime Is A US$870 Billion A Year Business' (*United Nations: Office on Drugs and Crime*, 2012) <www.unodc.org/unodc/en/frontpage/2012/July/new-unodc-campaign-highlights-transnational-organized-crime-as-an-us-870-billion-a-year-business.html> accessed 20 June 2020.
[151] 'Organized Crime Module 16 Key Issues: Organized Crime International Framework - The Organized Crime Convention And Its Protocols' (*Unodc.org*, 2019) <www.unodc.org/e4j/en/organized-crime/module-16/key-issues/organized-crime-international-framework---the-organized-crime-convention-and-its-protocols.html> accessed 20 June 2020.
[152] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).

As a guardian of the Convention, UNTOC plays a vital role in helping States to translate their commitments into action, to integrate criminal and security warrant related to UN system, and to promote global awareness of the problem.[153]

### 4.1 Smuggling of Migrants

Pursuant the Article 3(a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air:

> Smuggling of migrants' shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;[154]

In order to complement such definition, the article also gives the meaning of illegal entry as being the 'crossing borders without complying with the necessary requirements for legal entry into the receiving State'.[155] In this regard, it is important to note that not all acts that facilitate or allow illegal immigration comprise smuggling of migrants, because the profit-making, which is the purpose of the crime, must be engaged in the action.

Thus, the smuggling of migrants is characterised when the transportation of people across borders, illegally, is done upon payment or promise of payment. The distinction between this crime and trafficking in person, which will be assessed later on, is that in the first there is no intention of exploitation after the delivery of the person, because the aim is the profit generated by the manufacture and sale of false documents as well as the transportation.[156] In order to characterise the latter, it is necessary to have the intention of some kind of exploitation.[157] Smuggling is widely used by people who is seeking refuge, that pay for this type of service believing they will be able to find a better life in another country. In these cases, especially when the smugglers themselves promise employment elsewhere, the victims end up falling into a debt bondage regime or are sold to explorers for compensation of the expenses they had with them.

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[153] 'About UNODC' (*United Nations: Office on Drugs and Crime*) <www.unodc.org/unodc/en/about-unodc/index.html> accessed 20 June 2020.
[154] Protocol against the Smuggling, art 3(a).
[155] Ibid.
[156] Thomas Gammeltoft-Hansen, *Access To Asylum: International Refugee Law And The Globalisation Of Migration Control* (Cambridge University Press 2011).
[157] Ibid.

In this respect, Shelley highlights 'Many of these illicit immigrants have paid human smugglers and cannot be considered victims of trafficking. But all too often those who pay smugglers become victims of trafficking along the way or on arrival'[158], and further emphasises:

> Although the phenomena of human smuggling and trafficking are clearly delineated legally, in reality the situation is often not as clear. Because trafficking often occurs within the context of large-scale migration, there are numerous possibilities for abuse. Individuals may start off as paying clients of human smugglers but some of the migrants, especially women and children, become trafficking victim.[159]

The difficulty is when people are caught at the border, because there is hardly any way to be sure if they would be exploited later and, therefore, they are treated as illegal immigrants and deported. Hence, it is extremely important that States respect the principle of non-refoulement even if they are not sure if all those people are seeking for refuge. By doing so, the purpose of the Protocol which is to 'prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants', would be achieved.[160] To that end, the treaty establishes several obligations to preserve and protect the rights of the migrants, taking the necessary measures to assist them.

Regarding the rescued at sea, among the migrants, people involved in the smuggling may be often confused with them, and, therefore, being delivered to a safe place. Nevertheless, according with the Article 6(1) of the Protocol it is implied that if a State's authority suspects of the commitment of the crime, they must investigate and prosecute.[161] Consequently, the following articles provide an operative system for dealing with the smuggling of migrants, such as: cooperation between States, measures to combat the crime, and safeguard clauses.[162] In that respect, States should have a cooperative relationship between them in order to take necessary measures towards the prevention of the smuggling of migrants at the sea, ensuring the safety of the migrants as well as their humane treatment.

Under the Protocol, therefore, States are entitled to intercept vessels on the high seas following consultation with the flag State if they believe the ship is involved with smuggling of migrants. However, they must always respect the principle of *non-refoulement*, complying with their

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[158] Louise Shelly, *Human Trafficking* (Cambridge University Press 2010).
[159] Ibid.
[160] Protocol against the Smuggling, art 2.
[161] Ibid.
[162] Protocol against the Smuggling, art 7,8,9.

obligations under international human rights and refugee law.[163] The wording of the Article 19(1) of the Protocol shed a light in this issue:

> Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of nonrefoulement as contained therein.[164]

Furthermore, taking into account the vulnerability of those persons, the Article 5 of the Protocol states that 'migrants shall not become liable to criminal prosecution',[165] protecting them from violence, preserving their rights in accordance with public international law, and taking appropriate measures to deliver them to a place of safety. It must be note that everyone rescued at sea, not only smuggled migrants, is entitled to be delivered to a safe place pursuant the provisions of the SOLAS Convention and the SAR Convention. However, only the Smuggling of Migrants Protocol do not permit their liability to criminal persecution, consequently, prohibiting their disembarkation to a place that would put them in any danger.

The scope of the Protocol is extended to the assistance and protection of smuggled migrants, not being limited just to the law enforcement, because takes into consideration their vulnerability as well as their economic, psychological, social, and cultural situation. Towards this end, since March 1999, the UNODC maintained the Global Program against Trafficking in Persons in collaboration with the United Nations Interregional Crime and Justice Research Institute (UNICRI). The Program cooperates with Member States in combating crimes and trafficking in persons, highlighting the involvement of organised crimes and promoting measures of disapproval for such actions.[166]

Following this trend, in the same year, the mandate of the Special Rapporteur on the Human Rights of Migrants was created the Commission on Human Rights pursuant to resolution 1999/44.[167] Its purposes are the protection of human rights of migrants, taking into

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[163] Thomas Gammeltoft-Hansen, *Access To Asylum: International Refugee Law And The Globalisation Of Migration Control* (Cambridge University Press 2011).
[164] Protocol against the Smuggling, art 19(1).
[165] Ibid.
[166] *An Analytical Review 10 Years On From The Adoption Of The UN Trafficking In Persons Protocol* (ICAT 2010) <www.unodc.org/documents/human-trafficking/ICAT/ICAT_Backgound_Paper.pdf> accessed 26 July 2020.
[167] 'OHCHR | Special Rapporteur On The Human Rights Of Migrants' (*Ohchr.org*) <www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/SRMigrantsIndex.aspx> accessed 26 July 2020.

consideration the vulnerability of women, children and irregular/undocumented persons; request and receive information concerning violations of their human rights; take appropriate measures to prevent and remedy such violations; promote the application of the international norms; recommend actions, both in national and international level, to supress human rights violations; among other tasks.[168]

The adoption, in 2000, of the Protocol to Prevention, Suppress and Punish Trafficking in Persons Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime, represents a fundamental milestone in international efforts to tackle human trafficking, which is considered a modern form of slavery.[169]

### 4.2 Trafficking in Persons

Smuggling of migrants and trafficking in person are often confused, whereas the first involves the procurement of illegal entry in order to obtain financial benefit, the latter requires the use of force or other forms of coercion with the purpose of exploitation.[170] The definition of such crime is given by the Trafficking in Persons Protocol:

> `Trafficking in persons` shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;[171]

With the evolution of technologies, international mobility, and communication, criminal organisations have found opportunities never imagined before to develop their business. These new technologies have enabled criminal groups to organise themselves in a new way: as ‘networks’ giving more flexibility to the organisation, as well as hampering its research and

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[168] 'OHCHR | Special Rapporteur On The Human Rights Of Migrants' (*Ohchr.org*) <www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/SRMigrantsIndex.aspx> accessed 26 July 2020.
[169] *An Analytical Review 10 Years On From The Adoption Of The UN Trafficking In Persons Protocol* (ICAT 2010) <www.unodc.org/documents/human-trafficking/ICAT/ICAT_Backgound_Paper.pdf> accessed 26 July 2020.
[170] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).
[171] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized, art 3(a).

pursuit, and at the same time generating greater profits, due to the lower costs that new technologies provide.[172] Regarding human trafficking, networks are essential, both for capturing victims (especially in cases where they are deceived with false promises of good jobs, weddings and so on), as well as for locomotion and delivery.[173] Trafficking in persons is most practiced by criminal organisations and for this reason it was debated and integrated into the scope of the UNTOC. It is one of the modalities of organised crime that generates more profit, only losing to drug trafficking. Its big advantage is that the 'goods' can be sold repeatedly by criminals.[174] Additionally, the traffic of workers is very profitable since the explorers make a profit from the work as well as from the reselling to other explorers.

On the other hand, even though one of its goals is the profit making, this practice is also used for '[...] to fund a terrorist group, a guerrilla movement, or an insurgency. Others trade in people to provide suicide bombers.'[175] Therefore, human trafficking in some part of the world has a very close link with terrorist groups and, in countries in conflict, with insurgent groups, not only as a source of financing, but also as a supply of people and, in the case of women, as a reward of soldiers.[176] The crime is practiced by traditional criminal organisation as well as new ones that arose after the end of the Cold War. They act in the most diverse way, depending on the type of the crime and the region of the globe.[177]

Trafficking in person takes place all around the world and several patterns are repeated. Thus, there are great difficulty in identifying the victims and to establish more accurate statistics and studies on the question. Overall, the victims of human trafficking are also victims of a social reality, being in a situation of vulnerability. These weaknesses are generated by economic, political, social, or cultural issues.[178] The lack of perspective in certain countries and regions make people seek opportunities elsewhere to support themselves and family members. Inequality of treatment between ethnic groups, or between genders, in some places, also allows for the emergence of vulnerable populations.[179]

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[172] Paolo Campana, 'Explaining Criminal Networks: Strategies And Potential Pitfalls' (2016) 9 Methodological Innovations.
[173] Ibid.
[174] Louise Shelly, *Human Trafficking* (Cambridge University Press 2010).
[175] Ibid.
[176] Ibid.
[177] Louise Shelly, *Human Trafficking* (Cambridge University Press 2010).
[178] Ibid.
[179] The corruption among the border's authorities as well as the diplomatic ones is frequent, both in countries that is known to be corrupt, as in those considered more acquitted. Police and other enforcement authorities may also collaborate in maintaining criminal activities, by omitting their functions by means of rewards, or simply because they are unaware of the serious issues involved in conducts apparently 'acceptable'.

The use of violence, both physical and psychological, is an elemental part of this crime. In general, they suffer physical aggression, deprivation of food, as well as death threats for themselves and loved ones. Criminal organisations are currently linked with the society from which the victims are, because, in addition to knowing their reality better, they are able to transmit more confidence to deceive them.[180]

Human trafficking is, therefore, composed by three elements: action, means and purpose.[181] The action is the recruitment, transfer, accommodation, or hosting. The means are the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of authority or taking advantage of the situation of vulnerability, or the surrender or acceptance of payments or benefits to obtain a person's consent. The elements all together must be present to characterise the criminal conduct, except in cases involving children, when the means, as provided for the Article 3(c) of the Protocol, are not needed.[182]

Often times, the distinction of smuggling of migrants and trafficking in person is not always clear, however, it is safe to say that refugees and migrants travelling at the sea towards a safe place, cannot be confused with the meaning of both crimes, since the purpose of exploitation is no present.[183] In this sense, the Trafficking in Person Protocol establishes several requirements towards States regarding the rescue of those people in distress at the sea, being one of its purposes the prevention of the human trafficking, by taking measures to investigate and prosecute suspect persons of trafficking in persons, and protect and assist the victims.[184]

In the context of irregular maritime migration, the Protocol entails obligations towards the protection of refugees and migrants rescued at sea, bearing in mind that persons engaged or associated with human trafficking may also be saved and protected by mistake.[185] That is, rescued people may be offenders as well as victims, reason why is needed a careful investigation if suspected trafficking.

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[180] Paolo Campana, 'Explaining Criminal Networks: Strategies And Potential Pitfalls' (2016) 9 Methodological Innovations.
[181] Anne Gallagher, *The International Law Of Human Trafficking* (Cambridge University Press 2010).
[182] Ibid.
[183] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art 4.
[184] OHCHR, art 2.
[185] Martin Ratcovich, 'International Law And The Rescue Of Refugees At Sea' (PhD, Stockholm University 2019).

## CHAPTER 5

## RESCUE MISSION AT THE MEDITERRANEAN SEA

Persecutions, conflicts, and human rights violations continue to force people to leave their homes and seek security in Europe. Many risks their lives and face dangerous journeys to the continent. It is estimated that 362,000 refugees and migrants risked their lives crossing the Mediterranean Sea in 2016, with 181,400 people arriving from Italy and 173,450 in Greece. In the first half of 2017, more than 105,000 refugees and migrants entered Europe.[186]

This movement towards the European continent continues to have a devastating impact on many lives. Several persons are believed to have died or disappeared while crossing the Mediterranean Sea towards Europe. The risks do not end once they reach their destination. Those who travel irregularly across the continent suffer several abuses, including being prevented from crossing borders.[187] With so many lives at risk, rescue mission at sea carried out by different actors must remain a priority, but this is not what is happening today. In 2015, the Operation Sophia arouse as a response to the huge migration issue with the purpose of controlling the migration flow in the Mediterranean Sea. This implies, among other tasks, patrolling that crossing area where several people died trying to reach Europe, and this is also means rescuing people in distress at sea.[188] The operation was an essential part of the European Union's work to dismantle the trafficking in person businesses and improve maritime security and stability within the Mediterranean.

Amnesty International estimates that at least 23 thousand people died from 2000 to 2014 risking themselves on the tortuous paths to the Old Continent.[189] The frightening numbers tend to increase in the current word scenario. The incessant wars in Syria and the conflicts in the Middle east and Sub-Saharan Africa gradually inflate this data.[190] Unfortunately, the European Union's performance in face of the facts also seems to have its share of responsibility in these serious statistics, and, therefore, it must be critically analysed with respect for human rights.

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[186] United Refugees, 'Europe Situation' (*UNHCR*, 2017) <www.unhcr.org/en-ie/europe-emergency.html> accessed 27 June 2020.0

[187] Ibid.

[188] 'About Us - Operation Sophia' (*Operation Sophia*, 2015) <www.operationsophia.eu/about-us/> accessed 27 June 2020.

[189] The Human Cost Of Fortress Europe: Human Rights Violations Against Migrants And Refugees At Europe's Borders' (*Amnesty.org*, 2014) <www.amnesty.org/en/documents/eur05/001/2014/en/> accessed 15 July 2020.

[190] *Global Report On International Displacement* (IDMC 2019) <migracionesclimaticas.org/wp-content/uploads/2019/05/2019-IDMC-GRID.pdf> accessed 27 June 2020.

'Fortress Europe' is how Amnesty International calls the process that the continent has been undergoing in preventing immigration.[191] The fact is that Europe has been increasingly concerned with protecting its borders in order to prevent the entry of illegal immigrants and less concerned with the defence of the human rights of refugees.

The EU-Turkey deal illustrates such situation. The Syrian war is lasting more than one decade, and along with that more than half of million people died and half of the population is internally displaced or is a refugee in other countries. The peak of asylum seekers in the EU was registered in 2015, with about 1 million people entering the continent by land or sea. Therefore, the lack of willingness of the Member States to redistribute the asylum seekers led to the decision to make a deal with Turkey, which nowadays has millions of refugees and is the main host country for refugees in the world.[192] The deal is an agreement to control migration flows in exchange for six million euros alongside political concessions from the EU, and Turkey agreed to receive all irregular migrants who make the crossing to the Greek island after March 2016. The justification for this agreement is based on the assumption that Turkey is a safe place to which asylum seekers and refuges can return.[193]

This agreement was presented as the solution to the so-called crisis that affects Europe, being a perfect illustration of this dangerous approach. The regime for the admission of Syrians to Turkey is not based on the needs for assistance and protection of refugees, but on Turkey's capability to contain migration to Europe. At a times when millions of people around the world are displaced, it is shameful that the only safe route offered by the EU is conditional on the number of people they can send back. The Mediterranean Sea is the largest inland sea in the world. Connected to the Atlantic Ocean by Strait of Gibraltar, its waters bathe the North Africa, Southern Europe, and the Middle East, in a portion of approximately 2.5 million square kilometres.[194] Due to its privileged position, it has been the scenario of several political conflicts and cultural connection, in addition to functioning as an important trade route integrating three continents. Today the Mediterranean Sea has become the main migratory

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[191] *Global Report On International Displacement* (IDMC 2019) <migracionesclimaticas.org/wp-content/uploads/2019/05/2019-IDMC-GRID.pdf> accessed 27 June 2020.
[192] *One Year On From The EU-Turkey Deal: Challenging The EU's Alternative Facts* (Medecins Sans Frontieres 2017) <www.msf.org/sites/msf.org/files/one_year_on_from_the_eu-turkey_deal.pdf> accessed 26 July 2020.
[193] Ibid.
[194] Mostafa Salah, 'Mediterranean Sea - Hydrologic Features And Climate' (*Encyclopedia Britannica*) <www.britannica.com/place/Mediterranean-Sea/Hydrologic-features-and-climate> accessed 27 June 2020.

route for those seeking a safe life in Europe.[195] The logic is simple, when fences are erected and overland path obstructed and surrounded by surveillance, immigrants seek the sea to leave their country. Data from the International Organisation of Migration (IMO) indicate that, between 2011 and 2016, approximately 630 thousand people used the Mediterranean Sea to reach the European territory.[196]

However, this path has proved to be frighteningly thorny, with the constant occurrence of shipwrecks involving vessels in totally precarious situations, generating deaths and disappearances. The IMO states that, in 2015, 3.789 deaths and disappearances occurred in this route, a number that increased to 5.143 in 2016, a worrying growth of 36%.[197] These statistics make the Mediterranean Sea the scenario of 60% of all migrant deaths in the world.[198] Those who manage to survive the long and hard crossing, often face even more complicated situations at the borders. Migrants who tried to reach Greece across the sea, reported to the Amnesty International that their vessels were intentionally damaged by local authorities near the shores.[199] The forced return of migrants back to the place they came from are even more serious, without legally supporting the asylum seekers, human rights is being globally violated.[200]

The greatest concern with controlling borders to prevent the entry of migrants, added to the negligence in the treatment of asylum seekers, is the lack of care in saving lives. Rescuing shipwrecked persons in the Mediterranean Sea, or even receiving those who were rescued by third parties in EU ports, becomes a problem that some nations do not seem willing to solve. Rescue work ends up being left to NGOs, such as the Maltese Migrant Offshore Aid Station (MOAS), who help with the rescue of 3.000 survivors in 2014, and the Spanish Proactiva Open Arms. The latter, in July 2018, starred in the rescue of a forty-year-old Cameroonian woman who was adrift after a shipwreck.[201] The NGO saw the ports of Italy and Malta as being the

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[195] *World Migration Report* (International Organization for Migration 2018) <www.iom.int/sites/default/files/country/docs/china/r5_world_migration_report_2018_en.pdf> accessed 27 June 2020.

[196] 'Irregular Migration Via The Central Mediterranean From Emergency Responses To Systemic Solutions' [2017] European Political Strategy Centre.

[197] *World Migration Report* (International Organization for Migration 2018) <www.iom.int/sites/default/files/country/docs/china/r5_world_migration_report_2018_en.pdf> accessed 27 June 2020.

[198] Ibid.

[199] Ibid.

[200] Ibid.

[201] 'Couple Spends Millions To Save Migrants In The Mediterranean' (*Npr.org*, 2015) <www.npr.org/sections/parallels/2015/03/25/393557932/a-couple-spends-their-millions-to-save-migrants-in-the-mediterranean> accessed 28 June 2020.

closest to their vessel, however, was forced to travel farther way back to Spanish soil, where managed to dock.[202]

IMO data reported that from January to July 2018 there were 1,500 deaths in the Mediterranean Sea.[203] As fatalities increase, people take advantage to make this a profitable business. The crossing of the Mediterranean is done in boats or in overcrowded vessels, without the minimum safety requirements, by smugglers. The trip can cost more than 3 thousand euros per person, which makes the business highly profitable, since a single vessel can yield 1 million dollars.[204]

When, in 2013, the image of the boy Alan Kurdi, a three-year-old Syrian refugee killed on a beach in Turkey shocked the world, some policy change was expected by the European community as well as greater concern for refugees, starting from a re-education of European citizens themselves who were ecstatic with the episode.[205] Nevertheless, the tragedy was soon forgotten, and thousands of 'Alan Kurdis' continued to lose their lives in the Mediterranean Sea, under the watch of Europe.

### 5.1 Criminalisation of the rescue mission in the Mediterranean Sea (Salvini Law)

In May 2018, the Operation Sophia, an EU mission to combat smuggling of migrants, suspended naval patrols in the Mediterranean Sea, which had rescued thousands of people, and began to rely on aerial surveillance. The measure stemmed from concerns that EU planes were providing information to the Libyan Coast Guard to allow interceptions and, consequently, the forced return of asylum seekers to Libya, rather than relaying information about vessels at risk.[206] The UNHCR estimated that 1.098 people had disappeared in the sea in the past year.[207] Furthermore, 12.680 people has arrived in Italy and Malta by sea, and 8.155 had been

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[202] 'Couple Spends Millions To Save Migrants In The Mediterranean' (*Npr.org*, 2015) <www.npr.org/sections/parallels/2015/03/25/393557932/a-couple-spends-their-millions-to-save-migrants-in-the-mediterranean> accessed 28 June 2020.

[203] *World Migration Report* (International Organization for Migration 2018) <www.iom.int/sites/default/files/country/docs/china/r5_world_migration_report_2018_en.pdf> accessed 27 June 2020.

[204] 'The €8,000 Ticket: The Migrants Crossing The Mediterranean By Yacht' (*the Guardian*, 2018) <www.theguardian.com/world/2017/sep/14/luxury-landings-the-migrants-crossing-the-mediterranean-by-yacht> accessed 27 June 2020.

[205] Mukul Devichand, 'Did Alan Kurdi's Death Change Anything?' (*BBC News*, 2016) <www.bbc.com/news/blogs-trending-37257869> accessed 28 June 2020.

[206] 'World Report 2020: Rights Trends In União Europeia' (*Human Rights Watch*, 2020) <www.hrw.org/pt/world-report/2020/country-chapters/336435> accessed 28 June 2020.

[207] Ibid.

intercepted by the Libyan Coast guard and returned to arbitrary automatic detention centres, amid worse conditions, as hostilities increase in Tripoli and around the city.[208]

As EU governments have prioritised border control and outsourced responsibility for migrants and asylum seekers to other countries, progress has been limited in expanding legal and safe routes for migrants to enter the EU. The European Commission announced that EU countries fulfilled 64% of their pledge to resettle 50.000 refugees in 2018-2019, which represents only a fraction of global needs.[209] The accusations in Italy and the public defamation of Carola Rackete, captain of the Sea Watch rescue vessel, exemplifies the worrying tendency to criminalise humanitarian assistance to migrants and asylum seekers.[210]

The Italian Interior Minister Matteo Salvini, leader of the extreme right-wing party, has come to dominate the debate on the issue of immigration. Shortly after taking office, he announced that Italy would begin to prevent humanitarian aid vessels rescuing migrants in the Mediterranean Sea from docking in Italian ports.[211] There were at least 15 deadlocks on the high seas due to the refusal of the Italian authorities to allow NGOs ships to disembark rescued people.[212]

Following this trend, the Italian government passed a decree (Salvini decree) limiting humanitarian protection, aggravating the chances of a migrant being denied refuge and allowing the possibility of loss of citizenship. The decree provides for the abolition of humanitarian protection granted by the Italian government, as well as the guarantee given to asylum seekers to be granted subsidiary protection, even though these elements are ensured by international treaties. Its objective is to prevent the arrival of migrants by sea, forcing the EU Member States to share the burden of the first reception of those who manage to complete the crossing.[213] The UNHCR has already expressed its uneasiness after the approval of the law by the Italian Parliament, underlining the invaluable performance of the NGOs in rescuing

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[208] 'World Report 2020: Rights Trends In União Europeia' (*Human Rights Watch*, 2020) <www.hrw.org/pt/world-report/2020/country-chapters/336435> accessed 28 June 2020.
[209] Deutsche (www.dw.com), 'EU Breaks Promise Of Safe Passage For 50,000 Refugees | DW | 14.10.2019' (*DW.COM*, 2019) <www.dw.com/en/eu-breaks-promise-of-safe-passage-for-50000-refugees/a-50803664> accessed 4 July 2020.
[210] Roland Hughes, 'How This Ship Captain Took On Italy's Strongman' (*BBC News*, 2019) <www.bbc.com/news/world-europe-48853050> accessed 4 July 2020.
[211] Sertan Anwar and Sanderson Ashraf, 'Fact Check: The Salvini Decree Explained' (*InfoMigrants*, 2019) <www.infomigrants.net/en/post/17537/fact-check-the-salvini-decree-explained> accessed 4 July 2020.
[212] Ibid.
[213] Ibid.

refugees and migrants trying to cross the sea towards Europe.[214] Furthermore, show its concern regarding the imposition of fines and other penalties on shipmasters, since NGO plays a vital role in saving lives.[215]

In this respect, Carola Rackete, the captain of the Dutch-flagged Sea Watch 3, a vessel operated by a German NGO which is committed with the search and rescue of migrants and refugees in the Mediterranean Sea, docked in Lampedusa in Italy without permission, after several days of waiting at the sea. Rackete challenged the Italian Interior Minister Salvini and the port authorities by entering with the vessel in Italian waters, allowing 40 Lebanese migrants to disembark. The prosecution alleged that the captain deliberately attacked a border police boat that blocked her path.[216]

However, the Italian media disclosed a recording of the shipmaster, in which Rackete informed the Italian port authorities that she was heading to the island due to her inability to guarantee the safety of the people on board, claiming that the Lampedusa's port was the safest and closest to the rescue point. The port's response was that the ship would not be allowed to enter Italian waters. Salvini, in this sense, insisted that the ship should have continued to Malta, Tunisia or other ports in northern Europe, rather than docking in Italy.[217]

Nevertheless, the captain explained that, at that moment, docking in Lampedusa seemed the only solution giving the desperate situation they were experiencing on board. She was carrying 40 migrants rescued at sea 17 days before and had declared state of emergency on board more than 36 hours before docking, having been ignored by the Italian authorities.[218]

Once an idyllic holiday setting in the past decade the Mediterranean Sea has become the backdrop for daily tragedies, and 2020 seems to have brought a new tide of bad luck for those who venture on the most dangerous sea crossing in the world. Since 13th of April 2020, there have been no civilian rescue boats in the Mediterranean. The last two on mission, Alan Kurdi from the Germany organisation Sea-Eye, and Aita Mari from the Spanish *Salvamento Marítimo Humanitario*, were detained in the port of Palermo, capital of Sicily, for 'technical and security

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[214] United Refugees, 'UNHCR Concerned At New Measures Impacting Rescue At Sea In The Central Mediterranean' (*UNHCR*, 2019) <www.unhcr.org/en-ie/news/briefing/2019/8/5d49370e4/unhcr-concerned-new-measures-impacting-rescue-sea-central-mediterranean.html> accessed 4 July 2020.
[215] Ibid.
[216] Roland Hughes, 'How This Ship Captain Took On Italy's Strongman' (*BBC News*, 2019) <www.bbc.com/news/world-europe-48853050> accessed 4 July 2020.
[217] Ibid.
[218] Ibid.

reasons', claimed the Italian authorities.[219] Since the installation of this new scenario within the Mediterranean Sea, at least 1.151 people have died, and more than 10.000 were forced to return to their country, mostly coming from Libya.[220] Those numbers clearly show that European governments put politics before people's lives, and that regardless the criminalisation of the humanitarian vessels' work at sea people still continue to pursue a better life in Europe, in spite of the risks.

The blockage of humanitarian vessels in the sea is recurrent, more than 18 occurrences were publicly recorded.[221] Therefore, the principle of rendering assistance at sea is being replaced by the obligation of not doing so. Not only NGOs are being affected, military and commercial vessels are also being prevented to render any assistance to anyone in distress at sea, since the disembarkation of those migrants and refugees may, and probably will be, denied, violating public international law.

SOLAS Convention provides that shipmasters are obliged to render assistance to anyone found in distress at sea,[222] making clear the duty to rescue those in trouble. UNCLOS also enshrines the same obligation, establishing that countries need to cooperate between them in the open sea in order to comply with international law as well as the fundamental human rights.[223]

Thus, it remains clear that Italy, and other EU Member States, are breaching its obligations under international law, especially under the European Convention on Human Rights, by not allowing the disembarkation of migrants and refugees in its territory as well as by cooperating with Libya to enable its coast guard to intercept people at sea and forced them to go back.[224] Additionally, as opposed to protect human rights and assist migrants, refugees and asylum seekers, Italy, along with other European countries, are enabling horrific abuses resulted from

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[219] 'Two Rescue Ships Impounded By Italy' (*Aljazeera.com*, 2020) <www.aljazeera.com/news/2020/05/rescue-ships-impounded-italy-200507161734217.html> accessed 4 July 2020.

[220] 'European Policies Continue To Claim Lives On The Mediterranean Sea | Migration | MSF' (*Médecins Sans Frontières (MSF) International*, 2019) <www.msf.org/european-policies-continue-claim-lives-mediterranean-sea-migration> accessed 4 July 2020.y

[221] Ibid.

[222] 'Steamship Mutual - Master'S Duty To Rescue Persons At Sea And Recent IMO Amendments' (*Steamshipmutual.com*) <www.steamshipmutual.com/publications/Articles/Rescue0107.asp#:~:text=%E2%80%9Cmaster%20of%20a%20ship%20at,the%20ship%20is%20doing%20so%E2%80%A6%E2%80%9D> accessed 4 July 2020.

[223] United nations Convention on the Law of the Sea 1982.

[224] 'Italy Shares Responsibility For Libya For Abuses Against Migrants' (*Amnesty.org*, 2019) <www.amnesty.org/download/Documents/EUR3013922019ENGLISH.pdf> accessed 4 July 2020.

maritime operations such as their forced return to the origin country, where they can face risk of life.[225]

### 5.2 Responsibility of States in face of violations of refugee rights

In addition to the violations of the refugees' rights in the Mediterranean Sea, and the analysis of the legal protection of these individuals under international law, it is also essential to study the accountability of the violations' perpetrators. Since the perpetrators are the States and international and intergovernmental bodies and organisations, the issue often becomes subject of controversy regarding liability as well as which tribunal is more appropriate for the persecution.

In relation to the European continent, there are two main courts that play key roles safeguarding the rights of the refugees: the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU). Both courts can prosecute cases involving violations of human rights.

Headquartered in Strasbourg, France, the ECHR was founded in 1959 and aims to protect everyone, safeguarding the European Convention on Human Rights of 1950.[226] It is a branch of the Council of Europe, and, therefore, has jurisdiction over all EU Member States, with the exception of Kazakhstan, Belarus, and the Vatican.

Created in 1952 and based in Luxembourg, the CJEU is a body of the EU and its mission it to ensure that European law is interpreted, applied, and respected in all EU countries.[227] Among other obligations, the Court is responsible for accountability of the EU Member States and the bodies that form the economic block.[228] The internationalisation of migration law made it more complex to assign responsibility or potential human rights violations. Readmission agreements with third countries outside the EU are contributing factors to this difficulty, being considered

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[225] 'Italy Shares Responsibility For Libya For Abuses Against Migrants' (*Amnesty.org*, 2019) <www.amnesty.org/download/Documents/EUR3013922019ENGLISH.pdf> accessed 4 July 2020.
[226] 'What Is The European Convention On Human Rights?' (*Amnesty.org.uk*, 2018) <www.amnesty.org.uk/what-is-the-european-convention-on-human-rights> accessed 28 June 2020.
[227] 'Court Of Justice Of The European Union (CJEU) | European Union' (*European Union*) <europa.eu/european-union/about-eu/institutions-bodies/court-justice_en> accessed 28 June 2020.
[228] Ibid.

as ‘deterritorialization’ of operations,[229] placing obstacles in identifying the entity to be held responsible in cases of human rights violations.

The case *Hirsi v. Italy* was a result of a bilateral agreement signed between Italy and Libya, for the readmission of immigrants, carrying out operations at the Mediterranean Sea.[230] In May 2009, a vessel was intercepted on the high seas transporting 35 potential asylum seekers from Somalia. The vessel responsible for the interception belonged to the Italian government, however, were being used by Libyan authorities. Somalians were taken to a Libyan detention centres and had their personal documents confiscated by the authorities, being unable to apply for asylum in the EU.[231] The case was referred to the ECHR, which analysed the occurrence of a breach of the principle of *non-refoulement*, among other violations. In its judgement, the Court granted responsibility not only to the Libyan government, but also extraterritorial responsibility to Italy, which, in addition to having signed a bilateral agreement with Libya allowing such operations and supplying the ships, was aware of the poor conditions in which the Somalians refugees were left.[232] Another case involving refugees was assessed by the CJEU*: N.S v. Secretary of State for the Home Department*.[233] The case refers to an Afghan who entered Europe through Greece, where he had his entry registered, and then headed to the United Kingdom, where he applied for asylum. The UK Secretary of State send him back to Greece, claiming that as he had been registered there, he should apply for asylum there.[234]

In Greek territory, N.S was then deported to Turkey, where he was kept in terrible conditions. Later on, the Afghan managed to flee and return to the United Kingdom, deciding to file a lawsuit in the CJEU. During the process, the British Secretary claimed that taking the refugee to Greek territory would not violate N.S human rights, since Greece is considered a safe place.[235] The Court interpreted that the argument that Greece is considered a safe place was insufficient, since the country had already been accused and convicted in recent cases involving refuges of violation of the Article 3 of the ECHR, which provides for the prohibition of torture. The judgement even serves as a precedent for determining that EU Member States cannot

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[229] 'Frontex: Human Rights Responsibility And Access To Justice – EU Immigration And Asylum Law And Policy' (*Eumigrationlawblog.eu*, 2020) <eumigrationlawblog.eu/frontex-human-rights-responsibility-and-access-to-justice/> accessed 28 June 2020.
[230] *Hirsi Jamaa and Others v Italy* [2012] ECHR (ECHR).
[231] Ibid.
[232] Ibid.
[233] *NS v Secretary of State for the Home Department* [2011] CJEU (CJEU).
[234] 'Refugee Law And Policy: Greece' (*Loc.gov*) <www.loc.gov/law/help/refugee-law/greece.php> accessed 28 June 2020.
[235] Ibid.

return refugee for the so-called responsible State for their entry, where asylum requirements may be threatened by degrading or inhumane treatments.[236]

Thus, there is a judicial history of penalising States for human rights violations of refugees, nevertheless, few are the cases that reach European courts due to the ignorance of their rights, and as a result, they continued to have their rights constantly violated.[237] Consequently, several European governments, such as Croatia, Greece, Hungary, Romania, Italy, Poland, and Spain, has been increasingly closing its borders, contributing with the forced return, and breaching the principle of *non-refoulement*. The sharp decline in the number of arrivals by sea from Morocco and Libya appeared to be linked to the intensified cooperation between EU institutions and Member States on the issue of migration, which are not preoccupied with the treatment given to migrants and asylum seekers in both countries.[238]

The growth in the number of vessels arriving on the Greek islands underscored the lack of a functional system for a fair sharing of responsibilities between EU Members, and Greece continued to failed towards the protection of the rights of asylum seekers within its territory, allowing their forced return. The increase also drew attention to the migration control agreement, signed between EU and Turkey in 2016, when the Turkish president tried to use the threat of a greater number of arrivals in the EU as an instrument of political negotiation.[239] Furthermore, there were several impasses on the high seas after Italy and Malta refused to allow non-governmental organisations and merchant vessels to disembark rescued people there. Despite a change of government in Italy and several high-level EU summits, there has been no progress in adopting consistent agreement for the disembark and transfer mechanisms.[240]

EU institutions continued to assess the conduct of EU governments that threaten the rule of law and human rights, including legal actions before the CJEU. They also discussed new mechanism to hold EU governments accountable for such violations. Additionally, the European Commission has released its proposals to strengthen protections to the EU law.

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[236] 'Refugee Law And Policy: Greece' (*Loc.gov*) <www.loc.gov/law/help/refugee-law/greece.php> accessed 28 June 2020.
[237] Ibid.
[238] 'World Report 2020: Rights Trends In European Union' (*Human Rights Watch*, 2020) <www.hrw.org/world-report/2020/country-chapters/european-union> accessed 28 June 2020.
[239] 'EU-Turkey Relations: "We Are Entering A New Phase" | News | European Parliament' (*Europarl.europa.eu*, 2016) <www.europarl.europa.eu/news/en/headlines/world/20161128STO53408/eu-turkey-relations-we-are-entering-a-new-phase> accessed 28 June 2020.
[240] Ibid.

Among the proposals: an annual report to help to identify problems, a new review mechanism, and law enforcement through CJEU.[241]

[241] 'World Report 2020: Rights Trends In European Union' (*Human Rights Watch*, 2020) <www.hrw.org/world-report/2020/country-chapters/european-union> accessed 28 June 2020.

# CHAPTER 6
# CONCLUSION

As mentioned in chapter one, the present study aims to examine the background of refugees and migrants rescue at sea, considering the limits of the coastal State to protect itself from threats. The dissertation was divided in six chapters following a clear structure, developing a theoretical study and a legal analysis in order to answer the research question.

While chapter one introduced this research, chapter two started to assess the legal framework of the study, specifically the International Law of the Sea, identifying the rules and principles that must be observed by States in using maritime spaces as well as the rules regarding its jurisdiction over ships. Chapter three presented the status and rights of the refugees, dealing with the International Refugee Law, such as the Convention Relating to the Status of Refugees 1951 and the Protocol Relating to the Status of Refugees 1967. This assessment enabled a great understanding of territorial sovereignty, and the principle of non-refoulement, which is the core mechanism of protection of refugees, migrants, and asylum seekers.

Chapter four outlined the United Nations Convention against Transnational Organised Crime, shedding a light into the smuggling of migrants as well as trafficking in persons. In this analysis, it was possible to observe how International Law against Transnational Crime, International Law of the Sea, and International Refugee Law are connected. Chapter five reviewed the situation involving the rescue mission, which is being largely criminalised by European countries, in the Mediterranean Sea, since it is the main migratory route towards Europe. In this regard, it was also studied the accountability of the States in relation to the violation of refugees` rights. Chapter six is the present and the last one, where the concluding remarks will be made in relation to the research as a whole and in an attempt to successfully answer the research question.

As already mentioned, refugees form a vulnerable, uniquely sensitive group, chased by their own homeland, trying to provide for their families a life without war and violence. Exposed to unknown territories where the violation of their fundamental rights, which often they do not even know exist, is recurrent. If, in normal times, the search for refuge is already full of misfortunes, the recent reactionary wave that grows around the world generates even more embarrassments.

The space occupied by refugees within the contemporary international law is delimited, on the one hand, by the classic notions of nation-state in its legal dimension of autonomy and insubordination to any outside authority, and on the other hand for the principle of humanity, built around the purpose of solidarity derived from the principles of international law. Sovereignty has been a crucial element in the history of interstate cooperation on the issue of refugees: the normative adjustment has fluctuated between State's behaviour, inclined to the protection, and the prevalence of sovereignty and domestic interests.

In view of what was presented in this study, the European posture of priority towards the protection of its borders was evident in detriment to the protection of the lives of refugees. The performance of forced returns, violating the principle of *non-refoulement*, represents a serious and irreversible damage to the human rights of those who seek asylum within the European Union. Shipwreck fatalities in the Mediterranean Sea are neglected, and important international agreements and conventions are ignored. The performance of countries like Italy is not properly scrutinised, with violations not being investigated or held responsible for the competent tribunals.

At a time the phenomenon of forced migration is seen by States as a potential threat to national security, it is to be expected that sovereignty will not give way to unrestricted acquiescence to the duty to grant refuge and search for permanent solutions. The effort to implement binding obligations between the State and the individual may therefore appear to be vain. International cooperation as a form of burden-sharing and solidarity seems to be better suited to a normative and political reality that is not yet able to establish a core of obligations that override State sovereignty.

However, State sovereignty is not absolute, there are limits that need to be respected. For instance, the Universal Declaration of Human Rights, in its Article 13,[242] defends the freedom of movement and residence, a right that would be meaningless if the destination countries refuse to accept migrants and asylum seekers. The jurisprudence regarding the respect of fundamental rights seems to be established not only through a position already assumed in several treaties, but also through the European Convention on Human Rights (ECHR). Furthermore, the UDHR, and the International Covenant on Civil and Political Rights (ICCPR), even though they are not binding, they have power within international law. With that in mind,

[242] UDHR, art 13

is possible to conclude that regarding the entry, permanence, and expulsion of persons, the authority of States is limited y international conventions for the protection of human rights and fundamental freedoms. By way of illustration, we can cite the Italian Interior Minister Salvini, that based on his law – Salvini law - prevented several NGOs vessels from disembarking in Lampedusa port during his term. As a result, prosecutors from Palermo accused him of abusing his powers, and in the end of July 2020, the prior Minister lost his parliamentary immunity and can be tried for blocking the entry of the Open Arms vessel, with migrants on board, when he was still in power.[243]

Thereby, on the one hand, States need to strike a balance between national security concerns and border control, and a migration management that fully respects the fundamental rights of migrants on the other hand. From that perspective, the IOM considers that there is no incompatibility between these two aspects and does not prejudice the sovereignty of States in relation to the control of their territory nor the effective implementation of their migration policy. Thus, migration policy must guarantee: an effective management of migratory flows, equitable treatment of third-countries nationals legally residing in the territory, prevention and strengthening the fight against human trafficking.

Additionally, national security and a dignified reception for refugees and asylum seekers are not mutually exclusive. Refugees cannot be seen as threat, they are an unintended consequence of the State system, the result of the delimitation of borders, the failure to ensure representation and protection to them. When investigating a migratory wave like the one that hit Europe, the possibility of a great exposure to a phenomena such as organised crime and terrorism is present, because it opens an opportunity for other organisations to take advantage to the flows to introduce their operational schemes within European soil. Nevertheless, it is possible to conclude that it is not legitimate to associate refugees with such events, since they are also victims of the system.

Notwithstanding, the migratory flow generates several consequences, in relation to the politics we can cite the growth of the nationalism in countries that receive large numbers of refugees and migrants. A significant example of this trend was in Italy, mentioned in the chapter five, which was preventing the disembarkation of migrants' boats within its territory. This drastic

[243] 'Italy's Far-Right Leader Salvini Loses His Parliamentary Immunity' (*euronews*, 2020) <www.euronews.com/2020/07/30/matteo-salvini-will-italy-s-far-right-leader-lose-his-parliamentary-immunity> accessed 3 August 2020.

move to close Italian ports has meant that both migrant and refugee ships and vessels from non-governmental organisations have being adrift for several days in the Mediterranean Sea. The fear of the local population of losing their jobs, having their access to State services restricted, or reducing the quality of these services, and paying more taxes for the governmental safety net to serve foreigners, ended up generating outbreaks of intolerance towards those individuals. Within this framework, the States, due to the pressure on national protection by its population, act in a way to be more protect with these own citizens rather than welcoming refugees and migrants.

In this sense, to reverse this situation, European governments need to implement new measures and rules, starting with the investment in refugee protection at EU borders and territory. EU Member States and local borders control agents must effectively safeguard refugees' human rights in their operations. The implementation of efficient mechanisms for inspection and sanction of possible human rights violations is also crucial. EU Member States must open safe paths for the refugees arrival – thereby decreasing the risk of lives on dangerous crossing – and then conduct the due process of asylum application in line with all provisions of the 1951 Geneva Convention and other international treaties and conventions protecting refugees. Rescuing people in distress at sea cannot be the task of NGOs alone, the States need to act directly in the rescue of castaways, in accordance with the UNCLOS which establishes basic parameters, and SOLAS and SAR Convention that set forth obligations in a more detailed manner, without the fear of having to process asylum applications and without violating the principle of *non-refoulement*. They must also make local laws that severely penalise civilians for facilitating illegal entry of people less stringent, because this situation ends up generating omissions of rendering assistance in the face of fear of possible criminal sanctions.

Finally, the biggest problem lies with the inability to build a genuine common policy, both for immigration and for refugee support. It is true that there is a minimum European framework, especially in terms of flow management, under EU directives and asylum and refugee regulations. The absence of a full European dimension of immigration policy results not only from the nature of national states, which continue to see the movement of people as a matter of national sovereignty, but also from the increasing pressures of current flows, which make political solutions more difficult matured and consensual.

## BIBLIOGRAPHY


**Legislation:**

1. Convention Relating to the Status of Refugees (adopted 14 December 1950, entered into force 25 July 1951).
2. United Nations Convention on the High Seas (entered into force 30 September 1962)
3. Protocol Relating To The Status Of Refugees (adopted 16 December 1966, entered into force 4 October 1967)
4. United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994).
5. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 9 December 1975, entered into force 26 June 1987)
6. Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004)
7. Charter of Fundamental Rights of the European Union (adopted 1950, entered into force 1 December 2009)
8. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2003, entered into force 25 December 2000)
9. United Nations Convention against Transnational Organized Crime and the Protocol Thereto (adopted 15 November 2000, entered into force 29 September 2003)

**Cases:**

1. *Lotus Case* [1927] PCIJ (PCIJ)
2. *Corfu Chanel* [1949] ICJ (ICJ)
3. *Asylum* [1950] ICJ, 266 (ICJ)
4. *NS v Secretary of State for the Home Department* [2011] CJEU (CJEU)
5. *Hirsi Jamaa and Others v Italy* [2012] ECHR (ECHR)

**Books:**

1. Anghie A, *Imperialism, Sovereignty And The Making Of International Law* (Cambridge Univ Press 2011)
2. Caminos H, *Law Of The Sea* (Ashgate Publishing Company 2001)

3. Frowein J, Wolfrum R, and Philipp C, *Max Planck Yearbook Of United Nations Law. Volume 5, 2001* (BRILL 2002)
4. Gallagher A, *The International Law Of Human Trafficking* (Cambridge University Press 2010)
5. Gammeltoft-Hansen T, *Access To Asylum: International Refugee Law And The Globalisation Of Migration Control* (Cambridge University Press 2011)
6. Islam R, and Hossain Bhuiyan J, *An Introduction To International Refugee Law* (Martinus Nijhoff 2013)
7. Ngantcha F, *The Right Of Innocent Passage And The Evolution Of The International Law Of The Sea* (Pinter Publishers 1990)
8. Rothwell D and others, *The Oxford Handbook Of The Law Of The Sea*
9. R Rothwell D, and Stephens T, *International Law Of The Sea* (1st edn, Hart Publishing 2010)
10. Shelly L, *Human Trafficking* (Cambridge University Press 2010)
11. Silverburg S, *International Law* (Routledge 2019)
12. Weiner M, *International Migration And Security* (Westview Press 1993)

**Articles:**

1. *Advisory Opinion On The Extraterritorial Application Of Non-Refoulement Obligations Under The 1951 Convention Relating To The Status Of Refugees And Its 1967 Protocol* (UNHCR)
2. *An Analytical Review 10 Years On From The Adoption Of The UN Trafficking In Persons Protocol* (ICAT 2010) <www.unodc.org/documents/human-trafficking/ICAT/ICAT_Backgound_Paper.pdf> accessed 26 July 2020
3. Bardin A, '*Coastal State Coastal State's Jurisdiction O S Jurisdiction Over Foreign Vessels*' (2002) 14 Pace International Law Review <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1188&context=pilr> accessed 8 June 2020
4. Campana P, '*Explaining Criminal Networks: Strategies And Potential Pitfalls*' (2016) 9 Methodological Innovations
5. *Convention Plus At A Glance* (UNHCR) <www.unhcr.org/403b30684.pdf> accessed 10 July 2020

6. *Global Report On International Displacement* (IDMC 2019) <migracionesclimaticas.org/wp-content/uploads/2019/05/2019-IDMC-GRID.pdf> accessed 27 June 2020
7. H. Oxman B, '*Human Rights And The United Nations Convention On The Law Of The Sea*' [1997] University of Miami School of Law Institutional Repository <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1404&context=fac_articles> accessed 25 July 2020
8. 'Irregular Migration Via The Central Mediterranean From Emergency Responses To Systemic Solutions' [2017] European Political Strategy Centre
9. Lewis C, '*UNHCR And International Refugee Law: From Treaties To Innovation*' [2010] London School of Economics and Political Science
10. Orchard P, '*Refugees And The Evolution Of International Cooperation*' [2006] International Conference on Refugees and International Law: The Challenge of Protection
11. *One Year On From The EU-Turkey Deal: Challenging The EU's Alternative Facts* (Medecins Sans Frontieres 2017) <www.msf.org/sites/msf.org/files/one_year_on_from_the_eu-turkey_deal.pdf> accessed 26 July 2020
12. Ratcovich M, '*International Law And The Rescue Of Refugees At Sea*' (PhD, Stockholm University 2019)
13. *The Globalization Of Crime A Transnational Organized Crime Threat Assessment* (UNODC 2010)
14. Voyvodic Casabó C, '*Security And Self: Identity Construction From Above And Below In The Refugee Crisis In Europe*' Belonging and Inclusion University of Glasgow
15. *World Migration Report* (International Organization for Migration 2018) <www.iom.int/sites/default/files/country/docs/china/r5_world_migration_report_2018_en.pdf> accessed 27 June 2020

**Online Sources:**

**1.** '20 Years Of The United Nations Convention On The Law Of The Sea' (*Un.org*, 2012) <www.un.org/depts/los/convention_agreements/convention_20years/Montego%20Bay.htm> accessed 31 May 2020

**2.** 'About Us - Operation Sophia' (*Operation Sophia*, 2015) <www.operationsophia.eu/about-us/> accessed 27 June 2020

**3.** 'About UNODC' (*United Nations: Office on Drugs and Crime*) <https://www.unodc.org/unodc/en/about-unodc/index.html> accessed 20 June 2020

**4.** Anwar S, and Ashraf S, 'Fact Check: The Salvini Decree Explained' (*InfoMigrants*, 2019) <www.infomigrants.net/en/post/17537/fact-check-the-salvini-decree-explained> accessed 4 July 2020

**5.** 'Chapter 1: International Law, Adoption Of The Law Of The Sea Convention – Law Of The Sea' (*Sites.tufts.edu*) <sites.tufts.edu/lawofthesea/chapter-one/> accessed 25 July 2020

6. 'Common European Asylum System - Migration And Home Affairs - European Commission' *(Migration and Home Affairs - European Commission*, 2020) <ec.europa.eu/home-affairs/what-we-do/policies/asylum_en> accessed 14 July 2020

**7.** 'Country Responsible For Asylum Application (Dublin) - Migration And Home Affairs - European Commission' (*Migration and Home Affairs - European Commission*) <ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en> accessed 25 July 2020

**8.** 'Couple Spends Millions To Save Migrants In The Mediterranean' (*Npr.org*, 2015) <www.npr.org/sections/parallels/2015/03/25/393557932/a-couple-spends-their-millions-to-save-migrants-in-the-mediterranean> accessed 28 June 2020

**9.** 'Court Of Justice Of The European Union (CJEU) | European Union' (*European Union*) <europa.eu/european-union/about-eu/institutions-bodies/court-justice_en> accessed 28 June 2020

**10.** Craven M, 'Between Law And History: The Berlin Conference Of 1884-1885 And The Logic Of Free Trade' (*Oxford Academic*, 2015) <academic.oup.com/lril/article/3/1/31/2413101> accessed 26 July 2020

**11.** Draft Articles On The Expulsion Of Aliens, With Commentaries (*United Nations,* 2014) <legal.un.org/ilc/texts/instruments/english/commentaries/9_12_2014.pdf> accessed 9 July 2020

**12.** Devichand M, 'Did Alan Kurdi's Death Change Anything?' (*BBC News*, 2016) <www.bbc.com/news/blogs-trending-37257869> accessed 28 June 2020

**13.** 'European Policies Continue To Claim Lives On The Mediterranean Sea | Migration | MSF' (*Médecins Sans Frontières (MSF) International*, 2019) <www.msf.org/european-policies-continue-claim-lives-mediterranean-sea-migration> accessed 4 July 2020

**14.** 'EU-Turkey Relations: “We Are Entering A New Phase” | News | European Parliament' (*Europarl.europa.eu*, 2016) <www.europarl.europa.eu/news/en/headlines/world/20161128STO53408/eu-turkey-relations-we-are-entering-a-new-phase> accessed 28 June 2020

**15.** 'Everything You Need To Know About Human Rights In Italy' (*Amnesty.org*, 2019) <www.amnesty.org/en/countries/europe-and-central-asia/italy/report-italy/> accessed 15 July 2020

**16.** 'Frontex: Human Rights Responsibility And Access To Justice – EU Immigration And Asylum Law And Policy' (*Eumigrationlawblog.eu*, 2020) <http://eumigrationlawblog.eu/frontex-human-rights-responsibility-and-access-to-justice/> accessed 28 June 2020

**17.** 'Global Trends - Forced Displacement In 2018 - UNHCR' (*UNHCR Global Trends 2018*, 2018) <https://www.unhcr.org/globaltrends2018/> accessed 20 June 2020

**18.** Handbook On Procedures And Criteria For Determining Refugee Status Under The 1951 Convention And The 1967 Protocol Relating To The Status Of Refugees (*UNHCR*, 1979) <www.unhcr.org/4d93528a9.pdf> accessed 8 July 2020

**19.** Hughes R, 'How This Ship Captain Took On Italy's Strongman' (*BBC News*, 2019) <www.bbc.com/news/world-europe-48853050> accessed 4 July 2020

20. (*Ipo.gov.ie*, 2017) <www.ipo.gov.ie/en/IPO/InfoBookletNew.pdf/Files/InfoBookletNew.pdf> accessed 14 July 2020

**21.** 'Italy Shares Responsibility For Libya For Abuses Against Migrants' (*Amnesty.org*, 2019) <www.amnesty.org/download/Documents/EUR3013922019ENGLISH.pdf> accessed 4 July 2020

**22.** 'New UNODC Campaign: Transnational Organized Crime Is A US$870 Billion A Year Business' (*United Nations: Office on Drugs and Crime*, 2012) <www.unodc.org/unodc/en/frontpage/2012/July/new-unodc-campaign-highlights-transnational-organized-crime-as-an-us-870-billion-a-year-business.html> accessed 20 June 2020

**23.** Nicholson F, and Kumin J, *A Guide To International Refugee Protection And Building State Asylum Systems* (UNHCR, 2017) <www.unhcr.org/3d4aba564.pdf> accessed 5 July 2020

**24.** 'OHCHR | Special Rapporteur On The Human Rights Of Migrants' (*Ohchr.org*) <www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/SRMigrantsIndex.aspx> accessed 26 July 2020

**25.** 'Organized Crime Module 16 Key Issues: Organized Crime International Framework - The Organized Crime Convention And Its Protocols' (*Unodc.org*, 2019) <www.unodc.org/e4j/en/organized-crime/module-16/key-issues/organized-crime-international-framework---the-organized-crime-convention-and-its-protocols.html> accessed 20 June 2020

**26.** 'Overview - Convention & Related Agreements' (*Un.org*) <www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm> accessed 25 July 2020

**27.** 'Refugee Law And Policy: Greece' (*Loc.gov*) <www.loc.gov/law/help/refugee-law/greece.php> accessed 28 June 2020

28. Refugees U, '*UNHCR Global Trends 2019*' (UNHCR, 2020) <www.unhcr.org/5ee200e37/> accessed 14 July 2020

**29.** Refugees U, '*About Us*' (UNHCR, 2020) <www.unhcr.org/en-ie/about-us.html> accessed 14 June 2020

**30.** Refugees U, 'Europe Situation' (*UNHCR*, 2017) <www.unhcr.org/en-ie/europe-emergency.html> accessed 27 June 2020

**31.** Refugees U, 'UNHCR Concerned At New Measures Impacting Rescue At Sea In The Central Mediterranean' (*UNHCR*, 2019) <www.unhcr.org/en-ie/news/briefing/2019/8/5d49370e4/unhcr-concerned-new-measures-impacting-rescue-sea-central-mediterranean.html> accessed 4 July 2020

**32.** Rescue At Sea: A Guide To Principles And Practice As Applied To Refugees And Migrants (*UNHCR*) <www.unhcr.org/450037d34.pdf> accessed 8 July 2020

**33.** Salah M, 'Mediterranean Sea - Hydrologic Features And Climate' (*Encyclopedia Britannica*) <www.britannica.com/place/Mediterranean-Sea/Hydrologic-features-and-climate> accessed 27 June 2020

34. 'Statewatch | EU: Greece: Chios: NGO Complaints About The Treatment Of Refugees To The European Commission And Their Response' (*Statewatch.org*, 2018) <www.statewatch.org/news/2018/february/eu-greece-chios-ngo-complaints-about-the-treatment-of-refugees-to-the-european-commission-and-their-reponse/> accessed 14 July 2020

**35.** 'Steamship Mutual - Master'S Duty To Rescue Persons At Sea And Recent IMO Amendments' (*Steamshipmutual.com*) <www.steamshipmutual.com/publications/Articles/Rescue0107.asp#:~:text=%E2%80%9Cmaster%20of%20a%20ship%20at,the%20ship%20is%20doing%20so%E2%80%A6%E2%80%9D> accessed 4 July 2020

36. 'The Human Cost Of Fortress Europe: Human Rights Violations Against Migrants And Refugees At Europe's Borders' (*Amnesty.org*, 2014) <https://www.amnesty.org/en/documents/eur05/001/2014/en/> accessed 15 July 2020

**37.** 'The €8,000 Ticket: The Migrants Crossing The Mediterranean By Yacht' (*the Guardian*, 2018) <www.theguardian.com/world/2017/sep/14/luxury-landings-the-migrants-crossing-the-mediterranean-by-yacht> accessed 27 June 2020

**38.** 'Two Rescue Ships Impounded By Italy' (*Aljazeera.com*, 2020) <www.aljazeera.com/news/2020/05/rescue-ships-impounded-italy-200507161734217.html> accessed 4 July 2020

**39.** 'United Nations Convention Against Transnational Organized Crime' (*United Nations: Office on Drugs and Crime*) <www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> accessed 20 July 2020

**40.** 'UN Convention Against Transnational Organized Crime Celebrates 10 Years' (*Unodc.org*, 2020) <www.unodc.org/lpo-brazil/en/frontpage/2013/10/16-un-convention-against-organized-crime-celebrates-10-years.html> accessed 20 June 2020

**41.** 'Www.Itlos.Org: *The Tribunal*' (Itlos.org) <www.itlos.org/the-tribunal/> accessed 7 June 2020

**42.** 'World Report 2020: Rights Trends In União Europeia' (*Human Rights Watch*, 2020) <www.hrw.org/pt/world-report/2020/country-chapters/336435> accessed 28 June 2020

**43.** (www.dw.com) D, 'EU Breaks Promise Of Safe Passage For 50,000 Refugees | DW | 14.10.2019' (*DW.COM*, 2019) <www.dw.com/en/eu-breaks-promise-of-safe-passage-for-50000-refugees/a-50803664> accessed 4 July 2020

**44.** 'What Is The European Convention On Human Rights?' (*Amnesty.org.uk*, 2018) <www.amnesty.org.uk/what-is-the-european-convention-on-human-rights> accessed 28 June 2020

45. 'Italy's Far-Right Leader Salvini Loses His Parliamentary Immunity' (*euronews*, 2020) <www.euronews.com/2020/07/30/matteo-salvini-will-italy-s-far-right-leader-lose-his-parliamentary-immunity> accessed 3 August 2020

# `Fortress Europe` and the vilification of refugees

GRADEMARK REPORT

FINAL GRADE

68/100

GENERAL COMMENTS

## Instructor

**TOTAL: /100**

***Analysis, evaluation and synthesis: 15/20***

In-depth analysis, evaluation and synthesis of advanced theoretical knowledge and complex legal problems

***Research techniques: 15/20***
Advanced research techniques to investigate, evaluate and synthesise international legal data in a systematic fashion

***Legal Reasoning: 11/15***
Critical awareness of current legal problems demonstrated in strong reasoned arguments, challenging assumptions and reaching judgments and new insights informed by the forefront of the international legal field

***Critical engagement and application: 10/20***

Some engagement with the philosophical, political and economic structured underpinning chosen topic

***Oral and written presentation skills: 11/15***

Excellent ability to communicate ideas effectively to argue, advocate, present and persuade with clarity and accuracy in addition to evaluating and taking responsibility for own professional and academic development

***Original contribution: 6/10***

Critical awareness of seminal original work to advocate creative and novel solutions to complex problems

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