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## EUNAVFOR *Operation Sophia* and the International Law of the Sea

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### Abstract

EUNAVFOR *Operation Sophia* was launched in summer 2015 in order to combat the smuggling of migrants in the South Mediterranean Sea, as part of a more comprehensive response by the EU to the ongoing and increasing refugee crisis in Europe. Its mandate includes the interdiction of vessels suspected of engaging in the smuggling of migrants from Libya, the seizure of such vessels and even their disposal in certain cases. This paper discusses the legality of the interdiction operations against the background of the law of the sea, in particular the UN Convention on the Law of the Sea, as well as other applicable rules of international law. Special emphasis is given to UN Security Council Resolution 2240 (2015), which provides an extra layer of authority for the boarding operations. In addition, the question of the seizure and prosecution of the suspected vessels and smugglers respectively is examined by reference to the international rules governing the exercise of jurisdiction and the relevant provisions of the UN Smuggling Protocol.

### Keywords

European Union, smuggling of migrants, EUNAVFOR *Operation Sophia*, interdiction operations, jurisdiction, UNCLOS

## 1. Introduction

On 22 June 2015, the second naval operation of the European Union (EU)<sup>2</sup> was launched with the aim of disrupting the business model of human smuggling and trafficking networks in the Southern Central Mediterranean (EUNAVFOR MED). This operation is part of the EU's so-called Comprehensive Approach to the current refugee crisis in Europe, which was first conceived on 23 April 2015 by

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2 The first naval operation was EUNAVFOR Operation Atalanta. See Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Coast of Somalia [2008] OJ L301/31. For comments see Efthymios Papastavridis, 'EUNAVOR Operation Atalanta off Somalia: the EU in Unchartered Legal Waters?' (2015) 64 *International & Comparative Law Quarterly* 533 and Ricardo Gosalbo-Bono and Sonja Boelaert, 'The European Union's Comprehensive Approach to Combating Piracy at Sea: Legal Aspects' in Panos Koutrakos and Achilles Skordas (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart Publishing 2014) 87-134.



the European Council<sup>3</sup> after approximately 800 'boat people' lost their lives in the Mediterranean Sea.<sup>4</sup>

In accordance with Article 2 of Council Decision (CFSP) 2015/778 dated 18 May 2015, which approved the operation,

(2) EUNAVFOR MED shall be conducted in sequential phases, and in accordance with the requirements of international law. EUNAVFOR MED shall:

(a) in a first phase, support the detection and monitoring of migration networks through information gathering and patrolling on the high seas in accordance with international law;

(b) in a second phase, (i) conduct boarding, search, seizure and diversion on the high seas of vessels suspected of being used for human smuggling or trafficking, under the conditions provided for by applicable international law, including UNCLOS and the Protocol against the Smuggling of Migrants; (ii) in accordance with any applicable UN Security Council Resolution or consent by the coastal State concerned, conduct boarding, search, seizure and diversion, on the high seas or in the territorial and internal waters of that State, of vessels suspected of being used for human smuggling or trafficking, under the conditions set out in that Resolution or consent;

(c) in a third phase, in accordance with any applicable UN Security Council Resolution or consent by the coastal State concerned, take all necessary measures against a vessel and related assets, including through disposing of them or rendering them inoperable, which are suspected of being used for human smuggling or trafficking, in the territory of that State, under the conditions set out in that Resolution or consent.<sup>5</sup>

Since 7 October 2015, as agreed by the EU Ambassadors within the Security Committee on 28 September 2015, the EUNAVFOR MED mission moved to its second phase (Phase II) as set out in the Council Decision and was renamed '*Sophia*' (after the name given to a baby born on board a ship participating in the operation which rescued her mother off the coast of Libya).<sup>6</sup> As reported by the EU External Action Service, there are currently 24 contributing Member States, while the Operation

3 On 23 April 2015, the European Council expressed its indignation about the situation in the Mediterranean and underlined that the EU would mobilise all efforts at its disposal to prevent further loss of life at sea and to tackle the root causes of this human emergency, in cooperation with the countries of origin and transit, and that the immediate priority is to prevent more people from dying at sea. See European Council, 'Special Meeting of the European Council, 23 April 2015 – statement' (2015) <[www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/](http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/)> accessed 1 March 2016.

4 On 19 April 2015, more than 800 people drowned after their 20 metre boat capsized in the Mediterranean Sea. The migrants reportedly fell overboard when they rushed to draw the attention of a passing merchant vessel, causing their ship to capsize. See reports in the press, *inter alia*, Patrick Kingsley, Alessandra Bonomolo and Stephanie Kirchgaessner, '700 migrants feared dead in Mediterranean shipwreck' (*The Guardian*, 19 April 2015) <[www.theguardian.com/world/2015/apr/19/700-migrants-feared-dead-mediterranean-shipwreck-worst-yet](http://www.theguardian.com/world/2015/apr/19/700-migrants-feared-dead-mediterranean-shipwreck-worst-yet)> accessed 28 January 2016.

5 See Art 2 Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L122/31 (Council Decision).

6 See European Council, 'EUNAVFOR Med: EU agrees to start the active phase of the operation against human smugglers and to rename it "Operation Sophia"' (28 September 2015) <[www.consilium.europa.eu/en/press/press-releases/2015/09/28-eunavfor/](http://www.consilium.europa.eu/en/press/press-releases/2015/09/28-eunavfor/)> accessed 20 February 2016.



Commander is an Italian national.<sup>7</sup>

As the above Council Decision mentions, *Operation Sophia* is to be conducted ‘in accordance with the requirements of international law’, which in the present case includes, *inter alia*, requirements of the law of the sea, international human rights law and international refugee law. This legal framework was supplemented by a long-anticipated Security Council Resolution under Chapter VII of the UN Charter.<sup>8</sup> Since May 2015, the EU had been trying to secure a resolution that would authorise the interdiction of smuggling vessels either on the high seas or, more importantly, within the territorial waters of Libya.<sup>9</sup> These efforts were intensified during the ensuing months in light of the reticence of the Libyan side to consent to such operations within its waters.<sup>10</sup> Finally, the Security Council adopted Resolution 2240 two days after the commencement of the second phase of the operation on the high seas on 9 October 2015.<sup>11</sup>

In short, Resolution 2240 sets off by identifying the ‘recent proliferation of, and endangerment of lives by human trafficking and migrant smuggling in the Mediterranean Sea ... off the coast of Libya’ as the situation that needed to be addressed through the Council’s action under Chapter VII.<sup>12</sup> It then condemns all acts of smuggling of migrants and human trafficking from Libya.<sup>13</sup> As per the enforcement measures at sea, after calling upon Member States to use the already existing legal bases for boarding vessels on the high seas, the Council decided to authorise the inspection and seizure of suspected vessels.<sup>14</sup>

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7 See ‘European Union Naval Force – Mediterranean Operation Sophia’ (*EU External Action*, updated 11 March 2016) <[http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/factsheet\\_eunavfor\\_med\\_en.pdf](http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/factsheet_eunavfor_med_en.pdf)> accessed 20 March 2016.

8 See UNSC Res 2240 (9 October 2015) UN Doc S/RES/2240.

9 See ‘EU seeks UN support to tackle migrant smuggling’ (*BBC News*, 11 May 2015) <[www.bbc.com/news/world-europe-32695483](http://www.bbc.com/news/world-europe-32695483)> accessed 28 January 2016.

10 See in this regard Giuliana Ziccardi Capaldo, ‘The EUNVFOR MED Operation and the Use of Force’ (*ASIL Insights*, 18 December 2015) <[www.asil.org/insights/volume/19/issue/27/eunavfor-med-operation-and-use-force](http://www.asil.org/insights/volume/19/issue/27/eunavfor-med-operation-and-use-force)> accessed 28 January 2016.

11 For the negotiations leading to the adoption of UNSC Res 2240, see ‘Vote on a Resolution on Human Trafficking and Migrant Smuggling in the Mediterranean’ (*What’s in Blue*, 8 October 2015) <[www.whatsinblue.org/2015/10/vote-on-a-resolution-on-human-trafficking-and-migrant-smuggling-in-the-mediterranean.php](http://www.whatsinblue.org/2015/10/vote-on-a-resolution-on-human-trafficking-and-migrant-smuggling-in-the-mediterranean.php)> accessed 28 January 2016.

12 *cf* UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816, on the counter-piracy operations off the coast of Somalia, where the Council linked the ‘threat to the international peace and security’ to the situation in Somalia and did not coin piracy as such a threat. For further comments on this, see Marta Bo, ‘Fighting Transnational Crimes at Sea under UNSC’s Mandate: Piracy, Human Trafficking and Migrant Smuggling’ (*EJIL: Talk*, 30 October 2015) <[www.ejiltalk.org/fighting-transnational-crimes-at-sea-under-unscs-mandate-piracy-human-trafficking-and-migrant-smuggling/](http://www.ejiltalk.org/fighting-transnational-crimes-at-sea-under-unscs-mandate-piracy-human-trafficking-and-migrant-smuggling/)> accessed 28 January 2016.

13 See UNSC Res 2240, para 1.

14 See *ibid*, paras 7 and 8.



At the time of writing, Phase II of EUNAVFOR MED *Operation Sophia* has been operative for around four months.<sup>15</sup> According to the EU External Action Service, '[t]ill now [12 February 2016], the Operation contributed to save more than 9000 lives while 48 people have been arrested as possible smugglers and/or traffickers by competent Italian Judicial Authorities following EUNAVFOR MED activities and 76 boats have been removed from illegal organizations' availability'.<sup>16</sup> In addition, it is noticeable that the irregular migration flows from Libya have decreased in comparison to the flows in the Aegean Sea.<sup>17</sup> Notwithstanding this *prima facie* success, *Operation Sophia* is susceptible to criticism on many grounds: for example, it could be put forth that a military operation is an unsuitable response to a predominantly humanitarian problem or that its geographical scope is restricted to the central Mediterranean, while the smuggling of migrants occurs mainly through the Aegean Sea.

The purpose of this paper, however, is not to address this criticism or assess the efficacy of *Operation Sophia*; rather, it is to explore the legal bases for the interdictions<sup>18</sup> and seizures that take place during the operation and to assess their legality against the background of the applicable rules of international law, mainly the law of the sea and the aforementioned Resolution 2240. Also, it discusses the often-neglected, yet very important, issue of the *a posteriori* assertion of jurisdiction by domestic courts. Accordingly, this paper will first discuss the boarding of suspected vessels on the high seas and, second, their seizure and the subsequent assertion of jurisdiction over the suspected offenders. It will conclude that, as far as the interdiction and seizures at sea are concerned, the operation is consistent with international law; nonetheless, there are some operational as well as jurisdictional 'grey areas' that invite discussion. Needless to say, the analysis will focus on the interdictions taking place in the course of the operation and not on the other measures that states may take in relation to the smuggling of migrants or on questions regarding search and rescue services. Furthermore, it will not address the operation's consistency with international refugee law or international human rights law nor will it discuss questions of international responsibility of either the EU or the Member States involved, which may arise in cases of violations of international law in the course of the operation.<sup>19</sup>

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15 For further information about operation, see 'EUNAVFOR MED Operation SOPHIA' (*EU External Action*) <[http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/index\\_en.htm](http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/index_en.htm)> accessed 28 January 2016.

16 See 'EUNAVFOR MED: 24 EU Member States part of Operation Sophia' (*EU External Action*, 12 February 2016) <[http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/news/20160212\\_01\\_en.htm](http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/news/20160212_01_en.htm)> accessed 20 February 2016.

17 According to the UNHCR, out of the 1,018,616 arrivals by sea in 2015, 851,319 had been to Greece and only 153,600 in Italy and 105 to Malta coming from Libya: see 'Refugees/Migrants Emergency Response – Mediterranean' <<http://data.unhcr.org/mediterranean/regional.php>> accessed 28 January 2016.

18 The term 'interdiction' and 'interception' are used interchangeably in the present paper denoting the interference with navigation of suspected vessels and their boarding on the high seas. See, on the terminology used in this respect, Efthymios Papastavridis, *Interception of Vessels on the High Seas* (Hart Publishing 2013) 60-62 [Papastavridis, 'Interception'].

19 For an analysis of responsibility questions in the context of the first naval operation of the EU, ie EUNAVFOR *Operation Atalanta*, see Papastavridis (n 2) 551-66.



## 2. The interdiction of suspect vessels on the high seas

### 2.1 The right of visit of vessels in the context of *Operation Sophia*

The point of departure for a discussion of the legal basis for all the cases of interception on the high seas is Article 110 of the United Nations Convention on the Law of the Sea (UNCLOS),<sup>20</sup> which prescribes the right of visit of foreign-flagged vessels on the high seas. Article 110 sets forth that the right of visit is accorded to warships against only those vessels reasonably suspected of having engaged in certain proscribed activities. These activities are: (a) piracy, (b) slave trading, (c) unauthorised broadcasting, (d) absence of nationality of the ship, or (e) though flying a foreign flag or refusing to show its flag, the ship is in reality of the same nationality as the warship.<sup>21</sup> *In casu*, it is evident that on the face of this provision, trafficking and transporting illegal migrants or refugees are not contemplated by the Convention as a specific ground for visiting a foreign vessel on the high seas. As a result, the requisite legal basis should either be extrapolated from the above-mentioned grounds for interception or be sought in another legal framework.

Regarding the UNCLOS, it goes without saying that the ‘piracy’ and ‘unauthorised broadcasting’ grounds are completely irrelevant to the present survey. Moreover, the ‘same nationality’ ground seems not to raise any particular problems, since in this case the vessel will be subject to the full jurisdiction of the flag state pursuant to Article 92 UNCLOS. By contrast, the grounds of ‘the absence of nationality’ as well as ‘the slave trade’ are of relevance. As far as the former ground is concerned, it is often the case that the transportation of the persons in question is carried out using non-registered small vessels, without a name or flag, i.e. stateless vessels. With regard to the latter ground, it is submitted that there is room for the application of the slave trade provision to cases of a consistent pattern of human trafficking at sea. However, the analysis of this argument falls beyond the ambit of the present article.<sup>22</sup>

Furthermore, by virtue of the chapeau of Article 110(1) UNCLOS, the power to interfere can be conferred by a treaty on other grounds.<sup>23</sup> Accordingly, states have concluded multilateral and bilateral agreements that provide for the right of visit on the high seas with a view to addressing the smuggling of migrants at sea, while in everyday practice, interception of foreign vessels on the high seas takes place on the basis of more informal or *ad hoc* arrangements, namely with the consent of the flag state

20 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).

21 See, *inter alia*, Myron Nordquist and others (eds), *UNCLOS 1982: A Commentary*, vol III (Martinus Nijhoff 1993) 237; Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3rd edn, Manchester University Press 1999) 203.

22 See more on this Papastavridis, ‘Interception’ (n 18) 267-78 and Efthymios Papastavridis, ‘Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law’ (2009) 36 *Syracuse Journal of International Law and Commerce* 145.

23 Both Art 22(1) 1958 High Seas Convention (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11 and Art 110(1) UNCLOS contain the exception ‘where acts of interference derive from powers conferred by treaty’.



authorities or even with the consent of the master of the vessel (so-called ‘consensual boarding’).<sup>24</sup>

The sole multilateral treaty providing for the right of visit on the high seas for counter-migration purposes is the 2000 Smuggling of Migrants Protocol.<sup>25</sup> The right of visit of a foreign-flagged vessel is stipulated in Article 8(2) as follows:

A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorisation from the flag State to take appropriate measures with regard to that vessel. The flag State may authorise the requesting State, *inter alia*: (a) To board the vessel; (b) To search the vessel; and (c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.

Obviously, under this provision, any action against a foreign vessel on the high seas must be based on express flag state authorisation. Neither tacit consent nor the mere consent of the master of the vessel is sufficient to trigger Article 8(2) of the Protocol.<sup>26</sup> There have also been a few bilateral instruments granting the right of visit for counter-immigration purposes in the central Mediterranean Sea, most notably the Italy-Libya accords, which are no longer in force.<sup>27</sup>

In light of the foregoing, it follows that the interdiction of vessels smuggling migrants in the Mediterranean Sea could be lawful based on either the statelessness of the vessel in question or the consent of the flag state. The latter could be granted either pursuant to the Smuggling Protocol or on an *ad hoc* basis. Indeed, as Article 2(b)(i) of Council Decision 778/2015 sets forth, EUNAVFOR MED ‘shall conduct boarding, search, seizure and diversion on the high seas ... under the conditions provided for by applicable international law, including *UNCLOS and the Protocol against the Smuggling of*

<sup>24</sup> See, *inter alia*, Louis B Sohn, ‘International Law of the Sea and Human Rights issues’ in Thomas Clingan (ed), *The Law of the Sea: What Lies Ahead?* (Law of the Sea Institute 1988) 56; David Wilson, ‘Interdiction on the High Seas: The Role and Authority of a Master in the Boarding and Searching of His Ship by Foreign Warships’ (2008) 55 *Naval Law Review* 157.

<sup>25</sup> See 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) 2241 UNTS 507 (Smuggling Protocol). As of 4 February 2016, the Protocol has 142 contracting States, see the United Nations Treaty Collection <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-b&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en)> accessed on 5 February 2016; an overwhelming majority of the states bordering the Mediterranean Sea are parties to the Smuggling Protocol.

<sup>26</sup> See further analysis in Papastavridis, ‘Interception’ (n 18) 279-80. See also Anne Gallagher and Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 430-38; Ximena Hinrichs, ‘Measures against Smuggling of Migrants at Sea: A Law of the Sea Related Perspective’ (2003) 36 *Revue Belge de Droit International* 413.

<sup>27</sup> See, *inter alia*, Alessia Di Pascale, ‘Migration Control at Sea: The Italian Case’ in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010) 281-309 and Mariagiulia Giuffrè, ‘State Responsibility Beyond Borders: What Legal Basis for Italy’s Push-backs to Libya?’ (2012) 24 *International Journal of Refugee Law* 692. On other similar agreements in the European context see Papastavridis, ‘Interception’ (n 18) 283-91.



*Migrants*.<sup>28</sup> Accordingly, only stateless vessels and vessels for which consent was obtained should be boarded. This was explicitly acknowledged in the previous version of the Rules of Engagement (RoEs) of *Operation Sophia*, namely the version prior to the initiation of Phase High Seas,<sup>29</sup> and more importantly, in Resolution 2240, particularly paragraphs 5<sup>30</sup> and 6.<sup>31</sup>

Resolution 2240, however, added a third alternative, i.e. the authority of the Security Council Resolution under Chapter VII of the UN Charter.<sup>32</sup> In particular, the Security Council authorises:

Member States, acting nationally or through regional organizations [the EU], to inspect on the high seas off the coast of Libya vessels that they have reasonable grounds to suspect are being used for migrant smuggling or human trafficking from Libya, provided that such Member States and regional organizations make good faith efforts to obtain the consent of the vessel's flag State prior to using the authority outlined in this paragraph.<sup>33</sup>

This is not the first time that UN Member States have been authorised to interdict and inspect foreign-flagged vessels on the high seas. Such authorisations have been given previously in order to enforce sanctions under Chapter VII of the UN Charter<sup>34</sup> or, under stricter conditions, to combat the nuclear proliferation activities of Iran and North Korea.<sup>35</sup> More recently, the Council did give a similar authorisation for the inspection of vessels illicitly carrying crude oil from Libya.<sup>36</sup> This is the first time, however, that the Council authorised inspections on the high seas for the purpose of fight-

28 Emphasis added.

29 See EUNAVFOR MED Rules of Engagement (RoEs) No. 170-3; applicable during the First Phase of the Operation (on file with the author).

30 UNSC Res 2240, para 5: 'Calls upon Member States acting nationally or through regional organisations that are engaged in the fight against migrant smuggling and human trafficking to inspect, as permitted under international law, on the high seas off the coast of Libya, any unflagged vessels that they have reasonable grounds to believe have been, are being, or imminently will be used by organised criminal enterprises for migrant smuggling or human trafficking from Libya, including inflatable boats, rafts and dinghies.'

31 UNSC Res 2240, para 6: 'Further calls upon such Member States to inspect, with the consent of the flag State, on the high seas off the coast of Libya, vessels that they have reasonable grounds to believe have been, are being, or imminently will be used by organized criminal enterprises for migrant smuggling or human trafficking from Libya.'

32 On Chapter VII Resolutions, which may entail binding measures on Member States, see generally Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (OUP 1999) and Linos-Alexandre Sicilianos, 'Entre multilatéralisme et unilatéralisme: l'autorisation par le Conseil de sécurité de recourir à la force' (2008) 339 *Recueil des Cours* 9.

33 UNSC Res 2240, para 7.

34 See, *inter alia*, UNSC Res 665 (25 August 1990) UN Doc S/RES/665 (on Iraq); UNSC Res 820 (17 April 1993) UN Doc S/RES/820 (on the Former Republic of Yugoslavia); UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132 (on Sierra Leone); UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 (on Libya). See also A Soons, 'A New Exception to the Freedom of the High Seas: The Enforcement of U.N. Sanctions' in Terry D Gill and Wybo P Heere (eds), *Reflections on Principles and Practices of International Law* (Martinus Nijhoff 2000) 205, 212.

35 See, *inter alia*, UNSC Res 1929 (9 June 2010) UN Doc S/RES/1929 (on Iran); UNSC Res 1874 (12 June 2009) UN Doc S/RES/1874 (on North Korea). See further analysis in Papastavridis, 'Interception' (n 18) 110-12.

36 See UNSC Res 2146 (19 March 2014) UN Doc S/RES/2146.



ing the smuggling of migrants and human trafficking at sea.<sup>37</sup> What is more striking is the wording employed by Resolution 2240, which authorises states to inspect suspect vessels on the high seas only after good faith efforts have been made to secure the consent of the flag state. Thus, there is an obligation of conduct or a best efforts obligation<sup>38</sup> incumbent upon Member States, and more specifically on the EU, to make all best efforts, or more precisely all ‘good faith efforts’, to obtain the consent of the flag state prior to taking any measures pursuant to this Resolution.

It appears that the EU has taken this obligation into serious consideration. The current RoEs of Operation Sophia, which govern the conduct of the operation,<sup>39</sup> set out the following: the EU External Action Service will first seek to obtain permanent consent from certain flag states. The RoEs do not specify how this will be achieved, but obviously this involves a certain form of standing agreements, which are also in line with the EU law.<sup>40</sup> If such consent has not been obtained, the Operation Commander is to seek the *ad hoc* consent of the flag state of vessels suspected of being engaged in the smuggling of migrants from Libya.<sup>41</sup> The ‘good faith efforts’ mentioned in Resolution 2240 ‘will be considered to have been exhausted if there is no response to the request made pursuant to actions taken under GENTEXT 13 within 4 (four) hours from the time of the request within the given time preparatory measures are authorised.’<sup>42</sup> Thus, for the EU, ‘good faith efforts’ mean requesting the flag state for its consent to board the suspect vessel and waiting for four hours for that state to respond, after which the authority of Resolution 2240 is triggered and the boarding takes place without the respective flag state’s consent.

In my view, this time window of four hours seems reasonable both in terms of the area’s geographical circumstances and the urgency of the situation. It may well be that the safety of lives of the migrants on board would be further endangered with the passage of time or that the suspect vessel could easily flee within these four hours and enter the territorial waters of neighbouring states where

37 Some authors erroneously assimilate the Resolution under scrutiny with the Resolutions issued by the Council in relation to piracy off the coast of Somalia (see UNSC Res 1816 (2008) and UNSC Res 1851 (2008)); see also Bo (n 12). Nevertheless, the UNSC Resolutions on piracy never authorised the inspection of suspect vessels on the high seas, since this was already permitted under Art 110 UNCLOS. See relevant analysis in Efthymios Papastavridis, ‘Piracy off Somalia: The Emperors and the Thieves of the Oceans in the 21st Century’ in Ademola Abass (ed), *Protecting Human Security in Africa* (OUP 2010) 122, 136-39.

38 As summarised by James Crawford, ‘obligations of result involve in some measures a guarantee of the outcome, whereas obligations of conduct are in the nature of best efforts obligations, obligations to do all in one’s power to achieve a result, but without ultimate commitment’: see ‘Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur’ (ILC, 51<sup>st</sup> Session, 30 April 1999) UN Doc A/CN.4/498/Add.2, para 67. See also relevant comments in Pierre-Marie Dupuy, ‘Reviewing the Difficulties of Codification: On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility’ (1999) 10 *European Journal of International Law* 371, 379.

39 On the legal nature of the Rules of Engagement, see remarks in Papastavridis, ‘Interception’ (n 18) 58-59.

40 See Arts 37 and 218 of the TEU and also Aurel Sari, ‘The Conclusion of International Agreements by the European Union in the Context of ESDP’ (2007) 56 *International & Comparative Law Quarterly* 53.

41 See EUNAVFOR MED Operation Sophia-Revised Draft 3-ROEAUTH-004, EEAS (2015) 10394 REV3, GENTEXT/13 (on file with the author) [Operation RoEs].

42 Operation RoEs, GENTEXT 14, *ibid*.



the operation lacks mandate and authority. Moreover, this practice is not unknown in maritime interdiction operations; quite to the contrary, this ‘tacit or deemed authorisation model’ is commonly found in various US bilateral agreements either in the context of the Proliferation Security Initiative (PSI)<sup>43</sup> or in the context of the fight against drug trafficking in the Caribbean Sea.<sup>44</sup> Tacit or deemed authorisation is also an option under the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Navigation (SUA Protocol).<sup>45</sup> It is telling that in some of these treaties the window is even smaller, i.e. two hours instead of four.<sup>46</sup>

Consequently, it could be argued that the RoEs of *Operation Sophia*, as they stand, are consistent with the international law of the sea and the terms of Resolution 2240 and thus, according to these RoEs, any boarding would be lawful. However, it goes without saying that the legality of each boarding should be scrutinised on an *ad hoc* basis.

## 2.2 The *modus operandi* of the interdictions undertaken by *Operation Sophia*

Next, there is the question of the *modus operandi* of the interdiction operations, i.e. the modalities that the EU forces employ in order to board the suspect vessels, and whether they are in accordance with general international law, including the law of the sea and human rights law. In short, under the law of the sea, before boarding a suspect vessel on the high seas, it is customary for warships to approach the vessel and ask it to identify itself, this being a right and not a duty *per se* (right of approach).<sup>47</sup> If there are reasonable grounds to believe that the vessel is engaged in a proscribed activity under Article 110 UNCLOS, the warship has the right to stop the suspected vessel. To effect a stoppage, of course, the warship will hail the suspect vessel or, if this is impossible or ineffectual, fire across its bow.<sup>48</sup> This may also include the use force, but in extreme moderation and in strict accord-

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43 See in this regard Papastavridis, ‘Interception’ (n 18) 146, and Douglas Guilfoyle, ‘Maritime Interdiction of Weapons of Mass Destruction’ (2007) 12 *Journal of Conflict and Security Law* 1.

44 See, *inter alia*, Joseph Kramek, ‘Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is this the World of the Future?’ (2000) 31 *University of Miami Inter-American Law Review* 121, 137.

45 Art 8bis (para 4) includes an option that boarding is permitted to proceed after four hours of no response, provided the flag state had previously notified the Secretary General to this effect: 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 14 October 2005, entered into force 28 July 2010) IMO Doc LEG/CONF 15/21.

46 See, eg, US-Mongolia and the US-Antigua and Barbuda PSI agreements: the text of these agreements is available at US Department of State, ‘Ship Boarding Agreements’ <[www.state.gov/t/isn/c27733.htm](http://www.state.gov/t/isn/c27733.htm)> accessed 5 February 2016.

47 See Yves Van der Mensbrugge, ‘Le Pouvoir de Police des Etats en Haute Mer’ (1975) 11 *Revue Belge de Droit International* 56, 61, and Robert Reuland, ‘Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction’ (1989) 22 *Vanderbilt Journal of Transnational Law* 1161, 1170.

48 See René Jean Dupuy and Daniel Vignes, *Traité du nouveau droit de la mer* (Economica 1985) 371.



ance with the requirements of necessity and proportionality.<sup>49</sup> The actual verification of the flag takes place aboard the suspect vessel, which requires the warship to send a party under the command of an officer to the suspect vessel, who will examine the papers and documentation of the suspect vessel.<sup>50</sup> The whole operation is subject to international human rights law, including the right to life and the prohibition of *refoulement*, provided that the state of the warship exerts control over the suspect vessel and the persons on board.<sup>51</sup>

The EU has seemingly taken into account the above requirements and has included very detailed procedures within the Operation RoEs. For example, the latter set out that prior to an engagement, identification is to be established visually or with other systems requiring a positive response from the unidentified unit, including electro-optic, thermal imaging or electronic warfare support measures (right of approach).<sup>52</sup> Also, when the firing of warning shots or the minimum use of force is authorised, 'due precautions shall be applied not to induce panic that will compromise maritime safety or is likely to put lives at risk'.<sup>53</sup> The latter also flows from the authorisation provided by Resolution 2240 itself: in authorising the EU and its Member States to use all measures commensurate to the specific circumstances in confronting migrant smugglers or human traffickers, it makes explicit reference that these measures should be in full compliance with international human rights law, as applicable, and they should provide *for the safety of persons on board as an utmost priority* and to avoid harming the marine environment or the safety of navigation.<sup>54</sup>

An extensive analysis of all the applicable RoEs and procedures of the boarding operations is beyond the ambit of the present paper; be that as it may, it is submitted that even though 'due regard precautions' have been included therein, the idea that electronic warfare<sup>55</sup> or even that the minimum use of force is permitted against a boat full of migrants is at least alarming. In any case, an assessment of the legality of the boarding operation and whether it would be conducted in full compliance with the above rules on the permissible use of force, as well as with international human rights law, can only be made on an *ad hoc* basis and not *a priori*. From the vantage point of having read the applica-

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49 The *locus classicus* in this regard has been the judgment of the International Tribunal for the Law of the Sea (ITLOS) in the *M/V Saiga (No 2)* case (1999). The Tribunal expressed the view that 'international law requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law': *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* ITLOS Case No 2 (1999) 38 ILM 1323, para 155. See also Vaughan Lowe, 'National Security and the Law of the Sea' (1991) 17 *Thesaurus Acroasium* 162, and Efthymios Papastavridis, 'The Use of Force at Sea in the 21<sup>st</sup> Century: Some Reflections on the Proper Legal Framework(s)' (2015) 2 *Journal of Territorial and Maritime Studies* 119.

50 See Art 110(2) UNCLOS.

51 See, *inter alia*, *Hirsi Jamaa and others v Italy* App no 27765/09 (ECtHR Grand Chamber Judgment, 23 February 2012) and Anna Petrig, *Human Rights and Law Enforcement at Sea* (Brill 2014) 326 *et seq.*

52 Operation RoEs, ROEAUTH/231.

53 Operation RoEs, ROEAUTH/151.

54 UNSC Res 2240, para 10 (emphasis added).

55 Operation RoEs, ROEAUTH/361.



ble RoEs, the conclusion may be drawn that the latter have indeed taken into account the applicable legal framework and thus the operation is in principle conducted in accordance with international law; this notwithstanding, there are certain operational 'grey zones' within these RoEs, which give rise to concerns about their implementation.

### 3. The seizure of suspect vessels and the assertion of jurisdiction over alleged smugglers

*Operation Sophia* is not only engaged in boarding suspect vessels in the South Mediterranean Sea, but according to its mandate, it is also engaged in seizing them and diverting them to ports.<sup>56</sup> The assertion of further enforcement measures, including the prosecution of suspected smugglers, fall beyond the remit of the operation, according to both the Council Decision and its RoEs,<sup>57</sup> and this matter is dealt with exclusively by the state of the competent authorities to which the suspects are being transferred, which for the time being is Italy.<sup>58</sup> Nevertheless, it certainly merits scrutiny since, as argued elsewhere,<sup>59</sup> transnational organised crime can be suppressed only on land and not at sea; and in this regard, it is of the utmost importance to have established and exercised jurisdiction. In other words, states, *in casu* Italy, should have prescribed legislation that criminalizes the conduct in question, i.e. the smuggling of migrants, prior to arresting the suspect smugglers after the latter's vessels have been brought to their ports and initiating criminal proceedings against them in their domestic courts.

Under the law of the sea, in particular Article 92 UNCLOS, vessels on the high seas are subject only to the prescriptive and enforcement jurisdiction<sup>60</sup> of their flag state. Even in cases where the law of the sea accords the right of visit on the high seas under Article 110 UNCLOS, this does not automat-

56 See Art 2(2)(b) Council Decision.

57 See Operation RoEs GENTEXT/11, which explicitly exclude from the mandate of *Operation Sophia* the assertion of jurisdiction over the persons concerned.

58 See (n 16).

59 See UNODC, 'Combating Transnational Organized Crime Committed at Sea' (Issue Paper, March 2013) <[www.unodc.org/documents/organized-crime/GPTOC/Issue\\_Paper\\_-\\_TOC\\_at\\_Sea.pdf](http://www.unodc.org/documents/organized-crime/GPTOC/Issue_Paper_-_TOC_at_Sea.pdf)> accessed 1 February 2016.

60 Under international law, there is a basic distinction between legislative or prescriptive jurisdiction (i.e. the power to make laws and regulations) and enforcement jurisdiction (i.e. the power to take executive or judicial action in pursuance of or consequent on the making of decisions or rules), see James Crawford, *Brownlie's Principles of Public International Law* (8<sup>th</sup> edn, OUP 2012) 486. On jurisdiction in general see, *inter alia*, Frederick Alexander Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours* 1, and Frederick Alexander Mann, 'The Doctrine of Jurisdiction Revisited after Twenty Years' (1984) 186 *Recueil des Cours* 11; Cedric Ryngaert, *Jurisdiction in International Law* (2<sup>nd</sup> edn, OUP 2015). As rightly observed by O'Keefe, 'separate reference is sometimes made, especially in the civil context, to jurisdiction to adjudicate ... But in the criminal context the distinction is generally unnecessary. The application of a state's criminal law by its criminal courts is simply the exercise or actualization of prescription: both amount to an assertion that the law in question is applicable to the relevant conduct': Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735, 737. See similarly Michael Akehurst, 'Jurisdiction in international Law' (1972-73) 46 *British Yearbook of International Law* 145, 179, and Patrick Daillier, Alain Pellet and Nguyen Quoc Dinh, *Droit International Public* (6<sup>th</sup> edn, LGDJ 1999) §§ 334-36.



ically mean that the boarding state may assert enforcement jurisdiction over the respective offence, including the right to bring the offenders before their domestic courts. The only provision in this part of the UNCLOS, i.e. the part about the high seas that provides for the assertion of both prescriptive and enforcement jurisdiction over crimes committed therein, is Article 105 concerning piracy.<sup>61</sup>

Thus, in the realm of smuggling, it is essential for third states, i.e. non-flag states, to have either a treaty provision analogous to Article 105 UNCLOS, or a customary rule in the form of a jurisdictional principle, such as the protective<sup>62</sup> or universality principle,<sup>63</sup> which would provide the necessary legal basis for the establishment of prescriptive jurisdiction. As per enforcement jurisdiction, the fundamental principle governing enforcement jurisdiction on the high seas is that it may not be exercised without the consent of the flag state. If the flag state accords its consent for the exercise of enforcement jurisdiction, this could entail measures such as bringing the vessel to a port of the boarding state, seizure of the vessel, arrest of the suspects on board, initiation of criminal proceedings pursuant to previously enacted legislation and confiscation of the illicit cargo and of the vessel itself. This consent may be granted either by a pre-existing international agreement or on an *ad hoc* basis. Agreements that grant the right of visit often also permit further enforcement measures. Alternatively, the boarding state may request the authorisation of the flag state for such enforcement measures after the visit and search of the delinquent foreign-flagged vessel. Even in these cases, however, the lawful assertion of enforcement jurisdiction, including the right to try the suspected smugglers, is contingent upon the existence of prior legislation proscribing the offence in question.

Special attention should be given in this regard to stateless vessels, which are often used in order to smuggle migrants to the EU. While by virtue of Article 110(1)(d) UNCLOS, warships or other duly authorised vessels of any state may exercise the right of visit on stateless vessels, this does not *ipso facto* entail the full extension of the jurisdictional – both prescriptive and enforcement – powers of the boarding states. This is the submission of the present author notwithstanding a significant strand of legal doctrine, which supports that the boarding states may also completely subject stateless ves-

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61 Under Art 105 UNCLOS, 'every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith'. See further analysis of Art 105 in Robin Geiß and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011).

62 Under the protective principle, a state claims jurisdiction over crimes which are injurious to its national security. Hence, the nexus for this basis of jurisdiction is the nature of its interest that has suffered harm. This jurisdiction allows a state to claim jurisdiction over offences directed against the security or vital interests or other offences threatening the integrity of governmental functions that are generally recognised as crimes: see, *inter alia*, Iain Cameron, *The Protective Principle of International Criminal Jurisdiction* (Aldershot 1994).

63 On universal jurisdiction see, *inter alia*, Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia 2005); O'Keefe (n 60).



sels to their laws.<sup>64</sup> The boarding states would have to rely on another legal basis in order to exert jurisdiction over persons and property on these vessels, since the statelessness itself would fall short of according them such jurisdiction. In other words, the states concerned should have enacted legislation in accordance with a well-accepted principle of international jurisdiction that criminalizes the conduct in question, even on stateless vessels on the high seas, in order to lawfully arrest and subject the offenders to their criminal jurisdiction.

In the context of the present enquiry, as elaborated above, the boarding of vessels suspected of being engaged in the smuggling of migrants from Libya is allowed pursuant to the statelessness of the vessel or, as regards a foreign-flagged vessel, pursuant to the consent of the flag state and the authority of Resolution 2240. Do the above suffice as the legal bases for the seizure of the suspect vessel and the prosecution of the arrested smugglers?

Firstly, neither the Smuggling Protocol nor Resolution 2240 includes any particular provision in relation to enforcement jurisdiction with regard to vessels without nationality. Article 8(7) of the Smuggling Protocol sets out that:

[A] State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality ... may board and search the vessel. If evidence confirming the suspicion is found, that State Party *shall take appropriate measures in accordance with relevant domestic and international law*.<sup>65</sup>

On the other hand, paragraph 5 of Resolution 2240 remains silent on enforcement measures following the inspection of stateless vessels. Thus, the legality of any seizure of vessels and of any trial of the arrested smugglers would be assessed on the basis of the 'relevant domestic and international law'.

It is submitted that the states that will prosecute suspected smugglers on stateless vessels, in particular Italy, the ports of which the vessels seized during *Operation Sophia* are brought, should have appropriate legislation in place criminalizing the commission of these offences on the high seas and then enforce it pursuant to the Smuggling Protocol and the UN Convention against Transnational Organized Crime (UNTOC). Indeed, Italy has long considered the 'stateless vessel' ground as sufficient for the arrest and assertion of criminal jurisdiction over illegal migrants on the high seas bound for the coast of Italy.<sup>66</sup> More recently, in 2014, the Italian Court of Cassation held in *HH v Court of Catania* that the reference to 'appropriate measures' in Article 8(7) of the Smuggling Protocol also

64 This is in line with UK and US practice, that a stateless vessel may be seized by any state as it enjoys the protection of none, see Daniel Patrick O'Connell and Ivan Shearer (ed), *The International Law of the Sea*, vol II (Clarendon Press 1984) 756, and also the United States Department of the Navy, 'The Commander's Handbook on the Law of Naval Operations' (NWP 1-14M, Edition July 2007) para 3.11.2.3 <[www.jag.navy.mil/documents/NWP\\_1-14M\\_Commanders\\_Handbook.pdf](http://www.jag.navy.mil/documents/NWP_1-14M_Commanders_Handbook.pdf)> accessed 1 February 2016.

65 Emphasis added.

66 See, eg, the decision of Tribunale di Crotone, 27 September 2001, *Pamuk et al*, cited in 2001 RDI 1155, and for commentary: Seline Trevisanut, 'Droit de la Mer' (2006) 133 *Journal du droit international* 1035.



entails the diversion of the vessel to a port and the initiation of criminal proceedings against the suspected persons.<sup>67</sup>

These cases notwithstanding, it is the view of the author that it would be on a sounder legal basis to argue the following: from the moment that the stateless vessels and the suspected smugglers are diverted to the ports of Italy, the diversion *per se* being lawful,<sup>68</sup> Italy may make use of the principle *aut dedere aut judicare*<sup>69</sup> under Article 16(10) UNTOC and prosecute the alleged offenders found on its territory.<sup>70</sup> The provision enunciates that:

A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution.

To that end, Article 15(3) UNTOC sets out that:

For the purposes of article 16, paragraph 10, of this Convention, each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite.

It follows that if both Italy and the state of nationality of the alleged offender are parties to the UNTOC and its Smuggling Protocol,<sup>71</sup> Italy could lawfully assert prescriptive jurisdiction first and then upon the diversion of the suspected vessel to its port, enforcement, including adjudicative, jurisdiction in this regard. In all other cases, i.e. in cases where the above instruments are not applicable, and no matter how broadly Italian courts interpret its immigration laws, the assertion of enforcement jurisdiction would be contestable.

As regards foreign-flagged vessels that are suspected of being engaged in the smuggling of migrants and are boarded by the authorities participating in *Operation Sophia*, the following remarks are in order. Firstly, the Smuggling Protocol retains the exclusive enforcement jurisdiction of the flag state on the high seas. Thus, any measure taken under the Protocol, including diversion, let alone asser-

67 See *Harabi Hani Abdal Qadir Saad v Tribunale di Catania*, 23 May 2014, No. 36052, Corte di Cassazione (Sez. I penale). See comments by Giuseppe Cataldi, 'Judicial Decisions' (2014) 24 *Italian Yearbook of International Law* 468, and Gemma Andreone, 'Chronique de la Jurisprudence' [2014] *Annuaire du Droit de la Mer*, Tome XIX, 678.

68 This was the opinion also of the Special Rapporteur of the International Law Commission François: see Regime of the High Seas, Draft Articles (A/CN.4/17) in *Yearbook of the International Law Commission*, vol II (1950) 29.

69 See, for the customary nature of this principle, Michael Plachta, 'The Lockerbie case: The Role of the Security Council in Enforcing the Principle *Aut Dedere Aut Judicare*' (2001) 12 *European Journal of International Law* 125.

70 By virtue of Art 1(2) Smuggling Protocol, the provisions of the UNTOC apply *mutatis mutandis* to this Protocol.

71 In view of the wide ratification of the Smuggling Protocol (142 parties, as of 4 February 2016), it is very likely that this would be the case. Italy has been a party to the Smuggling Protocol since 2 August 2006; see United Nations Treaty Collection <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-b&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en)> accessed 5 February 2016.



tion of enforcement jurisdiction, should be pursuant to the express consent of the flag state.<sup>72</sup> Should the flag state consent to the diversion of the vessel to the Italian ports or to the ports of other states participating in the operation, then the above-mentioned *aut dedere aut judicare* mechanism may be lawfully triggered.

In addition, Resolution 2240 extends its authorisation under Chapter VII not only to the boarding as such, but also to the seizure of suspected vessels coming from Libya. In more detail, it decided to

authorise for a period of one year from the date of the adoption of this resolution, Member States acting nationally or through regional organisations to seize vessels inspected under the authority of paragraph 7 that are confirmed as being used for migrant smuggling or human trafficking from Libya.<sup>73</sup>

However, it underscored that ‘further action with regard to such vessels inspected under the authority of paragraph 7, including disposal, will be taken in accordance with applicable international law with due consideration of the interests of any third parties who have acted in good faith.’<sup>74</sup>

It follows that the EU and its Member States may not only inspect but also seize the suspect vessels after good faith efforts have been made to secure the consent of the flag state. Be that as it may, Resolution 2240 is silent on the assertion of enforcement jurisdiction *per se*: it only says that it must be ‘in accordance with applicable international law’. Thus, absent the consent of the flag state concerned, it is exclusively a matter of the domestic jurisdiction of Italy or any other EU Member State that assumes jurisdiction over the crime in question. Needless to say, the Smuggling Protocol and the UNTOC with its *aut dedere aut judicare* principle would be instrumental. Besides this, it is well worth mentioning another recent Italian Court of Cassation judgment, which interestingly held that the violation of Italian immigration laws had been committed in Italian territorial waters even though the smuggled migrants were rescued on the high seas. It held that smugglers committed the crimes as indirect perpetrators (*autore mediato*) through the Italian rescue authorities. The authorities acted as the smugglers’ innocent agents by bringing the migrants to Italy.<sup>75</sup>

In sum, the EU Member States do have various jurisdictional tools on hand in order to lawfully prosecute alleged smugglers, provided that they have enacted precise and foreseeable legislation pursuant to the Smuggling Protocol and the UNTOC. As noted above, it remains to be seen how states, and in particular the Italian courts, will implement their legislation vis-à-vis the apprehended smugglers of migrants.

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72 See Art 8(5) Smuggling Protocol.

73 UNSC Res 2240, para 8.

74 *ibid.*

75 *Procuratore della Repubblica presso il Tribunale di Catania v Haji Hassan*, 27 March 2014, No. 14510, Corte di Cassazione (Sez. I penale).



## 4. Concluding Remarks

EUNAVFOR *Operation Sophia* was launched in summer 2015 in order to combat the smuggling of migrants in the South Mediterranean Sea, which is one part of a comprehensive response by the EU to the continuing and increasing refugee crisis in Europe. Its mandate includes the interdiction of vessels suspected of being engaged in the smuggling of migrants from Libya, the seizure of such vessels and even their disposal in certain cases. Even though not within the mandate of the operation, a closely linked issue of particular relevance is that of the assertion of jurisdiction over the suspected smugglers after being handed over to the competent authorities of a Member State, namely Italy for current purposes.

This paper canvassed the legality of the interdiction operations against the background of the law of the sea, in particular the UNCLOS as well as other applicable rules of international law. The interdictions would be in accordance with international law as far as they are conducted either on stateless vessels or pursuant to the consent of the flag state. In addition, Resolution 2240 provides an extra layer of authority for the boarding operations: if good faith efforts to obtain the consent of the flag state have been exhausted, the boarding state may use the relevant authorisation of the said Resolution. The EU has construed these 'good faith efforts' as a time window of four hours from the initial request to the flag state to grant its consent. If the flag state does not respond within four hours, the EU assets may proceed with the interdiction in accordance with Resolution 2240. Mindful of the geographical circumstances of the Mediterranean basin, this time window seems to satisfy the requirement of 'good faith efforts'. In assessing the interdiction operations, it is necessary to have regard to the *modus operandi* of the operation as such and ascertain whether it is in accordance with the rules governing law enforcement at sea, including the right to life. It is the author's view that even though the RoEs of *Operation Sophia* make explicit reference that due regard will be made for the safety of persons on board the smuggling vessels, the simple fact that forcible action against these vessels is permissible certainly gives cause for concern.

Lastly, the question of the seizure and prosecution of the suspected vessels and smugglers was examined by reference to the international rules governing the exercise of jurisdiction and the relevant provisions of the Smuggling Protocol. It is submitted that the assertion of jurisdiction by Italian courts over interdictions on the high seas should be made pursuant to the Smuggling Protocol. That said, this is not currently the position of the Italian courts – especially insofar as stateless vessels are concerned.