



UNIVERSITY COLLEGE DUBLIN

UCD Working Papers in Law, Criminology & Socio-Legal Studies

Research Paper No.08/2017

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HUMAN RIGHTS ADRIFT? ENABLING THE DISEMBARKATION OF MIGRANTS TO A PLACE OF SAFETY IN THE MEDITERRANEAN

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Europe is in the throes of a refugee emergency. To many it will conjure up the image of Alan Kurdî, the Syrian three-year-old whose little body washed to shore in Turkey on 2 September 2015. It is only one of the many human tragedies that take place amidst large flows of migrants¹ trying to reach Europe over sea. An important challenge in this context concerns the safe and swift disembarkation of rescued and intercepted migrants to a place of safety. Failures to do so are a manifestation of coastal States being unable or unwilling to receive migrants on to their territory. Even though the 1974 Convention on the Safety of Life at Sea (SOLAS Convention)² and the 1979 International Convention on Maritime Search and Rescue (SAR Convention)³ have been amended in 2004 with a view to remedying this failure, disembarkation remains an unresolved issue. Moreover, commercial vessels are increasingly unwilling to pick up migrants exactly because there is no clear guidance on where to disembark, which for them leads to financial loss, security risks, and the danger of being prosecuted for smuggling activities.

This article scrutinises the legal obligations of EU Member States regarding the disembarkation to a place of safety of migrants at sea – *directly* or *indirectly* through assisting

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¹ The author uses the term migrants throughout this article to cover both irregular/undocumented migrants, asylum-seekers and refugees. The different terms may be used explicitly in specific contexts.

² International Convention for the Safety of Life at Sea of 1 November 1974 (entry into force: 25 May 1980), Vol. 1184 *UNTS*, 278.

³ International Convention on Maritime Search and Rescue of 27 April 1979 (entry into force: 22 June 1985), Vol. 1405 *UNTS*, 119.

vessels. It makes the normative claim that *specific regional obligations in terms of disembarkation arise based on European asylum and human rights law beyond the ambit of the International Law of the Sea (LoS)*. It also questions the compatibility of the current EU border control and asylum *acquis* with the parameters set out in this normative claim. It concludes that EU law needs reform in which *access, procedural guarantees and burden-sharing* are key, a task that needs to be taken up in light of the current reform of the Common European Asylum System (CEAS).⁴

Section I sketches the empirical background to the disembarkation problem. Section II briefly discusses disembarkation obligations of States under the SOLAS and SAR Conventions to illustrate that there exists no residual rule under the LoS determining a State ultimately responsible for allowing the disembarkation of migrants.⁵ Section III analyses how European human rights law supplements the LoS duty to disembark on to safe territory. Section IV discusses the effect on disembarkation of the right to asylum under the EU Charter of Fundamental Rights. It depicts the role of the EU border control and asylum *acquis* within this regime complexity, which is found to be ambiguous and arguably detrimental to the human rights of migrants at sea as it stands. Section V concludes by arguing for the need to factor in human rights and asylum law for disembarkation and suggests a few elements of burden sharing to incentivise EU Member States to accept disembarkations on to their territory.

⁴ European Commission, *Communication from the Commission to the European Parliament and the Council: Towards a reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, Brussels, 6 April 2016, COM (2016) 197 final, available at: http://europa.eu/rapid/press-release_IP-16-1246_en.htm; European Commission, Press release: *Completing the reform of the Common European Asylum System: towards an efficient, fair and humane asylum policy*, Brussels, 13 July 2016, available at: http://europa.eu/rapid/press-release_IP-16-2433_en.htm.

⁵ For a more detailed discussion of the role of the SAR Convention in the context of sea migration, see A Campàs Velasco, 'The International Convention on Maritime Search and Rescue: Legal Mechanisms of Responsibility-Sharing and Co-operation in the Context of Sea Migration', in this volume at XXX.

I. MIGRANTS AT SEA AND THE PROBLEM OF DISEMBARKATION

A significant amount of irregular migration towards EU territory takes place over sea.⁶ Encounters with migrants at sea often occur through extraterritorial border control and search and rescue activities of EU Member States or with the assistance of merchant vessels. It is often unclear where these migrants should be disembarked, leading to delays and diplomatic standoffs. This not only goes to the detriment of the humanitarian conditions of those retrieved at sea. It also negatively impacts the willingness of private vessels to rescue migrants at sea, especially when unauthorised disembarkations are criminalised on account of smuggling.⁷

Three main actors engage with migrants at sea: EU Member States individually, States operating jointly (eg with the assistance of Frontex,⁸ under the EU CSDP, or in the framework of NATO), and merchant vessels. Concerted efforts – mainly to disrupt smuggling routes, but also ‘to save lives at sea’ – have been in practice for a decade now, with the first missions focusing on assisting Spain (*Operation Hera*)⁹ and Malta (*Operation Nautilus*).¹⁰ More recent important operations assisted by Frontex are *Operation Triton* in Italy and *Operation Poseidon Sea* in Greece, with respective budgets of €38 million and €18 million

⁶ Between 2008 and 2013 an average of 46,194 persons arrived in Europe by sea per year. 2014 saw a steep increase of maritime arrivals with 216,054 persons who made it to European shore that year. This number soared in 2015, counting 1,015,078 sea arrivals. About 352,375 arrived in 2016. For data on sea arrivals and casualties in the Mediterranean, see: <http://data.unhcr.org/mediterranean/regional.php>.

⁷ T Basaran ‘The saved and the drowned: Governing indifference in the name of security’ (2015) 46 *Security Dialogue* 6.

⁸ The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. It is transformed into the ‘European Border and Coast Guard Agency’ in a new Regulation that was formally approved by the Council on 13 September 2016. See: <http://www.consilium.europa.eu/en/press/press-releases/2016/09/14-european-border-coast-guard/>.

⁹ This joint operation was requested by Spain and started in July 2006. Migrants intercepted mainly came from Liberia, Mauretania, Senegal and Guinea via the coasts of Senegal and Mauretania. A Baldaccini, ‘Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea’ in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Nijhoff, 2010) 239-240.

¹⁰ This joint operation was requested by Malta and started in October 2006. Migrants intercepted mainly came from Nigeria, Eritrea, Somalia, Tunisia, Bangladesh and Ghana. See Baldaccini (n 9) 240.

for 2015 and additional €45 for 2016.¹¹ The EU also established the military mission EUNAVFOR MED ('Sophia') to combat human smuggling and trafficking in the Mediterranean. It is fully operational since July 2015¹² and by September 2015 it had participated in nine rescue activities, saving over 1400 lives at sea.¹³ Since February 2016, NATO's *Standing NATO Maritime Group 2* started intelligence, surveillance and reconnaissance activities in the Aegean Sea to inform Greece, Turkey and Frontex on maritime migratory movements.¹⁴

Neither search and rescue practices nor maritime border control are, however, void of problems.¹⁵ Two related types of incidents occur: the lack of rescue¹⁶ and the lack or delay of disembarkation of those rescued (or intercepted) to a place of safety. While the first type of issue is not the focus here as such, rescue incidents are often the result of a negative incentive structure created by the absence of clear rules and practical options for swift disembarkation. Enabling disembarkation is therefore pivotal for the protection of migrants at sea. Although the precise frequency of disembarkation incidents is not well-known, some have been documented.

¹¹ During the summer of 2015, operation Triton deployed three airplanes, six Offshore Patrol Vessels, twelve patrol boats, two helicopters, nine debriefing and six screening teams. Frontex, 'Frontex expands its Joint Operation Triton', *Frontex news feed*, 26 May 2015, available at: <http://frontex.europa.eu/news/frontex-expands-its-joint-operation-triton-udpHP>.

¹² Using four naval units (the Italian flagship "Cavour", two German ships and one from the UK) and five air assets (two planes, belonging to France and Luxemburg respectively, and three helicopters: one British and two Italian). European External Action Service (2015), 'EUNAVFOR MED FORCE fully operational', Press release, Rome, 28 July 2015, available at: http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/press-releases/20150728_en.htm.

¹³ European External Action Service (2015), 'International Organization for Migration (IOM) visits the EU Operation Headquarters', Press release, Brussels, 1 September 2015, available at: http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/news/20150901_en.htm.

¹⁴ NATO, *Assistance for the refugee and migrant crisis in Europe*, 24 March 2016, available at: http://www.nato.int/cps/en/natohq/topics_128746.htm#.

¹⁵ For an overview of incidents, see FRA (2013), *Fundamental rights at Europe's southern sea borders*, European Union Agency for Fundamental Rights, 29-31.

¹⁶ Basaran (n 7) 1-2 (and references included therein) and Baldaccini (n 9) 244. For more testimonies, see: Human Rights Watch (2009), *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, Report, 21 September 2009, 41-46.

A first range of examples involves incidents with State vessels. The deployment of Frontex's *Operation Nautilus* was suspended at some point due to disagreement amongst the participating States over the responsibility for the migrants saved at sea.¹⁷ Under previous rules of engagement it was agreed among the participating States that those rescued in the Search and Rescue Region (SRR) of Malta would be taken to the closest port, while those rescued in the SRRs of third countries would be taken to the ports of the other participating EU Member States. According to the *Times of Malta*, France and Germany wanted to rethink these rules of engagement by disembarking *all* migrants in Malta or in Lampedusa and no longer unto their own territory.¹⁸ Another point in case is the incident of the *Marine I* in 2007. After Spanish coast guards had rescued 300 migrants in the SRR of Senegal, it took two weeks of negotiations from the time of the distress call to disembark the migrants in Mauritania, which had the closest port of call.¹⁹ In 2011, more than 100 migrants rescued at sea were stuck on a Spanish NATO vessel for several days as Malta, Italy and Spain disagreed on where to disembark them. Eventually, the migrants were disembarked in Tunisia and taken to the Dehiba refugee camp.²⁰

Standoffs and delays also occur when merchant vessels – both larger vessels and small fishing boats – are involved in rescue situations.²¹ For example, incidents occurred with the

¹⁷ Baldaccini (n 9) 240 & 250. See more recent reports on targeted violence by the Greek coast guard: Médecins Sans Frontières (2015), *Obstacle course to Europe: A policy-made humanitarian crisis at EU borders*, Brussels, December 2015, 22-23.

¹⁸ I Camilleri, 'EU patrols on hold as states grapple over destination of rescued illegal immigrants', *Times of Malta*, 27 April 2008, available at: <http://www.timesofmalta.com/articles/view/20080427/local/eu-patrols-on-hold-as-states-grapple-over-destination-of-rescued.205788>.

¹⁹ J Coppens and E Somers, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?' (2010) 25 *International Journal of Marine and Coastal Law* 379.

²⁰ FRA (n 15) 51.

²¹ UNHCR, *Background Paper to the High Commissioner's Dialogue on Protection Challenges: Protection at Sea*, Distr. General, 11 November 2014, 3, §13. The contribution of private vessels to search and rescue is significant. Issues, however, arise in terms of finding points of disembarkation after rescue. See e.g. Frontex, *Annual Risk Analysis 2015*, Warsaw, April 2015, 19; European Parliament, *Draft Opinion of the Committee on Transport and Tourism on the situation in the Mediterranean and the need for a holistic EU approach to migration*, 2015/2095 (INI), 20 July 2015, 3; L Maloney and C Paris, 'Europe's Cargo Ships Diverted to Sea Rescues', *The Wall Street Journal*, 26 March 2015, available at: <http://www.wsj.com/articles/boat-people->

MV Clementine Maersk in 2005, the *MV MS Noordam* in 2006 and the *Francisco y Catalina* in 2007.²² Another disembarkation incident occurred in 2009 when the *MV Pinar E*, a Turkish cargo ship rescued 154 persons at sea. Italy (whose port of Lampedusa was the closest) and Malta (in whose SRR the migrants were picked up) disagreed on where to allow disembarkation. Spending more than four days under substandard conditions, the migrants concerned were eventually allowed to transfer to an Italian patrol boat to disembark subsequently in Italy. The standoff only came to an end after the President of the European Commission intervened diplomatically.²³ Perhaps better known are incidents with smaller fishing vessels rescuing migrants at sea and subsequently being denied access to local ports in Italy and Malta. In 2008 for instance, two Tunisian fishing vessels (the *Fakhreddine Morthada* and the *Mohammed el-Hedi*) had rescued migrants at sea and disembarked them to Lampedusa despite the refusal of the Italian authorities to grant permission. Seven crew members were put on trial for smuggling as a result but were acquitted on appeal.²⁴ In 2007 a Maltese fishing boat, the *Budafel*, had migrants clinging onto its tuna pens for three days until they were picked up by the Italian coast guard. The captain of the *Budafel* was unwilling to divert his vessel to disembark the migrants because of the potential loss of the tuna catch.²⁵ Sometimes, private vessels have it as their main purpose to rescue migrants at sea. After having carried out a rescue of migrants, the *Cap Anamur* was refused permission to

[trying-to-reach-europe-disrupt-mediterranean-mercantile-shipping-1427399702](http://www.ics-shipping.org/key-issues/all-key-issues-(full-list)/rescue-at-sea---the-mediterranean-crisis); International Chamber of Shipping, 'Rescue at Sea – The Mediterranean Crisis', *Key Issues* (2015), available at: [http://www.ics-shipping.org/key-issues/all-key-issues-\(full-list\)/rescue-at-sea---the-mediterranean-crisis](http://www.ics-shipping.org/key-issues/all-key-issues-(full-list)/rescue-at-sea---the-mediterranean-crisis).

²² A Klug, 'Strengthening the Protection of Migrants and Refugees in Distress at Sea through International Cooperation and Burden-Sharing' (2014) 26 *International Journal of Refugee Law* 51, in fn17. Also well-known and spurring a lot of debate is the incident with the *M/V Tampa* off the coast of the Australian Christmas Island, in 2001, where permission to disembark was denied by Australia. The migrants were eventually disembarked in Nauru.

²³ R Barnes, 'The International Law of the Sea and Migration Control' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Nijhoff, 2010) 142.

²⁴ Basaran (n 7) 7.

²⁵ Coppens and Somers (n 19) 380.

disembark at the Sicilian port *Empedocle*. It did so nonetheless after waiting 12 days. The crew of the *Cap Anamur* were put on trial in Italy.²⁶

II. THE DUTY OF DISEMBARKATION UNDER THE LAW OF THE SEA (LOS)

Disembarkation forms an integral part of search and rescue at sea, which is regulated under three important treaties: the 1982 United Nations Convention on the Law of the Sea (UNCLOS),²⁷ the 1974 SOLAS Convention, and the 1979 SAR Convention.²⁸ As noted in the introduction, the SOLAS and SAR Conventions were amended in 2004 to ensure that those rescued would be delivered to a place of safety.

A. A place of safety ('what?')

The 2004 amendments create a legal obligation to disembark those rescued at sea to a place of safety, but do not define this notion. The *2004 Guidelines on the Treatment of Persons Rescued at Sea* adopted by the International Maritime Organization (IMO)'s Maritime Safety Committee²⁹ describe a place of safety as:

'A location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination.'³⁰

²⁶ Basaran (n 7), 7. The crew was eventually acquitted on human trafficking charges by an Italian court in August 2009. D Lindsey, 'Italy's Refugee Policies Should Be Put on Trial', *Der Spiegel*, 10 August 2009, available at: <http://www.spiegel.de/international/germany/the-world-from-berlin-italy-s-refugee-policies-should-be-put-on-trial-a-653989.html>.

²⁷ United Nations Convention on the Law of the Sea of 10 December 1982 (entry into force: 16 November 1994), Vol. 1833 *UNTS*, 397.

²⁸ For a detailed discussion on the search and rescue steps preceding disembarkation in the context of maritime migration, see sections 2 & 3 of Campàs Velasco (n 5).

²⁹ The Maritime Safety Committee is a subsidiary body of the IMO Council. It has all Member States represented and is the IMO's highest technical body.

³⁰ IMO, *Guidelines on the Treatment of Persons Rescued at Sea*, Resolution MSC.167 (78), 20 May 2004 (IMO Guidelines), paragraph 6.12. See also Campàs Velasco (n 5), at XXX(18-19).

The IMO Guidelines further suggest that disembarkation needs to be avoided in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened in case those retrieved at sea are asylum-seekers and refugees.³¹

The Parliamentary Assembly of the Council of Europe has argued that a place of safety should not only refer to the physical protection of people, but also entail the respect for their fundamental rights.³² The better view is not to read this fundamental rights precision of the place of safety notion into the LoS, but rather to conceive them as two distinct but complementary obligations.³³ Indeed, the duty to disembark to a place of safety holds for both States and private vessels, while obligations of refugee law and international human rights law (IHRL) only bind States.³⁴ The IMO Guidelines themselves corroborate the idea that human rights protection forms a *distinct* subject matter, indicating that if other non-SAR matters such as dealing with migrants or asylum seekers need to be resolved, this can be done *once* the survivors have been delivered to a place of safety.³⁵ Similarly, the *2009 IMO Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea* stress that operations and procedures such as screening and status assessment that go beyond assistance are to be carried out *after* disembarkation to a place of safety.³⁶

³¹ IMO Guidelines (n 30), paragraph 6.17. See also: UNHCR (n 21), 4, §17.

³² COE Parliamentary Assembly, *The interception and rescue at sea of asylum seekers, refugees and irregular migrants*, Resolution 1821/2011, 22nd Sitting, 21 June 2011, §5.2. The EU has actually adopted a definition of a place of safety in this sense in Article 2, §12 of Regulation No. 656/2014 on Frontex-assisted external border surveillance at sea. See further below, section 4.E.

³³ See also: E Papastavridis, 'Rescuing Migrants at Sea: The Responsibility of States under International Law' (2011), 4-5, available at: <https://ssrn.com/abstract=1934352>.

³⁴ M den Heijer, *Europe and Extraterritorial Asylum*, (Hart Publishing, 2012) 236.

³⁵ IMO Guidelines (n 30), paragraph 6.19.

³⁶ IMO Facilitation Committee, *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea*, FAL.3/Circ.194, 22 January 2009 (IMO Principles), paragraph 2.

B. Venue of disembarkation ('where?')

It does not transpire from the LoS that a place of safety requires the disembarkation *on land*. The IMO Guidelines allow the place of safety to be on a ship. As long as a vessel has the appropriate facilities and equipment to sustain additional persons on board without endangering its own safety or to care properly for survivors, a vessel can be considered a place of safety until the survivors are disembarked to their next destination.³⁷ Nonetheless, paragraph 6.13 of the IMO Guidelines suggests that those ships should be relieved of that responsibility as soon as alternative arrangements can be made. Eventually, the migrants rescued will have to be disembarked *somewhere* on land. Some argue that there exists a right of access for vessels to ports to seek refuge because of *force majeure*, but this customary rule is not clearly established, and neither are its parameters in cases involving migrants.³⁸ Even after the 2004 amendments there still does not exist a residual rule under the LoS pointing out a responsible State for allowing the eventual disembarkation on land. Instead, an open-ended rule was adopted:

'The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.' (emphasis added)³⁹

³⁷ IMO Guidelines (n 30), paragraph 6.14.

³⁸ AT Gallagher and F David, *The International Law of Migrant Smuggling* (Cambridge, Cambridge University Press, 2012) 460; R Barnes, 'Refugee Law at Sea' (2004) 53 *ICLQ* 51-52; M Crock, 'In the wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) 12 *Pacific Rim Law & Policy Journal* 55; Contra: B Ni Ghráinne, 'Left to Die at Sea: State Responsibility for the May 2015 Thai, Indonesian, and Malaysian Pushback Operations', in this volume at XXX(10), referring inter alia to the doctrinal work of Van Dyke, Tanaka, and Noyes, which affirms such a customary norm.

³⁹ IMO, Resolution MSC.153(78), adopted on 20 May 2004, *Annex: Amendments to the International Convention for the Safety of Life at Sea, 1974*, §4; IMO, Resolution MSC.155(78), adopted on 20 May 2004, *Annex: Amendments to the International Convention on Maritime Search and Rescue, 1979*, (SAR amendment), §3.

The 2004 amendment to the SAR Convention also adds a new paragraph 4.8.5, obliging the responsible Rescue Co-ordination (Sub)Centre to ‘initiate the process of identifying the most appropriate place(s) for disembarking persons found in distress at sea’ and to ‘inform the ship or ships and other relevant parties concerned thereof.’⁴⁰

Most States have accepted the 2004 amendments, such as Italy, while others like Malta have objected to it. Italy interprets it as requiring the SRR State in which the rescue takes place to allow disembarkation on its territory.⁴¹ Malta ‘advocates a “next port of call rule”, mandating disembarkation at the nearest safe port to the site of the rescue, which in the Maltese SAR area (*sic.*) is often a port in Italy.’⁴² Other coastal States have taken a reticent stance too on the duty to accept disembarkation. For instance, Australia has ‘made clear [its] rejection of any legal entitlement to disembark rescued persons at a particular port of a State without the consent of that State.’⁴³ This was also affirmed in *Ruddock v. Vadarlis* by the Federal Court of Australia in 2001, which held that ‘international law imposes no obligation upon the coastal state to resettle those rescued in the coastal state’s territory.’⁴⁴

To find a solution for the lasting disembarkation conundrum, the IMO has been in the process of adopting non-binding principles.⁴⁵ In 2009, the IMO Facilitation Committee⁴⁶ adopted a

⁴⁰ SAR amendment (n 39), §4. Moreover, at §2: ‘[each Party should authorise its rescue co-ordination centers: (...)] to make the necessary arrangements in co-operation with other RCCs to identify the most appropriate place(s) for disembarking persons found in distress at sea’.

⁴¹ P Mallia, ‘The MV Salamis and the State of Disembarkation at International Law: The Undefinable Goal’ (2014) 18 *ASIL Insights* (11).

⁴² *ibid.*

⁴³ Gallagher and David (n 38) 461.

⁴⁴ Federal Court of Australia, *Ruddock v. Vadarlis*, Judgment, 18 September 2001, [2001, FCA 1329], §126.

⁴⁵ The disembarkation issue came prominently on the Law of the Sea agenda after the M/V Tampa incident in 2001. For a detailed discussion of this agenda, see: Coppens and Somers (n 19).

⁴⁶ The Facilitation Committee is a subsidiary body of the IMO Council and was set up to eliminate unnecessary formalities in international shipping. It tries to ensure ‘that the right balance is struck between maritime security and the facilitation of maritime trade.’ (IMO, available at: <http://www.imo.org/en/About/Pages/Structure.aspx>).

Circular, *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea*.⁴⁷ These principles state that:

‘if disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, *the Government responsible for the SAR area (sic.) should accept the disembarkation* of the persons rescued in accordance with immigration laws and regulations of each Member State into a place of safety under its control in which the persons rescued can have timely access to post rescue support.’ (Emphasis added)⁴⁸

The advantage of this formulation is that in case no venue for disembarkation can be arranged, the SRR State will have to allow disembarkation. This adds to legal certainty for merchant vessels and enhances the conditions for those rescued.⁴⁹ These IMO Principles, however, do not constitute binding law, and so the problem remains.

Coppens and Somers have studied new discussions on amendments proposed by Spain and Italy before the IMO Sub-Committee on Flag State Implementation (now called the ‘Sub-Committee on Implementation of IMO Instruments’), identifying four major changes.⁵⁰ They resemble the IMO Principles adopted by the Facilitation Committee in 2009, but differ in one important respect: *there is no more reference to the ultimate responsibility of the SRR State to allow disembarkation in case no venue is found*. In this respect, the proposed Spain/Italy amendment is essentially the same as the existing 2004 amendment. Interestingly, Malta also submitted an amendment proposal. Instead of affirming the 2009 IMO Principles in putting the eventual obligation to allow disembarkation on the SRR State, they formulate that:

⁴⁷ IMO Principles (n 36).

⁴⁸ *ibid*, paragraph 2.3. Japan and Malta made reservations with regard to this residual obligation. See Coppens and Somers (n 19) 389.

⁴⁹ Coppens and Somers (n 19) 392.

⁵⁰ *ibid*, 393-95.

‘All Contracting Governments involved shall co-operate to ensure that disembarkation occurs in the nearest safe haven, that is, that port closest to the location of rescue which may be deemed a place of safety.’⁵¹

Every Contracting State should then have such a safe haven in place:

‘The implementation of such a concept requires that all Contracting Governments undertake to provide such a safe haven when so requested by an RCC coordinating a rescue operation, either on the basis of geographical proximity or on the basis of its role as first RCC. Such an obligation would permit the rapid identification of a place of disembarkation without ambiguity, ensure the rapid delivery of rescued persons to a place of safety and ensure minimum disruption to commercial shipping activities while respecting the value of human life.’⁵²

This proposal foresees a more clear-cut obligation to disembark, although in a subtle way: the next safe port is in principle where those rescued should be disembarked. The clear advantage of this proposal is that one can easily and quickly identify a port for disembarkation given the geographical realities of each case.⁵³ It would also speed up the disembarkation process and benefit both merchant vessels as well as the rescued individuals.

In sum, it transpires from the LoS as it currently stands⁵⁴ that there is no residual obligation for coastal States to accept disembarkation. It only determines the SRR State’s primary responsibility to ensure that coordination and cooperation for disembarkation occurs, but it

⁵¹ Sub-Committee on Flag State Implementation, *Measures to Protect the Safety of Persons Rescued at Sea, Comments on document FSI 17/15/1 (submitted by Malta)*, 27 February 2009, FSI 17/15/2, 4, §16 (Malta amendment).

⁵² Malta amendment (n 51) §15.

⁵³ Coppens and Somers (n 19) 397.

⁵⁴ With regard to the protection of the safety of persons rescued at sea in the Mediterranean, there have been new initiatives in the framework of the IMO. A *Draft text for a Regional Memorandum of Understanding on procedures relating to the disembarkation of persons rescued at sea* its target completion year has been extended to 2016.

does not – ultimately – oblige it to accept disembarkation onto its territory.⁵⁵ Under this formulation, disembarkation on to territory remains contingent upon the good will of States; with potential delays and stand-offs remaining likely.⁵⁶ Moreover, migrants do not derive subjective rights in terms of where to be disembarked from this body of international law.

III. THE EFFECT OF HUMAN RIGHTS LAW ON DISEMBARKATION

European human rights law obligations accruing at sea affect disembarkation to an important degree. Distinct from the duties under the law of the sea, the prohibition of *refoulement* and collective expulsion require disembarkation onto land in order to be complied with.⁵⁷ This does not necessarily have to occur on to the territory of the State exercising jurisdiction at sea.

A. Extraterritorial human rights jurisdiction at sea

Human rights obligations apply extraterritorially when individuals, including migrants, are under the jurisdiction of a State. Although this idea is still contested in some areas of the world – most notably in Australia⁵⁸ and the United States after the *Sale* judgment of the U.S. Supreme Court,⁵⁹ which received considerable critique both at home⁶⁰ and internationally⁶¹ –

⁵⁵ A State can still be held responsible for not adequately establishing administrative mechanisms for the coordination of search and rescue operations or for not cooperating with other States in this regard. Papastavridis (n 33) 19.

⁵⁶ Barnes (n 23) 139.

⁵⁷ The extraterritorial effect of the *right to asylum* upon the disembarkation question will be dealt with separately below in section 4. It concerns a right that only creates positive legal obligations towards EU Member States and EU agencies under the *Charter of Fundamental Rights of the European Union*.

⁵⁸ See eg High Court of Australia, *CPCF v. Minister for Immigration and Border Protection* (2014). For a critical assessment of the Australian jurisprudence, see: N Klein, ‘Assessing Australia’s Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants’ (2014) 15 *Melbourne Journal of International Law* 17-18, writing that ‘the weight of legal authority cuts against Australia’s position that it is not bound by an obligation of non-refoulement on the high seas.’

⁵⁹ U.S. Supreme Court, *Sale v. Haitian Centers Council* (1993).

⁶⁰ Dissenting Opinion of Justice Blackmun, Supreme Court of the United States, 509 U.S. 155 (1993); A Pizor, ‘Sale v. Haitian Centers Council: The Return of Haitian Refugees’ (1993) 17 *Fordham International Law Journal* 1065; HH Koh & M Wishnie, ‘The Story of Sale v. Haitian Centers Council: Guantánamo and Refoulement’ in D Hurwitz et al. (eds), *Human rights advocacy stories* (New York, Thomson Foundation Press, 1993) 424, calling the Haitian Centers Council decision of the Supreme Court ‘bad law making’. See also: UNHCR, ‘The Haitian Interdiction Case 1993: Brief *Amicus Curiae*’ (1994) 6 *International Journal of Refugee Law* 85-102.

this doctrine has been affirmed by the European Court of Human Rights ('ECtHR') in several landmark decisions. The ECtHR applies mainly three tests to establish extraterritorial jurisdiction under Article 1 of the European Convention on Human Rights (ECHR).⁶² Under the spatial model 'a State possesses jurisdiction whenever it has effective overall control of an area', while under the personal model 'a State has jurisdiction whenever it exercises authority or control over an individual'.⁶³ A third model consists of combining both, 'with an emphasis on the background exercise of governmental authority'.⁶⁴

A few ECtHR decisions have refined the personal⁶⁵ model-test in the maritime context. In *Hirsi Jamaa et al v Italy* the Court applied the personal model by referring to the exercise of control and authority over an individual.⁶⁶ Moreover, the exercise of effective control is not limited to situations in which the State actually takes the migrants on board its own State vessel. Indeed, other situations can also amount to effective control. There can be *de facto* control in case of State action on board the other vessel, as was the case in *Medvedyev and others v France* where '[the] events in issue took place on board the *Winner*, a vessel flying the flag of a third State but whose crew had been placed under the control of French military personnel'.⁶⁷ It is even possible to speak of jurisdiction in circumstances in which a State

⁶¹ Inter-American Commission on Human Rights, *The Haitian Center for Human Rights et al. v. United States* (1997). The Bush and Obama administrations continued to deny the extraterritorial application of the 1951 Refugee Convention, the ICCPR, and – a few exceptions aside – the Convention against Torture. See A Dastyari, *United States Migrant Interdiction and the Detention of Refugees in Guantánamo Bay* (2015) 97, 106, and 118-119.

⁶² Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (entry into force: 3 September 1953), Vol. 213 UNTS, 22.

⁶³ M Milanovic, *Extraterritorial Application of Human Rights Treaties; Law, Principles, and Policy* (Oxford, Oxford University Press, 2011) 122.

⁶⁴ C Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford, Oxford University Press, 2015) 241.

⁶⁵ The ECtHR does not seem to apply a *spatial* model to determine jurisdiction at sea, unless taken to the extreme in which it starts considering man-made objects, such as a vessel, as a 'space'. Milanovic (n 63) 124.

⁶⁶ This test has been applied earlier in ECtHR, *Issa and others v. Turkey*, Application no. 31821/96, Admissibility decision, 16 November 2004, §71; and in ECtHR, *Pad and others v. Turkey*, Application no. 60167/00, Admissibility decision, 28 June 2007. See also: Committee against Torture, *Sonko v Spain*, Communication No. 368/2998, A/67/44 (2008), 380, §103.

⁶⁷ ECtHR, *Hirsi Jamaa and others v. Italy*, Application no. 27765/09, Judgment, 23 February 2012, 26, §80.

neither takes individuals on board its vessels, *nor* goes on board the vessel concerned; one does not need to have a case of actual detention of the vessel and/or the people on board. In *Xhavara et al v Italy*, the ECtHR found that Italy, as the flag state of a patrol boat, could be held responsible for the human rights violations caused by its vessel to persons not on board its own vessel.⁶⁸

While some scenarios thus seem to trigger jurisdiction under the ECHR, other scenarios remain unclear, such as using subtler methods like escorting a vessel or using megaphones or somehow similarly dissuading vessels from taking a certain course.⁶⁹ Nonetheless, it seems that most human rights bodies would be quite inclusive in that regard.⁷⁰

A particularly difficult case to determine *from a human rights perspective* is whether a State can exercise jurisdiction over *another (merchant) vessel which has reacted to a distress call and took migrants on board*. This scenario is less clear-cut given that merchant vessels as private actors do not have human rights obligations as such. The question then becomes whether and how human rights jurisdiction can be established. Is it the flag State of the rescuing private vessel which bears the sole responsibility to ensure that human rights are respected? Or is it the State in whose Search and Rescue Region the rescuing vessel is situated which bears the responsibility?⁷¹ Can the responsibility for an SRR amount to an

⁶⁸ ECtHR, *Xhavara et autres c. Italie et Albanie*, Requête n°39473/98, Décision sur la Recevabilité, 11 janvier 2001, 6. The ECtHR did not decide on the merits. See also A Klug and T Howe, 'The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Nijhoff, 2010) 85.

⁶⁹ M den Heijer, 'Europe beyond its borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control* (Brill, 2010) 189.

⁷⁰ A Fischer-Lescano, T Löhr and T Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 *International Journal of Refugee Law* 275-276; A Klug and T Howe (n 68) 95; V Moreno-Lax, 'Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12 *Human Rights Law Review* 596-597.

⁷¹ One possible argument to make is that '[e]ven if the rescued people are on a private vessel, the shipmaster of such vessel is bound to follow the RCC's instructions. The RCC therefore exercises control over the rescued

‘overall control of an area’ or a ‘background exercise of governmental authority’ where the instructions of the SRR’s Rescue Co-ordination Centre constitute control? Does a coastal State exercise human rights jurisdiction over a fishing vessel if it refuses that vessel access to its port to disembark rescued migrants?

These questions have not yet been fully addressed by the ECtHR. However, in *Women on Waves v Portugal*, the ECtHR found a rights violation on the basis of Portugal refusing entry into its territorial waters of the *Borndiep*: a vessel of *Women On Waves*⁷² that, once anchored, would have been used for meetings and seminars on reproductive health rights.⁷³ *In casu*, the Portuguese Secretary for Maritime Affairs issued a decision that prohibited anchoring the vessel in its territorial waters. He backed-up his decision with a threat to prosecute on the grounds of promoting illegal pharmaceutical products and creating a danger to public health.⁷⁴ Moreover, a warship was placed in the vicinity of the *Borndiep* to prevent it from entering Portuguese waters.⁷⁵ *At no point in the proceedings before the ECtHR was the issue of human rights jurisdiction contested by Portugal.* Thus, if preventing passage into territorial waters by threatening prosecution and sending warships to prevent entry triggers human rights jurisdiction,⁷⁶ one can argue that the same State techniques *vis-à-vis* merchant vessels aiming to disembark migrants does so as well.

Legal-empirical research could enquire as to whether certain maritime areas in the Mediterranean Sea are to such an extent under surveillance and characterized by State (vessel)

people and can decide their fate.’ FRA, *Scope of the principle of non-refoulement in contemporary border management: evolving areas of law*, European Union Agency for Fundamental Rights (2016), 6.

⁷² *Women On Waves* is a Dutch NGO focusing its activities on the prevention of unsafe abortions and empowering women to exercise their human rights. See: <http://www.womenonwaves.org/en/page/650/who-are-we>.

⁷³ ECtHR, *Women On Waves et autres c. Portugal*, Requête n°31276/05, Arrêt, 3 février 2009, 12, §44.

⁷⁴ *ibid*, 2-3, §8.

⁷⁵ *ibid*, 3, §9.

⁷⁶ Not to be conflated with jurisdiction from a perspective of the Law of the Sea, more precisely the jurisdictional competence to prevent innocent passage in accordance with Article 19 of the 1982 UNCLOS.

presence that their zonal governance could be qualified as an ‘overall control of an area’ or ‘a background exercise of governmental authority’ under the different ECHR models for jurisdiction. Cases in point would be maritime areas specifically delineated in operational plans of missions aimed at combatting smuggling of migrants and curbing irregular sea crossings in the Central and Eastern Mediterranean; operations in which the exchange of large amounts of (real-time) data occurs among several actors (EU Member State capacities, the EU Border and Coast Guard Agency, NATO capacities, and capacities of third countries) based on maritime presence, overflight and satellite images.

Looking into these precise contours of jurisdiction goes beyond the scope of this article.⁷⁷ For now it suffices that human rights jurisdiction can be established over migrants at sea under a whole range of circumstances and that this may imply disembarkation to a *particular* territory as set out below. It should be stressed that *from a human rights law perspective* it is immaterial that the LoS only prescribes a duty to disembark the persons aboard to a place of safety *in cases of Search and Rescue*, but remains silent on this point *in cases of interception*. It is the presence of *human rights* jurisdiction which triggers the content and scope of human rights obligations which in turn – as argued below - necessitate disembarkation onto land.⁷⁸

B. The content and scope of the prohibition of refoulement and collective expulsion under the ECHR system⁷⁹

⁷⁷ For an exploration under the law of state responsibility, see Papastavridis (n 33) 36-37 and 39-40.

⁷⁸ Similarly, the ECtHR held that from a *human rights* perspective it is immaterial whether the migrants concerned are rescued instead of intercepted in order to fall under the jurisdiction of the ECHR. See *Hirsi* (n 67) 26, §79.

⁷⁹ This section particularly focuses on ECHR instruments, but occasionally refers to other human rights instruments such as the 1984 Convention against Torture and the 1966 ICCPR and the output of their respective surveillance bodies for comparative insight. For an analysis under the ICCPR, see: Ni Ghráinne (n 38), at XXX (15-19).

On 23 February 2012, the ECtHR rendered an important decision in the above mentioned *Hirsi Jamaa* case by settling that the prohibitions of *refoulement* and collective expulsion apply on the high seas ‘whenever a State through its agents exercise control and authority over an individual, and thus jurisdiction’.⁸⁰ The discussion below limits itself to *exploring the content and scope of these prohibitions as to assess their impact on the issue of disembarkation*. It is argued that the obligations inherent to these prohibitions require disembarkation unto a safe territory. Although in theory disembarkation does not have to occur on EU territory, the current constellation in the Mediterranean suggests it should if it is to comply with human rights obligations.

The complexity in applying the *non-refoulement* principle and prohibition of collective expulsion at sea lies in *determining the precise scope of the State obligations and how these obligations can be observed in the maritime context*. The distinction between negative and positive State obligations renders some useful insights in this regard. Put as a caricature, *negative* human rights obligations entail that the State refrains from certain actions (‘respect’), while *positive* human rights obligations demand certain State action and resources to ‘ensure’ the enjoyment of the right concerned.⁸¹ Within the category of positive State obligations, one can argue there exists a continuum in terms of efforts and resources a State should use in order to ensure a certain right is protected. Judicial review of required State action on this continuum is a delicate exercise.⁸² The ECtHR has specified certain aspects of the State

⁸⁰ *Hirsi* (n 67) 25, §74. See also: UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, Geneva, 26 January 2007, 12, §24.

⁸¹ D Shelton and A Gould, ‘Chapter 24: Positive and Negative Obligations’, in D Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford, Oxford University Press, 2013) 564.

⁸² In this regard, the ECtHR has stated that there must be regard to ‘the fair balance that has to be struck between the general interests of the individual, the diversity of situations obtaining in Contracting States, and the choices which must be made in terms of priorities and resources. Nor must these obligations be interpreted in such a way as to impose an impossible or disproportionate burden.’ See ECtHR, *Ilascu and others v. Moldova and Russia*, Application No. 48787/99, Judgment, 8 July 2004, 77, § 332. Within this exercise, the Strasbourg court assesses that it is its task, not to determine the precise measures for a State to be adopted, but to

obligations inherent to the *non-refoulement* principle, as well as the prohibition of collective expulsion.

The *prohibition of refoulement* is encapsulated in both refugee law and human rights law. Article 33, §1 of the Refugee Convention states that ‘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.’⁸³ Several international treaties⁸⁴ create the obligation not to *refoule* individuals *as a principle of international human rights law*. The definition of who falls under the principle is thus not limited to refugees strictly speaking.⁸⁵ However, the scope of the protection afforded and whether exceptions are allowed differ from one human rights instrument to the other.⁸⁶ The analysis below focuses on the prohibition of *refoulement* under Article 3 ECHR.

Article 3 ECHR implies a clear negative obligation *not* to send migrants back to a place where they might be tortured or subjected to inhuman or degrading treatment or punishment. Although this obligation could be formulated as a *negative* one – the State has to *refrain* from

nonetheless verify that the measures actually taken are *appropriate and sufficient* in the case before it; to determine *to what extent a minimum effort is possible* (at § 334).

⁸³ Convention Relating to the Status of Refugees of 28 July 1951 (entry into force: 22 April 1954), Vol. 189 *UNTS*, 150; Protocol relating to the Status of Refugees of 31 January 1967), Vol. 606 *UNTS*, 8781.

⁸⁴ It is debatable, however, whether the *non-refoulement* principle is also a customary human rights law norm. See: J Hathaway, ‘Leveraging Asylum’ (2010) 41 *Texas International Law Journal* 507-527.

⁸⁵ Article 7 of the ICCPR states that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ This provision has been interpreted as a *non-refoulement* obligation by the Human Rights Committee. See: International Covenant on Civil and Political Rights of 16 December 1966 (entry into force: 23 March 1976), Vol. 999 *UNTS*, 172; Article 3 of the 1984 Convention against Torture also states that ‘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.’ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (entry into force: 26 June 1987), Vol. 1465 *UNTS*, 113. The African Commission on Human and People’s Rights has also interpreted article 5 of the African Charter of Human and People’s Rights in that sense. African Commission, *JK Modise v. Botswana*, 28th Ordinary Session, Communication no. 97/93, 6 November 2000. See also Klein (n 58) 20.

⁸⁶ R Mungianu, *Frontex and Non-Refoulement – The International Responsibility of the EU* (Cambridge, Cambridge University Press, 2016) 95-98.

a certain action – it also contains *positive* State obligations. *Firstly*, disembarkation in a third country may violate Article 3 ECHR ‘where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.’⁸⁷ Therefore State authorities exercising jurisdiction over migrants at sea have the obligation to assess this risk with reference to those facts which are known or should be known to the State at the time of removal.⁸⁸ This examination should pertain to the foreseeable consequences upon removal ‘in the light of the general situation there *as well as his or her personal circumstances*.’⁸⁹ It is up to the authorities to investigate *proprio motu* the treatment to which those rescued would be exposed if disembarked to a certain territory. The fact that the individual concerned does not expressly request asylum does not exempt a State from this obligation.⁹⁰ *Secondly*, disembarkation to a third country may violate Article 3 ECHR when the State authorities can reasonably expect that this third country does not offer sufficient guarantees against arbitrary expatriation to a country where the individuals concerned may be at risk in the sense of Article 3 ECHR.⁹¹ Again, this requires the State authorities on the vessel to make an inquiry before disembarking persons rescued or intercepted.

Collective expulsion is prohibited under Article 4 of Protocol No. 4 to the ECHR⁹² and can – similar to Art 3 ECHR – apply extraterritorially, including on the high seas.⁹³ The difference

⁸⁷ *Hirsi* (n 67) 33, §114.

⁸⁸ *ibid* 34, §121. Cf. Article 3, §2 1984 Convention against Torture, which spells out that States have to take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

⁸⁹ *Hirsi* (n 67) 33, §117 (Emphasis added).

⁹⁰ *ibid* 36, §133; Moreno-Lax (n 70) 583-84.

⁹¹ *Hirsi* (n 67) 39, §§147-48.

⁹² Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto, Strasbourg, 16 September 1963 (entry into force: 2 May 1968), Article 4. See also: EU Charter of Fundamental Rights, Article 19, §1; American Convention on Human Rights, Article 22, §9; African Charter on Human and Peoples’ Rights, Article 12, §5; and the Arab Charter on Human Rights, Art. 26, §1.

⁹³ *Hirsi* (n 67) 47, §180.

between *refoulement* and collective expulsion mainly lies in the fact that in the case of *refoulement*, there exists a real risk for an individual to be persecuted⁹⁴ or to be submitted to torture or to inhuman or degrading treatment⁹⁵ if he or she is returned, while the prohibition of collective expulsion exists notwithstanding the existence or not of any risk.⁹⁶

The prohibition of collective expulsion requires a detailed examination of the personal circumstances of aliens before their removal and an opportunity for every individual to put forward arguments against their expulsion.⁹⁷ The Court implied in *Hirsi* that personnel trained to conduct individual interviews as well as the assistance of interpreters and legal advisers should be part of the applicable procedural guarantees.⁹⁸ In *Sharifi and others v. Italy and Greece*, the Court also mentioned the importance of having information provided in a language that the individuals concerned can understand with the aim of informing them about the existence and aspects of (asylum) procedures.⁹⁹

The latter passage on the Court's observations in *Sharifi* might be interpreted as implying that the *only* way to satisfy Article 4 of Protocol No. 4 is to provide access to *asylum*

⁹⁴ Under Article 33 (1) of the 1951 Refugee Convention.

⁹⁵ Under for example Article 3 ECHR.

⁹⁶ IOM, *International Standards on Interception and Rescue at Sea*, Geneva, International Migration Law Unit, 11 June 2011, 11, §36.

⁹⁷ ECtHR, *Čonka v. Belgium*, Application no. 51564/99, Judgment, 5 February 2002, 20, § 63; *Hirsi* (n 67) 46, § 177 and 48, §185 *in fine*; ECtHR, *Sharifi et autres c. Italie et Grèce*, Requête no. 16643/09, Arrêt, 21 Octobre 2014, 56, §210; Cf. OHCHR, 'Expulsions of aliens in international human rights law', *OHCHR Discussion Paper*, Geneva, April 2006, 15. The Strasbourg Court repeated in *Hirsi* that 'the fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis.' *Hirsi* (n 67) 48, §184. The ECtHR recently affirmed in *Khlaifia v. Italy* with regard to Article 4 that a mere individual identification procedure does not suffice; that there must be guarantees that an individual's particular circumstances are assessed and that the person has an opportunity to present elements individually against his or her expulsion in order to comply with the prohibition of collective expulsion. ECtHR, *Khlaifia et autres c. Italie*, Requête no. 16483/12, Arrêt, 44-45, §§ 154-157. The case was referred to the Grand Chamber which heard the case on 22 June 2016.

⁹⁸ *Hirsi* (n 67) 48, §185.

⁹⁹ *Sharifi* (n 97) 57, §§ 214-217.

procedures.¹⁰⁰ Similarly, it has been argued that the *non-refoulement* principle also needs ‘some form of refugee screening’.¹⁰¹ The OHCHR, UNHCR and several authors have argued that these obligations can only be complied with by checking every individual person *for their potential status as a refugee or person otherwise in need of international protection*, as all migrants should be treated under presumption of being in need of protection until proven otherwise.¹⁰² Although the ECtHR in *Sharifi* clearly drew a link between State practices of absence of information and access to asylum procedures in ports on the one hand, and collective expulsions and *refoulement*, on the other, it never stated that a *subjective right to access asylum procedures* flows from these prohibitions (see further below). Indeed, the Court also stated that it could be ‘*any other procedure*’ as long as it fulfills the exigencies of Article 13 ECHR.¹⁰³

Positive State obligations indeed become somewhat clearer when Article 3 ECHR and Article 4 of Protocol No. 4 are read in conjunction with *the right to an effective remedy* pursuant to Article 13 ECHR.¹⁰⁴ The latter stipulates that ‘everyone whose rights (...) are violated shall

¹⁰⁰ Cf. *Hirsi* (n 67) 53, §204.

¹⁰¹ *den Heijer* (n 34) 244.

¹⁰² OHCHR (n 97) 2; UNHCR states that ‘the prohibition of *refoulement* applies to *all* refugees, including those who have not been formally recognised as such, and thus to asylum-seekers whose status has not yet been determined.’ UNHCR, *UNHCR comments on the Commission proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)* COM 2013(197) final, April 2013, 3. See also: Barnes (n 23) 116; E Guild, C Costello, M Garlick, V Moreno-Lax, M Mouzourakis, *New approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection – Study for the LIBE Committee* (2014), 63, available at: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2014\)509989](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2014)509989); Moreno-Lax (n 70) 590; V Moreno-Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’ (2011) 23 *International Journal of Refugee Law* 211-212. For an overview of case law that could be interpreted as implying a subjective right to access asylum procedures, see Mungianu (n 86) 259-260.

¹⁰³ *Sharifi* (n 97) 63, § 243 using the wording: ‘[être] concrètement empêchés de demander l’asile ou d’avoir accès à une quelconque autre procédure nationale satisfaisant aux exigences de l’article 13.’

¹⁰⁴ It is also important to mention that a right to an effective remedy within the maritime context is not only crucial for asylum-seekers and refugees, but also for others deriving specific rights from international law, such as victims of trafficking in persons. AT Gallagher, *The Right to an Effective Remedy for Victims of Trafficking in Persons: A Survey of International Law and Policy*, Paper submitted for the expert consultation convened by

have an effective remedy before a national authority (...).¹⁰⁵ The notion of ‘authority’ does not necessarily refer to a judicial authority.¹⁰⁶ Submission to a national authority for scrutiny of an expulsion decision must have suspensive effect.¹⁰⁷ The right to an effective remedy arguably also triggers a right to information and the right to legal and other assistance necessary to claim remedy.¹⁰⁸ In practice, this obligation involves providing access to legal assistance and adequate interpretation to those under jurisdiction of the engaging State, as well as an obligation for State agents to inform the individuals concerned of the availability of a remedy.

C. The effect on disembarkation

As the ECtHR was able to ‘solve’ the *Hirsi* case by (merely) touching upon positive State obligations inherent to the prohibitions of *refoulement* and collective expulsion, the Strasbourg judges unfortunately did not clarify the issue of more extensive positive obligations, in general, and the aspect of access to asylum as a subjective right, in particular. In his separate Concurring Opinion, Judge Pinto de Albuquerque made a list of procedural safeguards inherent within the *non-refoulement* principle¹⁰⁹ and stated that the Italian

the UN Special Rapporteur on Trafficking in Persons, especially women and children, Ms. Joy Ngozi Ezeilo on ‘The right to an effective remedy trafficked persons’, Bratislava, 22-23 November 2010.

¹⁰⁵ Article 13, ECHR.

¹⁰⁶ *Hirsi* (n 67) 51, § 197. It is argued in legal doctrine, however, aspirant refugees should also be able to benefit from free access to the courts pursuant to Article 16 of the 1951 Refugee Convention. See Moreno-Lax (n 102) 212. Goodwin-Gill argues that where disembarkation is contemplated to a *non-EU state*, ‘a form of judicial control is required as a necessary safeguard against ill-treatment and the abuse of power – exactly what form of judicial control calls for an exercise of juristic imagination. In the nature of things, such oversight should be prompt, automatic, impartial and independent, extending ideally to the monitoring of interception operations overall.’ GS Goodwin-Gill, ‘The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement’ (2011) 23 *International Journal of Refugee Law* 456-57.

¹⁰⁷ *Hirsi* (n 67) 52, §§ 198-200; *Khlaifia* (n 97) 47, §167.

¹⁰⁸ IOM (n 96) 10, §33.

¹⁰⁹ A reasonable time limit in which to submit the asylum application; a personal interview; an opportunity to submit evidence and dispute the evidence; a written decision by an independent first-instance body; a reasonable time limit to appeal the latter’s decision and automatic suspensive effect of this appeal; full and speedy judicial review of the first instance decision; and free legal advice and representation and, if necessary free linguistic assistance and access to UNHCR or other organizations working on behalf of UNHCR. Judge Pinto de Albuquerque in *Hirsi* (n 67) 71. Cf. recommendations of the UNHCR ExCom (1977), ‘Conclusion No. 8 (XXVIII): Determination of Refugee Status’, in UNHCR (2008), *Thematic compilation of Executive Committee Conclusions* (3rd ed.), 383-384.

Government ‘also [had] a positive obligation to provide the applicants with practical and effective access to an asylum procedure in Italy.’¹¹⁰ This line of thought which reads a *right of access to asylum procedures* into the prohibition of *refoulement* is contestable.¹¹¹ While some authors, already mentioned above, argue that access to asylum procedures – and hence *de facto* disembarkation to the territory of asylum – is a necessary corollary of the *non-refoulement* principle¹¹², the Court – in my view – did not confirm this line of reasoning.¹¹³ Despite this – what some will qualify as a restrictive – reading of the ECtHR case law, there are important implications regarding disembarkation.

Firstly, the nature of the positive obligations inherent to the prohibitions of *refoulement* and collective expulsion as well as the right to an effective remedy arguably necessitate disembarkation *onto land*.¹¹⁴ Although the absence of compulsory access to courts may suggest that disembarkation to territory is not necessary, the other exigencies of Article 13 suggest otherwise. While modern technologies may support some procedural aspects, overall living up to them on board a vessel at sea seems a daunting task: these requirements lie on the outer end of a continuum in terms of state resources as they require the State to have specially trained staff in place for registration and identification procedures, access to legal assistance and representation, a national instance for remedy, etc.¹¹⁵ This is especially a concern as the

¹¹⁰ Judge Pinto de Albuquerque (n 109) 78.

¹¹¹ Hathaway has clearly formulated how the duty not to refoule is distinct from a right to (access) asylum. J Hathaway, *The rights of refugees in international law* (Cambridge, Cambridge University Press, 2005) 300-302. How the *right to asylum*, which has its footing as a binding legal obligation in EU law, affects disembarkation is discussed further below in section 4.

¹¹² M Giuffré, ‘Access to Asylum at Sea? Non-refoulement and a Comprehensive Approach to Extraterritorial Human Rights Obligations’, in V Moreno-Lax, E Papastavridis (eds), *‘Boat Refugees’ and Migrants at Sea: A Comprehensive Approach – Integrating Maritime Security with Human Rights* (Brill, 2016) 255-61.

¹¹³ Cf. Mungianu (n 86) 168.

¹¹⁴ A recent study for the European Parliament affirms that screenings at sea are highly undesirable. See Guild, Costello, Garlick, Moreno-Lax, and Mouzourakis (n 102) 45-46. See also Dastyari (n 61) 168-69.

¹¹⁵ The *Hirsi* case is illustrative in this regard as it was apparent that the Italian maritime authorities were not trained or equipped to conduct interviews for every individual, nor was there legal assistance or interpretation available. Moreno-Lax (n 70), 589. UNHCR noted in this regard that ship captains of commercial vessels ‘cannot be expected to make fine judgements as to the ‘safety’ in this ‘human rights’ sense of a proposed place of disembarkation. See UNHCR (n 21) 4, §17. See also IMO Guidelines (n 30), paragraph 6.1.0 which indicates

suspensive effect of a remedy would create a situation in which migrants could be stuck at sea for days or longer.

Secondly, the disembarkation may – in theory – occur *somewhere else* than on the territory of the State exercising jurisdiction at sea as long as it ensures that the State of disembarkation constitutes a territory where the migrants concerned are not at risk and where the necessary procedures mentioned above are in place.¹¹⁶ The current situation in the Mediterranean suggests that EU Member States – as parties to the ECHR – should accept disembarkation on to their territory in order to comply with the rules of the ECHR. Given that many off shore territories arguably cannot be designated as ‘safe’ in the sense of Article 3 ECHR, such as Tunisia, Libya or Egypt, and – even – Turkey,¹¹⁷ disembarkation onto the territory of an ECHR member State which exercises jurisdiction at sea seems almost inevitable.

Thirdly, the rescued or intercepted migrants under the jurisdiction of a State bound by the abovementioned human rights instruments have *a subjective right* to these procedural guarantees. The disembarkation onto a safe territory where the above mentioned procedural rights can be guaranteed does not depend on the courtesy or good will of a coastal State, as is often the case under the Law of the Sea regime. A large influx of migrants does not justify non-compliance with these obligations and living up to these subjective rights.¹¹⁸

IV. THE RIGHT TO ASYLUM UNDER THE CFR NECESSITATES DISEMBARKATION ON TO EU TERRITORY

that what can only be expected of the crew of the vessel is to collect information of those rescued with regard to name, age, gender, apparent health, medical condition etc.

¹¹⁶ For a description of UNHCR’s position on this, see den Heijer (n 34) 245, fn 179.

¹¹⁷ Amnesty International, *Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU-Turkey Deal*, Press Release, 1 April 2016, available at: <https://www.amnesty.org/en/press-releases/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/>.

¹¹⁸ *Hirsi* (n 67) 46-47, §179; *Sharifi* (n 97) 59, §224.

The Charter of Fundamental Rights of the European Union ('CFR') also provides for the protection against *refoulement* (Art. 19(2)) and collective expulsion (Art. 19(1)). Both provisions correspond to the prohibitions discussed above under the Council of Europe instruments, their meaning and scope being the same.¹¹⁹ The CFR is a rare human rights instrument, however, in that it specifically stipulates a *subjective right to asylum* under Article 18. This right is given practical effect through a whole body of Regulations and Directives that are currently under reform. The contention here is that the EU *acquis* on border control can apply extraterritorially when EU Member States and agencies encounter migrants at sea, and that therefore Article 18 CFR – aside from Article 19 (§§1-2) – applies too when that *acquis* is implemented. The logical consequence is disembarkation onto EU territory in order to comply with the normative exigency to facilitate access to asylum procedures.

A. Article 18 CFR creates a subjective right to access asylum procedures set up by the EU Member States

Article 18 of the CFR states that '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 on European Union and the Treaty on the Functioning of the European Union'.¹²⁰ Although not creating an automatic right to be *granted* asylum, it requires EU Member States to guarantee a right to have an individual's asylum application *assessed* and to grant asylum if the conditions are met.¹²¹ The

¹¹⁹ V Moreno-Lax, '(Extraterritorial) Entry Controls and (Extraterritorial) Non-Refoulement in EU Law', in M Maes, M-C Foblets, Ph De Bruycker (eds), *The External Dimensions of EU Asylum and Immigration Policy* (Bruylant, 2011) 472, referring to Article 52 (3) CFR.

¹²⁰ Charter of Fundamental Rights of the European Union, 2012/C 326/02, 399 (CFR).

¹²¹ M den Heijer, 'Article 18', in S Peers, T Hervey, J Kenner, A Ward (eds.), *The EU Charter of Fundamental Rights – A Commentary* (Hart Publishing, 2014) 535, §18.39; MT Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27 *Refugee Survey Quarterly* 34. See also Ni Ghráinne (n 38) at XXX (14-15) and references included therein for a brief sketch of the right to asylum in international law, which is said not to have crystallized as custom yet.

CJEU has confirmed the right to asylum pursuant to Article 18 to be a general principle of EU law.¹²² Secondary law has to comply with it and individuals can draw subjective rights from it, which may ‘give rise to direct claims for positive action by the Union’s institutions or Member States authorities.’¹²³

Article 18 is given practical effect through the secondary legislation of the EU, more precisely via the asylum *acquis*. This body of law regulates, among other things, common standards for (access to) asylum procedures,¹²⁴ common standards on who can qualify for international protection,¹²⁵ and rules on how asylum seekers should be received.¹²⁶ Another important instrument here is the Dublin Regulation,¹²⁷ which is used to determine the EU Member State responsible for the processing of an asylum claim. In short, the *acquis* guarantees that asylum-seekers within its scope can access procedures to scrutinize their claims for international protection and – once recognized – can benefit from the rights that accompany them.

B. The CFR, including Article 18, applies when EU law is being implemented extraterritorially

¹²² See reference to *N.S. and M.E.*, judgment, 21 December 2011, in Mungianu (n 86) 115.

¹²³ Reference in Moreno-Lax (n 119) 471 to the Explanations Relating to the Charter of Fundamental Rights, OJ C 303/17 of 14 December 2007, 35.

¹²⁴ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, [2013] OJ L180/60 (*recast APD*).

¹²⁵ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, [2011] OJ L337/9 (*recast QD*).

¹²⁶ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 29 June 2013, [2013] OJ L180/96 (*recast RCD*).

¹²⁷ Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 20 June 2013, [2013] OJ L180/31 (*Dublin III Regulation*).

The CFR – and hence also the right to asylum – can apply extraterritorially, yet *only* in cases when the EU institutions, bodies, offices and agencies or EU Member States ‘*are implementing Union law*’.¹²⁸ CFR obligations apply as a matter of EU constitutional obligation ‘without any additional IHRL jurisdictional criteria having to be met’.¹²⁹ Indeed, there is no test of spatial or personal jurisdictional control like under international human rights law.¹³⁰ What matters for the CFR is the *law* that governs a particular situation, namely EU law.¹³¹ This test thus potentially allows for a broader range of situations to fall under fundamental rights protection than under the ECHR as no effective control test is required. Applied to the context of rescue and interception at sea, the question therefore boils down to whether EU law is ‘being implemented’ in those particular circumstances. This is less obvious than one might think. There is no clear basis for extraterritorial border control in EU law,¹³² nor does the EU have competence to regulate on maritime search and rescue obligations. Is an EU Member State implementing EU law when pursuing a classic search and rescue action at sea? Is an EU Member State implementing EU law when patrolling beyond its territorial waters to prevent illegal entries and combat the smuggling of migrants? There are no clear answers to these questions, though both issues will be taken into consideration below.

C. The EU *acquis* on border control and asylum can apply extraterritorially at sea, hence necessitating disembarkation on to EU territory to comply with Article 18 CFR

¹²⁸ CFR (n 120), Article 51 (1).

¹²⁹ C Costello and V Moreno-Lax, ‘The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model’ in S Peers, T Hervey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights – A Commentary* (Hart Publishing, 2014) 1678, §59.53.

¹³⁰ Guild, Costello, Garlick, Moreno-Lax, and Mouzourakis (n 102) 63.

¹³¹ Costello and Moreno-Lax (n 129) 1680.

¹³² The Schengen Borders Code (below) only talks about ‘border checks’ at so-called Border Crossing Points (BCPs) and about ‘border surveillance’ between those BCPs.

The legal basis for legislative action in the field of border control and asylum can be found in Title V of the *Treaty on the Functioning of the European Union*.¹³³ Aside from being in accordance with the 1951 Convention on the Status of Refugees and its 1967 Protocol, these secondary norms must also protect the right to asylum under the CFR. Procedural guarantees to access and lodge asylum claims in the context of border control are regulated through the Schengen Borders Code (SBC)¹³⁴ and subsequently the secondary legislation constituting the CEAS. At first sight, a textual overview of the EU acquis on border control and asylum seems to indicate that its rules do not apply extraterritorially. However, it is argued below that (i) the SBC can apply extraterritorially, and that (ii) the rights guaranteed therein (and the acquis that gives effect to those rights) therefore should too.

i. The border acquis can apply extraterritorially, including its safety clauses

There are several indications that the SBC can apply extraterritorially. The SBC establishes rules on persons *crossing* the external borders of the EU Member States.¹³⁵ From that very general provision one may infer that the SBC does not apply to migrants who do not even come near the external border,¹³⁶ for example, on the high seas. However, the SBC allows for special regimes of border control *beyond* the EU territory (for instance, in train stations and commercial marine routes and ports in third countries) under Article 19 SBC.¹³⁷ A 2013 amendment of the SBC introduced an explicit obligation for border guards from EU Member

¹³³ 'The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.' TFEU, Article 78 (1).

¹³⁴ Regulation (EU) No. 399/2016 of the European Parliament and the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)(codification), 23 March 2016, [2016], OJ L77/1.

¹³⁵ SBC (codification) (n 134), Article 1.

¹³⁶ Article 2(2) of the SBC (codification)(n 133) defines 'external borders' as 'the Member States' land borders, including rivers and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders.'

¹³⁷ den Heijer (n 34) 197.

States present at shared Border Crossing Points (BCPs) in third countries that ‘a third-country national asking for international protection on Member State territory shall be given access to relevant Member State procedures in accordance with the Union asylum acquis.’¹³⁸ By way of analogy, when a State is operating at sea beyond its territorial waters checking for vessels with migrants on board, it is engaged in EU external border control. Overall, den Heijer’s observation is a case in point in that ‘the emerging logic is that, even though some definitional provisions of the Borders Code appear to locate the Schengen Border crossings regime ‘at’ the external border, the Code and related EU instruments are equipped with flexibility in terms of the geographical areas where border controls may be conducted.’¹³⁹

The border acquis contains several safety clauses. Article 3(b) of the Schengen Borders Code (SBC) stipulates that it applies ‘without prejudice to the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*’. Article 4 of the SBC states that EU Member States must fully comply with relevant EU law, including the CFR, and relevant international law, including the 1951 Refugee Convention.¹⁴⁰ Arguably, those SBC provisions must be interpreted in light of the EU asylum acquis,¹⁴¹ particularly Article 6(5)(c) SBC which stipulates that Member States may authorise entry on humanitarian grounds or because of international obligations. In short, in the words of Moreno-Lax, ‘where activities covered by the Code take place, the guarantees enshrined therein are applicable as well.’¹⁴² From the moment the SBC applies extraterritorially, effect

¹³⁸ Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013, amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), (...), 26 June 2013, [2013] OJ L182/1. See also G Beck, N Mole, and M Reneman, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, European Council on Refugees and Exiles & Dutch Council for Refugees (2014), 36.

¹³⁹ den Heijer (n 34) 199. See also Moreno-Lax (n 119) 474-75.

¹⁴⁰ SBC (codification) (n 134), Article 3(b) and Article 4.

¹⁴¹ S Peers, E Guild, J Tomkin, *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition – Volume 1: Visas and Border Controls* (Martinus Nijhoff, 2012) 43; den Heijer (n 34) 194.

¹⁴² Moreno-Lax (n 119) 476.

must be given to the safeguard provisions mentioned above in general, and Article 18 CFR in particular. Consequently, it should therefore be made sure that access to asylum and procedural safeguards are explicitly provided for these types of scenarios at sea. The analysis below focuses on the EU legislation that exists to give effect to the guarantees mentioned in Articles 3 and 4 of the SBC: the asylum *acquis*.

ii. The asylum acquis should be aligned with its potential extraterritorial application

Articles 13 and 18 of the *Qualification Directive (recast QD)*¹⁴³ oblige Member States to respectively grant refugee status and subsidiary protection for those who qualify. Access to lodge an application for international protection and procedural safeguards are provided by the *Asylum Procedures Directive (recast APD)*.¹⁴⁴ It lays down that rules to ensure access to asylum procedures and sets out important (procedural) safeguards.¹⁴⁵ The *recast APD* also sets out minimum conditions for accelerated procedures¹⁴⁶ as well as scrutiny tests for admissibility procedures.¹⁴⁷ The *Dublin III Regulation*¹⁴⁸ contains several procedural safeguards as well.¹⁴⁹ The EU *acquis* thus provides a whole range of guarantees and safeguards for those migrants wanting to lodge an asylum-claim on EU territory. It, however, seems to fall short in providing protection beyond the external border of that territory.

¹⁴³ *Recast QD* (n 125).

¹⁴⁴ *Recast APD* (n 124).

¹⁴⁵ Access to asylum procedures (Article 6), the right to remain in the Member State pending examination (Article 9), a range of guarantees related to access to eg an interpreter, a legal adviser, and the UNHCR (Article 12), a personal interview (Articles 14—17), the right to information (Article 19), the right to free legal assistance and representation in appeal (Art. 20), guarantees for persons with specific needs (Article 24) and unaccompanied minors (Article 25); see *recast APD* (n 124).

¹⁴⁶ ‘In accordance with the basic principles and guarantees of Chapter II’, *recast APD* (n 124), Article 43.

¹⁴⁷ *Recast APD* (n 124), Articles 33—39.

¹⁴⁸ *Dublin III Regulation* (n 127).

¹⁴⁹ A right to information (Article 4), the right to a personal interview, with interpreter where necessary (Article 5 (1) and (4)), written notification of transfer decisions (Article 26), and the right to an effective remedy before a court or tribunal (Article 27 (1)), *Dublin III Regulation* (n 127).

The approach of the EU legislator in terms of the extraterritorial application of the asylum *acquis* at sea can be characterised as reticent. Under *Dublin III*, interception or rescue of migrants in the *territorial* waters of an EU Member State does not constitute a problem as this maritime zone is generally seen as part of a State's territory. However, it is argued that *Dublin III* does not apply when persons are retrieved within maritime zones *beyond* the territorial sea and an application was initially made outside the territory.¹⁵⁰ Similarly, the APD limits its geographical scope to 'all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States (...).'¹⁵¹ Unlike the Dublin III Regulation, this Directive does explicitly recognise its application to the territorial waters of a Member State. However, beyond the territorial sea the APD suffers from the same blind spot *ratione loci* by not covering claims made on the high seas. The field of application of the recast RCD is similarly territorially limited.¹⁵² Interestingly, the recast QD contains no territorial delimitation. It has been argued that the territorial scope of the Qualification Directive is guided by the APD.¹⁵³ Others have argued that this reading is open to question, 'leaving the matter ultimately for the CJEU to resolve.'¹⁵⁴

Despite the territorial limitations present in the texts of the EU asylum legislation, this *acquis* must apply and be accessible once it is established that the SBC applies in a situation at sea, as already argued above. Both the textual provisions and practice of the asylum *acquis* instruments should be aligned with this interpretation. One cannot enforce EU law while at the same time excising certain safeguards encapsulated therein, namely fundamental rights in

¹⁵⁰ S Peers, V Moreno-Lax, M Garlick, E Guild, *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition – Volume 3: EU Asylum Law* (Brill-Nijhoff, 2015) 351-52.

¹⁵¹ *Recast APD* (n 124), Article 3 (1).

¹⁵² *Recast RCD* (n 126), Article 3(1).

¹⁵³ H Battjes, *European Asylum Law and International Law* (Brill, 2006) 209-10.

¹⁵⁴ Costello (n 64) 251 *in fine*; den Heijer (n 34) 204.

general, and the right to asylum pursuant to Article 18 CFR in particular. The necessary result is that, when Article 18 CFR applies at sea by virtue of the SBC that is ‘being implemented’, those persons under the jurisdiction of the EU Member State or agency in case should be disembarked onto EU territory for the purpose of being processed in accordance with the asylum acquis. It has indeed been widely argued that one cannot process asylum claims at sea ‘by the book’.¹⁵⁵

D. Article 18 CFR does not imply a right to access territory as such, but does so when EU law is being implemented and a sufficiently close link exists

It is, however, contested within the literature whether Article 18 implies a right to access the territory of the asylum State:

‘[It] is evident that several EU Member States have recognized asylum as an individual right in their constitutions. Therefore, it can be argued that if Article 18 of the EU Charter results from the constitutional traditions common to the Member States, it must be interpreted ‘in harmony’ with those traditions thus granting a right of entry which goes beyond protection against expulsion. Against this latter argument, it can be asserted that the Charter was not adopted with the intention of creating new rights but for the purposes of reaffirming rights resulting from national constitutional traditions and (...) international obligations common to the EU Member States. (...) Accordingly, Article 18 of the Charter should not be interpreted as an individual right of entry since such an interpretation does not reflect EU Member States’ international obligations.’¹⁵⁶

First of all, it should be pointed out that the right to asylum received a separate stipulation in the CFR, different from the prohibition of *refoulement* and collective expulsion. If the

¹⁵⁵ UNHCR (n 21) 4, §18 and 6, §29; UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, Geneva, 2011, 37-38. See also R Bruin, ‘Border Control: Not a Transparent Reality’ in FANJ Goudappel and HS Raulus (eds), *The future of asylum in the European Union* (The Hague, TMC Asser Press, 2009) 29; IOM (n 96) 3.

¹⁵⁶ For a brief overview, see Mungianu (n 86) 123-25.

positive State obligations involved in Article 18 were to be explained similar to, for instance, Article 19 (2) CFR, why create a separate provision? The prohibitions under Article 19 (1) and (2) imply obligations similar to those discussed under the ECHR system, but not a subjective right to asylum as indicated in the case law of the ECtHR. Moreover, the fact that Article 18 mentions the 1951 Convention does not necessarily mean that its scope of obligations is limited to the *non-refoulement* obligations of that instrument, as a sort of exclusive *renvoi*;¹⁵⁷ rather, it should ‘at a minimum’ observe the 1951 Convention.¹⁵⁸ Article 18 of the CFR encapsulates more than protection against *refoulement*, as it refers to the TEU and TFEU, which provide the legal basis for EU asylum acquis in order to materialise access to asylum procedures and the qualification and granting of asylum status in the EU Member States.

Secondly, whether Article 18 implies a right to territorial access cannot be pursued in a legal and contextual vacuum. Standing on its own, one needs indeed to inquire whether States could have wanted the right to asylum in Article 18 to imply a right to access the asylum State *from anywhere*, or whether such an implied right would be necessary to render Article 18 ‘practical and effective, not theoretical and illusory’. This would imply, for instance, that individuals could access embassies or consulates of the asylum State in third countries to claim a right to enter the EU territory with a view to accessing asylum procedures. It is not clear whether such a situation would constitute a ‘sufficient connection’, in line with the CJEU jurisprudence, to establish jurisdiction in the sense of Article 51(1) CFR. Hence, it is in doubt whether granting access to EU territory would be a Member State obligation under Article 18 of the Charter *as such*. The situation is, however, different when EU Member States and/or EU agencies actively engage migrants extraterritorially in a context in which

¹⁵⁷ Cf. Mungianu (n 86) 128, who states that ‘Article 18 of the EU Charter explicitly refers to the 1951 Refugee Convention and therefore effects a *renvoi* to Article 33 of the Convention.’

¹⁵⁸ Cf. Moreno-Lax (n 119) 471 *in fine*.

EU law and policy are pursued and implemented, in particular border control, combatting smuggling of migrants and trafficking of people. In those circumstances, there is arguably a clear link between the persons concerned and a body of EU law ‘being implemented’. Costello and Moreno-Lax have pointed out that the notion of implementation has been given a wide interpretation through the doctrine of effectiveness of EU law. One could argue that individual State operations at sea touch upon the migration and asylum policy and therefore are ‘connected in part to EU law’ and ‘affect the interests of the European Union’, criteria used in inter alia the *Fransson* case by the Luxembourg court to delineate the scope of the CFR.¹⁵⁹ Moreover, the right to asylum would be rendered theoretical and illusory when the whole gist of pre-border control and surveillance permits the prevention of asylum-seekers and refugees from physically accessing and exercising their rights.

E. Disembarkation and access to asylum under Regulation 656/2014

An exception in the myriad of EU acquis is the Frontex Maritime Surveillance Regulation,¹⁶⁰ which applies *only* to the operational context in which Frontex (soon EBCGA) assists Member States. Its provisions echo almost the same language as that of the Strasbourg judges in *Hirsi*. This was the co-result of an annulment of Council Decision 2010/252/EU and academia, civil society and players such as UNHCR¹⁶¹ inserting themselves in the legislative process and trying to ensure that this new Regulation would be ‘Hirsi-proof’. As a result, interceptions and rescue at sea scenarios in which Frontex is involved are guided by explicit rules concerning *non-refoulement* and disembarkation. Recital 19 of the Regulation states that the regulation ‘respects’ and ‘observes’ the right to asylum, while recital 17 states that ‘[the]

¹⁵⁹ Costello and Moreno-Lax (n 129) 1681, §59.60.

¹⁶⁰ Regulation No. 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 27 June 2014, [2014] OJ L189/93 (Frontex Maritime Surveillance Regulation).

¹⁶¹ See eg UNHCR (n 102).

operational plan should include procedures ensuring that persons with international protection needs (...) are identified and provided with appropriate assistance, including access to international protection.’ Nonetheless, there is no further explicit reference to the right to asylum pursuant to Article 18 CFR in the provisions of this Regulation, nor any operational article with a view to guaranteeing access to asylum in the EU once under CFR jurisdiction.

The principle of *non-refoulement* receives a prominent place in Article 4 of the Frontex Maritime Surveillance Regulation. It stipulates that no person shall be disembarked in contravention of the *non-refoulement* principle. In order to do so, States need to ensure that an assessment of the general situation in third countries in that regard is part of the operational plan.¹⁶² This does not mean that migrants retrieved at sea will automatically be disembarked to safe EU territory grounds. Implicit in the language of paragraph 3 of Article 4 is embedded the idea that participating units can still disembark migrants on non-EU territory. This is in line with our analysis that the prohibitions of *refoulement* and collective expulsion do not necessarily imply disembarkation on to the territory of the State which is exercising jurisdiction under the ECHR (see section 3 of this paper). The only constraint stems from positive human rights obligations – as in *Hirsi* – in that before disembarking migrants on third country soil, the participating units have to identify the intercepted or rescued persons, assess their personal circumstances, inform them of their destination and give them an opportunity to express that the planned disembarkation would violate the *non-refoulement* principle.¹⁶³

The second paragraph of Article 4(3) requires that operational plans must include ‘when necessary, the availability of shore-based medical staff, interpreters, legal advisers and other

¹⁶² Frontex Maritime Surveillance Regulation (n 160), Article 4 (1-2).

¹⁶³ *ibid*, Article 4(3), §1,

relevant experts of the host and participating Member States.’¹⁶⁴ This begs the question of how the shore-based capacities and services can be rendered practicable when it is decided to disembark on non-EU territory – *i.e.* a place where those very required capacities will not be present. These capacities allow satisfying the more demanding positive obligations that the *non-refoulement* principle arguably entails (see argument under section 3), but still only if disembarkation occurs in the EU territory where these capacities are present. In other words, when disembarkation occurs on the territory of a non-EU Member State this may still not be in conformity with the *non-refoulement* principle and *a fortiori* the right to asylum despite the efforts made in the Frontex Maritime Surveillance Regulation.

A second pivotal provision in the Regulation is Article 10 which regulates disembarkation. Aside from carrying out the above mentioned *non-refoulement* exercise (with its identified dysfunctions included), the Regulation contemplates four disembarkation scenarios:

- when interception takes place in the territorial sea or the contiguous zone, disembarkation *shall* take place in the coastal Member State (emphasis added);
- when interception takes place on the high seas, disembarkation *may* take place in the third country from which the vessel is assumed to have departed, but if that is not possible disembarkation *shall* take place in the host Member State (emphasis added);
- when a search and rescue takes place, the participating States shall then cooperate with the responsible SRR State to identify a place of safety¹⁶⁵ for disembarkation. In case no solution is found for disembarkation in this scenario, disembarkation must take place in the host Member State.

¹⁶⁴ *ibid*, Article 4(3), §2.

¹⁶⁵ A place of safety is defined as ‘a location where rescue operations are considered to terminate and where the survivors’ safety of life is not threatened, where their basic human needs can be met and from which transportation arrangements can be made for the survivors’ next destination, *taking into account the protection of their fundamental rights in compliance with the principle of non-refoulement*.’ Frontex Maritime Surveillance Regulation (n 160), Article 2(12).

- additionally, non-participating EU Member States can allow disembarkation on to their territory with their explicit (ad hoc) consent, but they cannot be forced to do so.

This disembarkation scheme remedies an important gap that exists in the classic LoS framework for disembarkation: In case no proper disembarkation venue can be found, there is *always a compulsory back up on EU soil* to avoid standoffs and delays. These provisions, however, remain problematic given that scenarios two and three risk impeding migrants to exercise their subjective right to seek asylum on EU territory; a right that must be guaranteed in the context of Frontex-assisted missions as the law that applies in those situations is EU law and hence triggers the application of Article 18 CFR.

V. CONCLUDING ANALYSIS

A. The mosaic of norms affecting disembarkation

Within the European context a complexity of norms is at play regarding the disembarkation of migrants. Under the Law of the Sea (LoS) there currently does not exist an obligation for States to accept the disembarkation of migrants onto their territory, nor does there exist a residual rule which allocates such responsibility when no venue for disembarkation can be found. It would be erroneous to conclude, however, that the LoS is unfit in terms of regulating disembarkations. The SAR and SOLAS Conventions describe clear responsibilities for coastal States and flag States to coordinate and cooperate to find a place for disembarkation and to have the appropriate mechanisms in place to that end.¹⁶⁶ Rather, the problem lies with the European coastal States who are unable or unwilling to accept migrants within their territory. Therefore, this paper aimed at looking for normative guidance beyond the LoS to establish how disembarkation may be regulated. As the underlying problem is not

¹⁶⁶ Cf. Campàs Velasco (n 5), at XXX (20).

one of maritime policy but one of border controls and asylum, the problem should be guided by the relevant human rights law and EU *acquis*.

Complying with the full scope of human rights obligations under the ECHR instruments necessitates the disembarkation onto land when migrants are under the ECHR jurisdiction of a Contracting Party. This land should, however, not necessarily be EU territory when migrants are intercepted or rescued on the high seas: under the ECHR, access to asylum procedures and courts are not an absolute requisite to fulfil the procedural guarantees of Article 13 ECHR. A third country is arguably suitable for disembarkation as long as procedures similar to the standards of Article 13 *juncto* Article 3 ECHR and Article 4 of Protocol No. 4 can be complied with. With the exception of one judge, the Grand Chamber in *Hirsi* did not – arguably rightly so – touch upon the issue of the precise positive State obligations arising from the prohibition on *refoulement* and collective expulsion in an extraterritorial context, in particular an implied right to asylum and access to territory.

The situation is different when migrants find themselves beyond the territorial waters of an EU Member State, but in a situation in which EU law is being implemented: once a migrant is engaged at sea by EU Member States authorities (in their individual capacity¹⁶⁷ or in the framework of a Frontex-assisted mission) or an EU agency in the framework of border control operations, he or she should be given access to international protection procedures pursuant to Article 18 CFR. This necessitates disembarkation on to EU territory and not merely on to a safe territory of a third country as – in theory – could be the case under the

¹⁶⁷ When negotiating the *Frontex Maritime Surveillance Regulation*, several coastal Member States opposed the application of its principles to their own operations at sea in their individual capacities. They also did not accept precise disembarkation rules for their *individual* missions: the general tone was that ‘regulation of search and rescue and disembarkation in an EU legislative instrument is unacceptable’ and ‘constitutes a red line’. S Carrera and L den Hertog, ‘Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean’, *CEPS Paper in Liberty and Security in Europe*, No. 79, January 2015, 11-12.

prohibitions of *refoulement* and collective expulsion under the ECHR system and Article 19 (1-2) of the CFR.

A brief scrutiny of the EU acquis reveals a reluctance to regulate access for migrants to European soil and international protection mechanisms. Although secondary legislation creates extensive procedural safeguards for asylum-seekers and refugees, these mechanisms are reserved for those who are able to make it to EU territory or to a place *at* its external borders. Absent a clear rule which obliges EU Member States to allow the migrants it engages on the high seas to lodge an asylum claim within its territory, there is arguably a situation of non-alignment between the EU acquis and the CFR.

The translation of fundamental rights into a protection-friendly external border practice is a challenge for the EU,¹⁶⁸ this despite policy commitments made at the highest political level on ‘facilitating access and improving security’¹⁶⁹ and ‘enhancing legal avenues to Europe’¹⁷⁰. Absent clear binding European norms, it will be up to the ECtHR or CJEU to embark upon this sensitive topic and settle the issue of access to protection in the extraterritorial context and hence also the issue of disembarkation.¹⁷¹ As the problem of disembarkation is also one of policy, this concluding analysis considers a few elements that may incentivise States to create legal and practical solutions for disembarkation, taking some of the pressure and expectations away from the court system.

B. Can disembarkation be made acceptable through burden-sharing?

¹⁶⁸ den Heijer (n 34) 205; Peers, Guild and Tomkin (n 141) 39.

¹⁶⁹ *The Stockholm Programme: An open and secure Europe serving and protecting citizens*, OJ 2010 C115/01, §5.1.

¹⁷⁰ CEAS reform communication (n 4).

¹⁷¹ ‘Bringing legal challenges with regard to distant and opaque State practices’ is, however, fraught with practical obstacles. Costello (n 64) 249.

It is not the first time that large influxes of migrants and refugees create challenges. Burden-sharing was successfully applied in some historical cases,¹⁷² while in others it remained stuck at the policy level.¹⁷³ Elements of burden-sharing may increase the willingness of EU coastal States to accept disembarkations of migrants, although recent developments have provided us with a reality check as we move on to contemplate possible solutions. Incentives may be provided with regard to three problem areas for coastal States: overburdened disembarkation venues, overburdened processing capacity, and an overburdened share of asylum-seekers.

A first component of burden-sharing could lie in *spreading disembarkations over different safe ports along the EU external border*. This would alleviate over-burdened smaller ports and islands close to popular routes for overseas crossings, which are mainly situated in Greece and the southern coasts of Italy. This could be operationalised through pre-established lists of safe ports which are provided by the EU coastal States.

A similar system of a list of ‘places of refuge for vessels’ already exists in the sphere of marine environment protection. Article 20 of Directive 2002/59/EC requires coastal States to identify safe ports for receiving vessels in distress in order to protect human life and the marine environment.¹⁷⁴ Its system practically runs on specialised authorities and is incentivised by financial compensations for allowing disembarkation.¹⁷⁵ In terms of decision making, the appointed authorities have an obligation to allow disembarkation to a place of

¹⁷² Klug (n 22) 57-58; A Suhrke, ‘Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action’ (1998) 11 *Journal of Refugee Studies* 405.

¹⁷³ By 1993, some 600,000 individuals from the former Yugoslavia has entered the European Union. The proposal of the German Presidency in the Council of 1994 to relocate migrants according to each State’s population, size of territory, and GDP did not receive the necessary support. C Boswell, ‘Burden-Sharing in the European Union: Lessons from the German and UK Experience’ (2003) 16 *Journal of Refugee Studies* 329; E Thielemann, ‘Burden-Sharing’ in E Jones, A Menon and S Weatherill (eds.), *The Oxford Handbook of the European Union* (Oxford, Oxford University Press, 2012) 817; Suhrke (n 172) 407.

¹⁷⁴ Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system as amended by Directive 2009/17/EC of 23 April 2009, 28 May 2009, [2009] OJ L131/101.

¹⁷⁵ *ibid*, Article 20c.

refuge 'if they consider such an accommodation the best course of action for the purposes of human life or the environment'.¹⁷⁶

Aside from the political hurdles, the concern that a journey to a port further down the European coastline would be *impracticable* can be refuted. French, Spanish or Portuguese ports or ports further down the Italian, Croatian or Slovenian coast could be reached between ten to twenty-four hours, depending on the vessel. There has even been one instance in which a Danish container ship picked up migrants off the coast of Sicily and disembarked them in Felixstowe, England.¹⁷⁷ Although merchant vessels might be less flexible than State vessels, a larger pre-established list may actually accommodate more flexibility in terms of venues for disembarkation. Major European coastal cities could play a role in this.

Coastal States other than Italy and Greece will, however, be reluctant to participate in a port-sharing scheme. To increase the incentives for acceptance, a second important element of burden-sharing may lie in *de-linking disembarkation duties from the identification and registration of migrants on the one hand, and the full responsibility to process asylum applications on the other hand*. This idea has already been proposed by UNHCR¹⁷⁸ and explored by *inter alia* Di Filippo, who argues that it could be implemented in accordance with the Dublin III Regulation.¹⁷⁹ This de-linking has also been used in the Gulf of Aden, where, with the involvement of UNHCR, migrants were disembarked in Djibouti and processed in Ethiopia.¹⁸⁰ Applied to the European context, UNHCR and EASO-assisted

¹⁷⁶ *ibid*, Article 20b.

¹⁷⁷ den Heijer (n 34), 231.

¹⁷⁸ UNHCR, *Central Mediterranean Sea Initiative (CMSI) – Action Plan* (2014) 2, §3.

¹⁷⁹ M Di Filippo, 'Delinking disembarkation and assumption of responsibility for asylum seekers – Proposal for an EU Pilot Project not Requiring an Amendment of the Dublin Regulation', *High Commissioner's Dialogue on Protection Challenges*, 2014 – Protection at Sea, 4.

¹⁸⁰ Klug (n 22) 60-61.

processing could - to varying degrees¹⁸¹ - be expanded to *other* safe ports along the EU coast, taking away pressure from the currently overcrowded so-called hotspots, while schemes of relocation – again with the support of UNHCR and EASO – could be used to share the burden of taking in qualified asylum-seekers. Return schemes for those not qualifying for international protection could also be organised from these venues with the assistance of the EBCGA, EASO, and IOM.

C. Current practice and reforms: the EU-Turkey Statement and beyond

i. *State practice in the Mediterranean: the EU-Turkey Statement*

The recent EU-Turkey Statement¹⁸² and its implementation are an example of how burden-sharing techniques can negatively affect the rights of migrants.

Firstly, the disembarkation and subsequent reception of migrants is mostly limited to the hotspots, leading to high concentrations of people on a limited amount of islands. The Greek Law 4375/2016¹⁸³ now foresees that all third country nationals and stateless persons irregularly entering the Greek territory are led to Reception and Identification Centres (RICs) where they are automatically detained.¹⁸⁴ These overcrowded *de facto* detention centres, risk

¹⁸¹ See: H Urth, M Heegaard Bausager, HM Kuhn, J Van Selms, *Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU*, Final Report for the European Commission, HOME/2011/ERFC/FW/04 (2013).

¹⁸² *Statement of the EU Head of State or Government*, European Council, Brussels, 8 March 2016, available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement/> and *EU-Turkey Statement*, European Council, Brussels, 18 March 2016, available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>.

¹⁸³ Greek Law No. 4375/2016 of 2 April 2016 on the establishment of an Asylum Service, an Appeals' Authority, a Reception and Identification Service, the establishment of the General Secretariat on Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC 'on common procedures granting and withdrawing the status of international protection' (L180/29.6.2013), provisions on the employment of beneficiaries of international protection and other provisions, *Journal of the Government, The Greek Republic, first issue, Sheet no. 51*, 3 April 2016 (Greek Law No. 4375/2016), available at: http://www.asylumineurope.org/sites/default/files/resources/nomos_4375-2016.pdf.

¹⁸⁴ Greek Law No. 4375/2016 (n 183), Article 14(1) & (2).

resulting in sub-standards conditions for migrants and delays in registering and processing asylum-claims.¹⁸⁵

Secondly, regarding ‘sharing migrants’ as a burden sharing element, the EU has turned away from using intra-EU relocation for all maritime arrivals as of 20th of March 2016 onwards.¹⁸⁶ Instead, all new maritime irregular arrivals from Turkey to Greece are to be returned to Turkey according to the EU-Turkey Statement. Irregular migrants not applying for asylum will be returned. Those migrants who do apply for asylum are being subjected to an ‘exceptional border procedure’¹⁸⁷ in which the Safe Third Country (STC) and First Country of Asylum (FCA) concepts pursuant to Article 33 APD are used to render asylum-claims on EU territory *inadmissible*.¹⁸⁸ According to Greek law, these expulsions are based on individual assessments and with respect to the necessary rights and procedural safeguards.¹⁸⁹ Nonetheless, there is a high risk that both Syrians and non-Syrians disembarked on the Greek islands are being returned to Turkey in violation of the criteria and safeguards laid down in EU and human rights law, as the plight of migrants and refugees in Turkey remains precarious.¹⁹⁰

¹⁸⁵ According to UNHCR, the RICs in Greece are currently characterized by overcrowding, internal tensions, delays in registrations, a lack of information on asylum claims and inadequate standards of living. See eg UNHCR, *Weekly Report - October 28, 2016*, available at: <http://data.unhcr.org/mediterranean/regional.php>.

¹⁸⁶ Moreover, for those who arrived before the 20th of March 2016 relocation numbers are very low: as of December 2016, only a total of 6,149 (9,2%) of the targeted 66,400 asylum-seekers have been relocated since the program’s inception in November 2015. The relocation numbers from Italy to other EU Member States are even lower both in absolute and relative terms: a mere 1,950 individuals (5%) out of the targeted 39,600 have been relocated. UNHCR, *Weekly Report – December 9, 2016*, 4. See also for more details: European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council: Seventh report on relocation and resettlement*, Brussels, 9 November 2016 COM(2016) 720 final.

¹⁸⁷ Greek Law No. 4375/2016 (n 183), Article 60(4).

¹⁸⁸ *ibid*, Article 54, 55 and 56.

¹⁸⁹ *ibid*, Article 60(1).

¹⁹⁰ UNHCR has indicated its concerns in several of its reports, inter alia with regards of a lack of information on what happens to those returned to Turkey and regarding the lack of access of UNHCR itself to those returned. See eg UNHCR, *Weekly Report – October 28, 2016*, 3, §3.

By trying to remove asylum-seekers and refugees under the STC and FCA concepts instead of assessing asylum-claims on their substance, the EU has found a way to return migrants *en masse* under the pretext of legality under the EU asylum acquis. As a form of compensation, for every Syrian readmitted to Turkey, one Syrian is supposed to be resettled to the EU under the ‘one for one’ scheme. The amount of resettlements under this scheme remains low, both compared to the number of pledges so far (2217 out of a total of 11228 pledges)¹⁹¹ and compared to the hypothetical amount of asylum-seekers that arguably could have reached Greek (EU) territory was it not for the enforcement of the EU-Turkey Statement at sea.¹⁹²

ii. The CEAS reform

On 6 April 2016, the European Commission announced a reform of the Common European Asylum System (CEAS), *inter alia* with a view to ‘improve safe and legal avenues to the EU’.¹⁹³ These reforms form an opportunity to remedy the existing flaws with regard to the protection and safe disembarkation of migrants at sea pointed out in this article. On 4 May 2016, the EC proposed reforming the Dublin Regulation which would contain a corrective allocation mechanism to share the burden of asylum-applications among the Member States ‘in situations when a Member State is confronted with a disproportionate number of applications for international protection for which it is the Member State responsible under the Regulation’.¹⁹⁴ This mechanism may especially be significant to lessen the burden of the coastal States Italy and Greece in terms of ‘sharing migrants’, yet has proven to be a contested issue.

¹⁹¹ European Commission (n 186) 13, §6.

¹⁹² In 2015, Greece had 856,723 arrivals by sea; that has been 171,496 so far in 2016, of which about 150,000 (roughly 88%) arrived before the implementation of the EU-Turkey Statement. Data available at: <http://data.unhcr.org/mediterranean/country.php?id=83>.

¹⁹³ CEAS reform communication (n 4).

¹⁹⁴ European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, Brussels, 4 May 2016, COM(2016) 270 final, 17-18.

Additionally, the EC also released a set of further reform proposals on 13 July 2016, including of the *recast APD* which will be transformed into an *Asylum Procedures Regulation (APR)*.¹⁹⁵ Certain elements should be taken into consideration with regard to the latter.

Firstly, two remarks should be made regarding the *physical access to asylum* after interception or rescue at sea following the triggering of Article 18 CFR and the asylum acquis. On the one hand, the *APR* proposal now explicitly stipulates that State officials at their own initiative have to ask the persons concerned whether they wish to receive international protection,¹⁹⁶ thereby aligning itself with the ECtHR jurisprudence in *Hirsi* as set out above. On the other hand, the new *APR* should moreover provide an express provision which facilitates access to asylum procedures when under the jurisdiction of an EU Member States at sea. Currently, Article 3 of the *recast APD* foresees that it only applies to applications made ‘in the territory, including at the border, in the territorial waters or in the transit zones of Member States’.¹⁹⁷ The proposed new Article 2(1) *APR* does not change anything in this regard.

Secondly, *the lowering of certain standards in the APR proposal* may affect access to protection in the EU territory and thus the disembarkation question in the longer run. The new *APR* consolidates the paradigm established under the EU-Turkey Agreement regarding the application of the First Country of Asylum and Safe Third Country concepts. While under the *recast APD* the application of these concepts is optional (‘may’), the *APR* proposal makes them a compulsory step. Not only are these concepts controversial from an international

¹⁹⁵ European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, Brussels, 13 July 2016, COM(2016) 467 final (*APR* proposal).

¹⁹⁶ *APR* proposal (n 195), Article 25(1), §2.

¹⁹⁷ *Recast APD* (n 124), Article 3(1).

refugee law perspective¹⁹⁸ their automatic application in the maritime context may lead to a practice in which only a very limited procedure¹⁹⁹ is followed compared to access to a substantive asylum procedure for those rescued or intercepted. While the latter clearly requires disembarkation on to land (i.e. EU territory), it may be a future development in EU policy to have admissibility procedures take place within territories of third States,²⁰⁰ or even at sea.²⁰¹

Awaiting new jurisprudence on the extraterritoriality of the right to asylum and the enactment of EU norms on physical access to international protection, durable disembarkation solutions in the Mediterranean with due respect for the subjective rights of migrants are very limited. This way the proper realization of human rights of migrants seeking to reach Europe by sea remains adrift.

¹⁹⁸ ECRE, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM (2016) 467*, November 2016, 51.

¹⁹⁹ On the minimal safeguards to be offered in admissibility procedures under the current *recast APD*, see inter alia UNHCR, *Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept*, 23 March 2016, 4 and 7, available at: <http://www.refworld.org/docid/56f3ee3f4.html>.

²⁰⁰ Cf. the so-called ‘Pacific solution’, see eg K Pennington-Hill, ‘Australia Makes a U-turn with the Revival of the Pacific Solution: Should Asylum Seekers Find a New Destination?’ (2014) 13 *Washington University Global Studies Law Review* 592-93.

²⁰¹ N Nielsen, ‘Italy’s “floating hotspot” idea to sink in legal waters’, *EUobserver*, 2 June 2016, available at: <https://euobserver.com/migration/133659>.