The Externalization of Europe's Borders in the Refugee Crisis, 2015-2016

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CAT	United Nations Convention against Torture
CEAS	Common European Asylum System
CEPS	Centre for European Policy Studies
CoE	Council of Europe
COREPER	Committee of the Permanent Representatives of the Governments of the Member States to the EU
CSDP	Common Security and Defence Policy of the European Union
EASO	European Asylum Support Office
EBCG	European Border and Coast Guard
ECDPM	European Centre for Development Policy Management
ECFR	European Council on Foreign Relations
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
EP	European Parliament
EPN	European Patrols Network
ESI	European Stability Initiative
EU	European Union
EUISS	European Union Institute for Security Studies
EUNAVFOR Med	European Union Naval Force Mediterranean
GNA	Libyan Government of National Accord
ICCPR	International Covenant on Civil and Political Rights
JO	Joint operation
MARCOM	Allied Maritime Command
NATO	North Atlantic Treaty Organization
PSC	Political and Security Committee
RABIT	Rapid border intervention teams
SAC	Schengen-Associated Countries
SACEUR	Supreme Allied Commander Europe
SAR	Search and rescue
SCO	Safe country of origin
SNMG2	Standing NATO Maritime Group Two
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
USAK	International Strategic Research Organisation (Turkey)

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The modern refugee regime was created by the 1951 United Nations Refugee Convention to manage the millions of Europeans displaced by World War II[1]. Sixty-five years later, European leaders face the challenge to live up to the international legal norms embodied in the convention while managing the worst refugee crisis in Europe since World War II. In 2015 alone, a record 1.3 million asylum applications were lodged in the European Union (EU)[2]. To add to the challenge, the European migration crisis developed at a fast pace. In 2015, five times as many migrants reached the EU by sea and twice as many asylum applications were lodged as in the previous year[3]. Many Europeans felt overwhelmed by the flows and threw their support to populist, xenophobic parties[4]. Others demanded that EU leaders show greater commitment to their humanitarian and rights-based obligations to protect people seeking refuge. The situation has become a crisis not only for refugees themselves, but also a crisis for the EU's political unity and its democracy.

The international refugee regime does not guarantee refugees access to protection in any particular country. At their discretion, states may resettle refugees recognized as such while the refugee is still abroad. For the 99 percent of refugees who will not be resettled, any protection is based on asking for asylum.[5] *Non-refoulement* is the principle that individuals seeking asylum

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[1] Convention relating to the Status of Refugees (1951). Retrieved from http://www.unhcr.org/en-us/3b66c2aa10

[2] Connor, P. (2016, August 2). Number of Refugees to Europe Surges to Record 1.3 Million in 2015. Retrieved from http://www.pewglobal.org/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/

[3] UNHCR. (n.d.). Refugees/Migrants Emergency Response - Mediterranean. Retrieved August 24, 2016, from http://data.unhcr.org/mediterranean/regional.php

[4] Hunyadi, B., & Molnár, C. (2016). *Central Europe's Faceless Strangers: The rise of xenophobia in the region* (Nations in Transit). Freedom House. Retrieved from https://freedomhouse.org/sites/default/files/July12016_xenophobia_final_brief_FH.pdf, at 3.

[5] UNHCR (United Nations High Commissioner for Refugees). 2016. *Global Trends: Forced Displacement in 2015*. http://www.unhcr.org/en-us/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html

will not be forcibly returned to countries where they will be persecuted "for reasons of race, religion, nationality, membership of a particular social group or political opinion." Of the world's 195 countries, 148 have signed the 1951 UN Convention Relating to the Status of Refugees and/or its 1967 Protocol, which established the principle of non-refoulement. Other governments have signed on to weaker versions of non-refoulement. The principle of non-refoulement is thus a deeply institutionalized human rights norm.

At the same time, media, politicians, and publics are often skeptical or ambivalent about granting asylum. Restrictionists aim to deter asylum seekers, whom they suspect of fraudulently pursuing economic gain, rather than refuge from persecution, and of taking advantage of social welfare benefits at the expense of natives. Fear that asylum seekers pose a security threat increases pressure to keep them out[6], a dynamic that erupted as a major political issue around the world in 2015 following a set of terrorist attacks. As a consequence, governments of the rich, democratic countries constituting the Global North are increasingly using tools of remote control to limit the number of people able to approach their borders to ask for asylum. In effect, governments are externalizing their borders. To the extent that asylum seekers travel illegally, they run afoul of controls. Many tools of remote control are part of the broader "mobility regime" that tries to manage all forms of international crossings, regardless of whether they are motivated by violence, economics, or other factors[7]. For example, visa policies hinder the ability of people to

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[6] Burke, A. (2008). *Fear of Security: Australia's Invasion Anxiety*. Cambridge University Press.
[7] Betts, A. (2004). The International Relations of the "New" Extraterritorial Approaches to Refugee Protection: Explaining the Policy Initiatives of the UK Government and UNHCR. *Refuge: Canada's Journal on Refugees*, *22*(1).

ask for asylum regardless of whether that was policymakers' original intent. Other tools of re-

mote control, such as excisions of territory, explicitly target asylum seekers[8].

A European Agenda on Migration

In response to the multifaceted challenges posed by the refugee crisis, the EU Commission de-

veloped the European Agenda on Migration in 2015[9]. EU migration policy as formulated in the

Agenda is based on four pillars: reducing the incentives for irregular migration, border manage-

ment, a common asylum policy, and a new policy on legal migration. The development of EU

remote control policies in the course of 2015 are embedded within this holistic approach that

builds on efforts since the early 1990s to control flows of refugees and other migrants before

they ever reach the borders of the EU.[10]

The Commission aims to reduce the incentives for irregular migration with several differ-

ent approaches. First, it claims to address the root causes of migration in regions of origin, in-

cluding violent conflicts and structural poverty. To this end, the Commission aims to step up its

development program, though it is not clear to the extent that on-going development initiatives

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[8] Guiraudon, V., & Lahav, G. (2000). A Reappraisal of the State Sovereignty Debate the Case of Migration Control. Comparative Political Studies, 33(2), 163–195, van Munster, R., & Sterkx, S. (2006). Governing Mobility: The Externalization of European Migration Policy and the Boundaries of the European Union. In R. Holzhacker & M. Haverland (Eds.), European research reloaded: cooperation and europeanized states integration among europeanized states (pp. 229–250). Dordrecht: Springer Netherlands, Bigo, D., & Guild, E. (2010). The Transformation of European Border Controls. In B. Ryan & V. Mitsilegas (Eds.), Extraterritorial Immigration Control (pp. 252–273). Brill, Hyndman, J., & Mountz, A. (2008). Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe1. Government and Opposition, 43(2), 249–269.

[9] European Commission. (2015). *A European Agenda on Migration* (No. COM(2015) 240 final). Brussels. Retrieved from http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf

[10] While acknowledging arguments that refugees and migrants are distinct legal and political categories (Price 2009, Betts 2013), for the purposes of this report and following Zolberg et al. 1989, we adopt a sociological approach that considers migrants as an umbrella category for people on the move, whose motivations may include seeking greater economic opportunity, family reunification, fleeing violence, or other factors. Refugees are a subset of migrants fleeing persecution and/or violence.

are simply being repackaged as migration control measures[11]. Second, the Commission emphasizes efforts against migrant smuggling and trafficking in cooperation with member states and key third countries[12]. The European migration control regime is increasingly characterized by the criminalization of migration flows and a blurring of trafficking, which by definition is constituted by the coercion of migrants, and smuggling, in which unauthorized migrants pay for services[13]. Third, the Commission aims to create a stricter deportation regime for irregular migrants that EU governments judge not to be in need of international protection[14]. Readmission agreements with transit countries are one of the principal techniques that guarantee that transit countries will allow the deportees to enter when they are expelled from the EU, and thus give the transit countries an incentive to prevent movement to the EU.[15] The securitization of the EU's external border management is another of the EU's priorities.[16] To this end, the Commission aims to improve monitoring and risk analysis as well as to establish an EU standard for border management across all member states with external borders[17]. The EU's border agency FRONTEX conducted operations on the Eastern, Central, and Western Mediterranean Routes. In the potentially greatest departure from policy since the early 2000s, the Commission recast FRONTEX into a new European Border and Coast Guard that goes beyond FRONTEX's role as a coordinating agency for member state forces. To establish a common asylum policy, the Commission plans to make the implementation of the Common European Asylum System (CEAS) a priority.

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[11] See supra note 9 (European Commission 2015), at 7-8.

[12] Ibid, at 9.

[13] Huysmans, J. (2006). *The Politics of Insecurity: Fear, Migration and Asylum in the EU*. Routledge.

[14] See supra note 9 (European Commission 2015), at 9-10.

[15] Brocza, S., & Paulhart, K. (2015). EU mobility partnerships: a smart instrument for the externalization of migration control. *European Journal of Futures Research*, *3*(1), 15.

[16] For contrasting views on the securitization of EU policy, see supra note 13 (Huysmans 2006), and Boswell, C. (2007). Migration Control in Europe After 9/11: Explaining the Absence of Securitization*. *JCMS: Journal of Common Market Studies*, *45*(3), 589–610.

[17] See supra note 9 (European Commission 2015), at 11.

Measures to this end include monitoring member states' asylum procedures to ensure EU stand-ards are met and encouraging "burden-sharing" in the redistribution of asylum seekers by a revi-sion of the Dublin system[18]. Part of the common standards protocol is the development of a list of countries of origin for asylum seekers presumed to be safe and whose nationals will not be granted asylum.

The following pages summarize important developments in EU remote control policies since 2015 to illustrate how European leaders have coped with the asylum paradox: a commit-ment to international protection for refugees who reach EU territory and efforts to keep them away from EU territory where they can enjoy those rights through the implementation of remote control policies. The report's sections are structured by categories of remote control policies which have been considered, implemented, or expanded at the EU level in 2015 and the first half of 2016.

"Safe Countries of Origin"

Under the EU Asylum Procedures Directive, member states may designate a country as safe for the purpose of the asylum process if it meets certain criteria[19]. Member states are to show that "no persecution (…), no torture (…) and no threat by reason of indiscriminate violence" exists in the country of origin by taking into account (a) relevant laws, (b) rights and freedoms as laid out in the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), and the United Nations Convention Against Torture (CAT), (c) respect

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[18] Ibid, at 13.
[19] European Parliament and Council of the European Union. Directive 2013/32/EU, Pub. L. No. OJ L 180 (2013). Retrieved from http://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013L0032, at Article 37 I. On the origins of the concept, see Kjaergaard, E. (1994). The Concept of "Safe Third Country" in Contemporary European Refugee Law. *International Journal of Refugee Law*, *6*(4), 649–655, and supra note 10 (Gil Bazo 2015).

for the non-refoulement principle, and (d) remedies against rights violations[20]. To make this assessment systematically, twelve member states have established lists of safe countries of origin (SCO), which allow the member states to considerably accelerate their asylum procedures[21]. However, the member states' SCO lists are not equivalent and are often subject to change. Figure 1 shows variation by nine EU member states around whether specific Balkan countries are considered safe countries of origin[22].

Figure 1: "Safe Countries of Origin" in the Balkans by EU Destination[23]

	Albania	Bosnia and Herzegovina	Macedonia	Kosovo	Montenegro	Serbia	Turkey
Austria	X	X	X	X	X	X	
Belgium	X	X	X	X	X	X	
Bulgaria	X	X	X		X	X	X
Czech Republic	X	X	X	X	X	X	
France	X	X	X		X	X	
Germany	X	X				X	
Luxembourg	X	X	X	X	X	X	X
Slovakia					X		
UK	X	X	X	X	X	X	

As part of the Agenda on Migration reforms, the Commission and European Council committed to harmonizing which countries of origin would be considered "safe" by all member states[24]. To this end, the Commission proposed a regulation to establish an EU common list of

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[20] See supra note 19 (European Parliament and Council of the European Union 2013), at Annex I.

[21] Justice and Home Affairs Council. (2015). Outcome of the Council Meeting (3405th Meeting). Presented at the 3405th Council meeting, Brussels. Retrieved from http://www.consilium.europa.eu/en/meetings/jha/2015/07/st11097_en15_pdf/, at 9.

[22] Apap, J., & Orav, A. (2015, October 8). Briefing - Safe countries of origin Proposed common EU list. European Parliamentary Research Service. Retrieved from http://www.europarl.europa.eu/EPRS/EPRS-Briefing-569008-Safe-countries-of-origin-FINAL.pdf, at 5.

[23] Source: European Parliament, http://www.europarl.europa.eu/EPRS/EPRS-Briefing-569008-Safe-countries-of-origin-FINAL.pdf

[24] See supra note 9 (European Commission 2015), at 13-14, European Parliament. (2016, July 7). Asylum: EU list of safe countries of origin to replace national lists in 3 years. Retrieved from http://www.europarl.europa.eu/news/en/news-room/20160707IPR36205/asylum-eu-list-of-safe-countries-of-origin-to-replace-national-lists-in-3-years

safe countries of origin for the purposes of the Asylum Procedures Directive 2013/32/EU on September 9, 2015[25]. The European Parliament's (EP) Civil Liberties Committee approved a committee report on the general concept of an EU common list of safe countries of origin on July 7, 2016 and prepared to open negotiations on the subject with the Council after the summer recess[26]. To ensure flexibility, the proposal foresees regular reviews of the list by the Commission and changes to the countries on the list through the ordinary legislative procedure[27]. Considering the existing SCO lists as well as relevant information from other international organizations, the Commission has, therefore, "come to the conclusion that Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey are safe countries of origin"[28].

The focus on countries in the Balkan region follows not only a legal but also a political rationale. In early 2015, the Commission warned of "asylum abuse by citizens of the visa-free countries in the Western Balkans"[29]. The Commission justified its concerns by pointing out two opposing dynamics: while the numbers of asylum applications from Western Balkan countries rose steadily since visa-free travel was established, the asylum recognition rate for these countries fell. In 2013, the asylum recognition rates for applications from the Western Balkan countries ranged from 1% to 8.1%[30]. In 2014, the highest asylum recognition rate for any Western

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[25] European Commission. Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU, Pub. L. No. COM/2015/0452 (2016). Retrieved from http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52015PC0452

[26] See supra note 24 (European Parliament 2016).

[27] See supra note 25 (Commission Proposal 2015), at Article 2.

[28] For detailed legal justifications for the Commission's assessment, see ibid, at 3-6.

[29] European Commission. (2015, February 25). Press release - Commission reports on visa-free travel from the Western Balkans. Retrieved from http://europa.eu/rapid/press-release_IP-15-4482_en.htm

[30] Ibid.

Balkan country was 5.8%,[31] before it dropped to 2.6% in 2015[32]. The Commission considered

this development "an increase in unfounded asylum applications lodged by nationals of the visa-

exempted Western Balkan countries"[33]. The member states' ministers in the Council emphasize

that additionally, the European Council has already recognized all Western Balkan countries as

potential membership candidates in 2000[34]. By mid-2016, it appeared highly likely that the

Western Balkan countries would become part of an EU-wide list of safe countries[35].

     The Commission's proposal has been criticized on principle as well as for the choice of

countries to be featured on the list. The European Council on Refugees and Exiles (ECRE), for

example, warns that even though a country may be considered "'generally and consistently' free

of persecution or serious harm", minorities may be persecuted based on the protected characteris-

tics of race, religion, nationality, membership in a particular social group, or political opinion[36].

The same concern is shared by several other human rights organizations[37], including Amnesty

International, which highlights that "no country of origin can be deemed 'safe' as such"[38]. The

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[31] European Stability Initiative. (2015). *New facts and figures on Western Balkan Asylum Seekers*. Retrieved from http://www.esiweb.org/pdf/New%20facts%20and%20figures%20on%20WB%20asy-lum%20claims%206%20April%202015.pdf, at 4.

[32] Eurostat. (2016). *EU Member States granted protection to more than 330000 asylum seekers in 2015* (No. 75 /2016). Retrieved from http://ec.europa.eu/eurostat/documents/2995521/7233417/3-20042016-AP-EN.pdf/

[33] See supra note 29 (European Commission 2015).

[34] See supra note 21 (Justice and Home Affairs Council 2015), at 9, European Council. (2000). Santa Maria da Feira European Council 19-20 June 2000: Conclusions of the Presidency. Presented at the European Council meeting. Retrieved from http://www.europarl.europa.eu/summits/fei1_en.htm, para 67.

[35] See supra note 21 (Justice and Home Affairs Council 2015), at 10.

[36] Asylum Information Database. (2015). *"Safe countries of origin": A safe concept?* (AIDA Legal Briefing No. 3). European Council on Refugees and Exiles. Retrieved from http://www.asylumlawdatabase.eu/sites/www.asy-lumlawdatabase.eu/files/aldfiles/AIDA%20Third%20Legal%20Briefing_Safe%20Country%20of%20Origin.pdf, at 4.

[37] European Association for the defence of Human Rights (AEDH), the International Federation for Human Rights (FIDH), and EuroMed Rights, see European Association for the defence of Human Rights (AEDH), International Federation for Human Rights (FIDH), & EuroMed Rights. (2016). *"Safe" countries: A denial of the right of asylum*. Retrieved from http://www.aedh.eu/plugins/fckeditor/userfiles/file/Safe%20Coutries%20-%20A%20de-nial%20of%20the%20right%20of%20asylum%20EN.pdf, at 7.

[38] Amnesty International. (2015, September 14). EU: Action not words needed to end suffering of thousands. Retrieved from https://www.amnesty.org/en/latest/news/2015/09/eu-action-not-words-needed-at-jha-to-end-suffering-of-thousands/

ECRE criticizes the choice of presumed safe countries as none of the suggested countries is featured on every member state SCO list[39]. It further criticizes using the numbers of European Court of Human Rights (ECtHR) rulings or progress in the EU accession progress as criteria for determining safety[40].

Readmission Agreements & Capacity Building

Readmission agreements are formal accords or informal memoranda of understanding in which a government pledges to accept deportees from another country. The agreements are often used to create incentives for countries of migrant transit to control migration flows to Europe. If transit migrants, including failed asylum seekers, are returned to a country that has signed a readmission agreement, that country's government becomes responsible for the migrant. Thus, transit countries with readmission agreements will be more likely to prevent migrants from entering their countries en route to Europe, thus pushing the borders of Europe out even further. Readmissions agreements are sometimes accompanied by aid or technical assistance programs to build up the migration control capacity of the same countries and thus turn them into "buffer states."[41]

Turkey: The Joint Action Plan

Due to its proximity to the ongoing violence in neighboring Syria and Iraq, Turkey has been deeply affected by increased refugee flows. By 2016, the Turkish government had registered over 2.7 million of the 4.8 million Syrian refugees uprooted by the conflicts, more than any other

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[39] See supra note 36 (Asylum Information Database 2015), at 5.
[40] Ibid.
[41] On the origins of these policies in Europe, see Collinson, S. (1996). Visa Requirements, Carrier Sanctions, "Safe Third Countries" and "Readmission": The Development of an Asylum "Buffer Zone" in Europe. *Transactions of the Institute of British Geographers*, *21*(1), 76–90.

country in the region and more than twice as many as all European countries together[42]. In addition to being a major host country itself, Turkey's position at Syria's northern border makes it the first country of transit for Syrian refugees on their way to Europe and the most popular European host countries of Sweden and Germany[43]. Refugees from the Middle East travel from Turkey to Greece via the Aegean Sea (the Eastern Mediterranean route) and continue their journey through Macedonia, Serbia, Hungary, and Austria (the Western Balkan route) before reaching Germany or Sweden[44]. In 2015 alone, over 850,000 refugees entered the EU via Greece from Turkey, more than via any other migration route[45]. The EU has an interest in Turkey as a partner in preventing irregular border crossings and the passage of asylum seekers while at the same time encouraging rights-based policies, which are part of the extensive conditions for Turkey's accession to the EU. The EU thus hopes that Turkey will resettle even greater numbers of Syrian refugees to prevent them from reaching Europe[46].

As it became clear over the course of 2015 that major disagreements between EU member states with regard to reception and relocation responsibilities persisted, the focus of EU crisis management increasingly turned to "stemming the flows" by collaborating with buffer states on the periphery of Europe. As refugee movements shifted from the Central Mediterranean to the Eastern Mediterranean route, a new urgency was palpable "to reinforce the dialogue with Turkey

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[42] United Nations High Commissioner for Refugees (UNHCR). (n.d.). UNHCR Syria Regional Refugee Response. Retrieved June 12, 2016, from http://data.unhcr.org/syrianrefugees/regional.php

[43] Migration Policy Center European University Institute. (n.d.). Syrian Refugees - A Snapshot of the Crisis - In the Middle East and Europe. Retrieved June 12, 2016, from http://public.tableau.com/views/EUInteractiveTest/Dashboard1?:embed=y&:display_count=no:showVizHome=no

[44] Frontex. (n.d.). Migratory routes map. Retrieved June 12, 2016, from http://frontex.europa.eu/trends-and-routes/migratory-routes-map/

[45] BBC. (2016, March). Migrants detected entering the EU illegally, 2014-2015. Retrieved from http://ichef-1.bbci.co.uk/news/624/cpsprodpb/11F0A/production/_88328437_migrant_routes_numbers_v9.png

[46] Vukašinović, J. (2011). Illegal Migration in TurkeyEU Relations: An Issue of Political Bargaining or Political Cooperation? *European Perspectives*, *3*(2), 147–167, İçduygu, A. (2015). *Syrian Refugees in Turkey: The Long Road Ahead*. Washington, DC: Migration Policy Institute.

at all levels, (…) in order to strengthen our cooperation on stemming and managing the migratory flows"[47].

The partnership with Turkey to manage migratory flows took shape when the joint action plan was welcomed by the European Council at its ~~next~~ (?) formal meeting on October 15, 2015[48]. The joint action plan combines several deterrence policies as it provides funds for capacity building and to improve the living conditions of Syrian refugees in Turkey (Part I), and emphasizes the EU-Turkey readmission agreement, and plans to dispatch liaison agents to enhance the cooperation to prevent irregular migration (Part II)[49]. More concretely, the original joint action plan as released by the Commission specifies under Part I measures that will support Syrian refugees under temporary protection in Turkey through the mobilization of "additional funds" [50] by the EU[51]. The Turkish side agreed to guarantee that refugees are registered and have access to public services[52]. Part II specifies measures aimed at preventing irregular migration. The EU side

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[47] European Council. (2015, September 24). Informal meeting of EU heads of state or government on migration, 23 September 2015 - statement. Retrieved from http://www.consilium.europa.eu/press-releases-pdf/2015/9/40802202698_en_635791230000000000.pdf

[48] European Council. (2015). European Council meeting (15 October 2015) – Conclusions (Vol. EUCO 26/15). Presented at the European Council meeting, Brussels. Retrieved from http://www.consilium.europa.eu/en/european-council/conclusions/

[49] European Commission. (2015, October 15). European Commission - Press release - EU-Turkey joint action plan. Retrieved from http://europa.eu/rapid/press-release_MEMO-15-5860_de.htm

[50] The original draft of the action plan, which was handed over to the European Commission President Juncker and to the President of the Republic of Turkey Erdoğan on October 5, 2015, foresaw the mobilization of 1 billion euros on the EU side in 2015-16. (See European Commission. (2015, October 6). European Commission - Fact Sheet - Draft Action Plan: Stepping up EU-Turkey cooperation on support of refugees and migration management in view of the situation in Syria and Iraq. Retrieved from http://europa.eu/rapid/press-release_MEMO-15-5777_en.htm#_ftn1). In the final version of the action plan, agreed upon by both sides by October 15, 2015, however, there is no concrete mention of the amount of funds to be mobilized.

[51] Priorities that are specifically named are: "(…) immediate humanitarian assistance; provision of legal, administrative and psychological support; support for community centres; the enhancement of self-sufficiency and participation in economy and their social inclusion during their stay in Turkey; improved access to education at all levels; but also actions supporting host communities in areas such as infrastructures and services." See supra note 49 (European Commission 2015), at 2.

[52] Ibid, at 2.

committed to informing refugees about legal avenues to the EU (though these are all but fore-

closed for most asylum seekers) and to contribute to strengthening the Turkish Coast Guard and

its capacity to tackle migrant smuggling. Furthermore, the EU intends to enhance the exchange

of information to this end by deploying a FRONTEX liaison officer to Turkey and cooperate on

joint return operations[53]. Turkey committed to improving the interception capacities of the Turk-

ish Coast Guard and preventing irregular migration across land borders with Bulgaria and

Greece. Moreover, Turkey agreed to crack down on smuggling networks in cooperation with the

EU, its member states, and FRONTEX. Importantly, Part II also required Turkey to accelerate

return procedures "in line with the established bilateral readmission provisions"[54], referring to

the EU – Turkey Readmission Agreement of 2013[55] which was signed parallel to the launch of

the Visa Liberalization Dialogue that aimed to ease visa requirements for Turks traveling to the

EU.

The joint action plan was activated at a meeting between EU and Turkish leaders on No-

vember 29, 2015 that included an agreement to accelerate visa liberalization, make the readmis-

sion agreement "fully applicable by June 2016", provide Turkey with 3 billion euros, and revital-

ize the accession talks[56]. However, the mutual concessions from this agreement have been criti-

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[53] Ibid.

[54] Ibid, at 2-3.

[55] European Union - Turkey. Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, Pub. L. No. L 134/3 (2014). Retrieved from http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0507(01)

[56] Ibid.

cized as "inconsequential" by the European Stability Initiative (ESI), a European think tank regionally focused on South East Europe[57]. In particular, it has been noted that despite the commitment to accelerate the process, visa-free travel for Turkish citizens is still tied to the 72 original requirements set forth in the "Roadmap towards a visa free regime with Turkey"[58] that has been the basis of the visa liberalization dialogue since its beginning in December 16, 2013.

Despite the agreement, the heads of state in the European Council noted in February 2016 that "the flows of migrants arriving in Greece from Turkey remain much too high"[59]. The numbers of arrivals by sea in Greece had indeed not varied greatly from the fall of 2015 to February 2016[60].

Freedom of movement within the EU is one of the pillars of the supranational project that has been threatened by member state responses to the refugee crisis. In the beginning of March 2016, the Commission released "Back to Schengen – A roadmap"[61] as a reaction to the increasing notifications of Schengen member states reinstating temporary internal border controls pursuant to Article 25 of the Schengen Borders Code since fall 2015[62]. The pressure to reduce the number of arrivals via Turkey increased. Consequently, EU-Turkey summit meetings on March

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[57] Knaus, G. (2015, November 29). The devil in the detail – EU-Turkey refugee summit in November 2015 - How the November refugee summit can fail – and how to get a deal that works. Retrieved from http://www.esi-web.org/rumeliobserver/2015/11/29/the-devil-in-the-detail-eu-turkey-refugee-summit-in-november-2015/

[58] European Commission. (2013, December 16). Roadmap towards a visa free regime with Turkey. Retrieved from http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131216-roadmap_towards_the_visa-free_regime_with_turkey_en.pdf

[59] European Council. (2016). European Council meeting (18 and 19 February 2016) – Conclusions (Vol. EUCO 1/16). Presented at the European Council meeting, Brussels. Retrieved from http://www.consilium.europa.eu/en/european-council/conclusions/

[60] UNHCR. (2016, February 18). Greece data snapshot - 18 Feb 2016. Retrieved from http://data.unhcr.org/mediterranean/download.php?id=693

[61] European Commission. (2016). *Back to Schengen - A Roadmap* (No. COM (2016) 120 final). Retrieved from http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/docs/communication-back-to-schengen-roadmap_en.pdf

[62] European Commission. (n.d.). Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 et seq. of the Schengen Borders Code. Retrieved from http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf

7 and 18, 2016 were intended to "end the irregular migration from Turkey to the EU"[63]. One out-come of the summit meetings was a new return mechanism for the return to Turkey of "all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 (as a) tempo-rary and extraordinary measure which is necessary to end the human suffering and restore public order"[64]. The agreement specifies that migrants are to be considered "irregular" if they do not ap-ply for asylum in Greece or if their asylum application are rejected by the Greek authorities. In reaction to criticism, the text furthermore emphasizes that no collective expulsions in violation of international law were to take place[65]. Furthermore, the agreement provides that "for every Syr-ian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria"[66]. However, this mechanism was lim-ited to the resettlement of around 72.000 refugees within the EU providing that when the limit would be reached, the mechanism would be reviewed or discontinued. The effect of this new more drastic approach to end irregular migration was immediately observable in the average numbers of daily arrivals in Greece, which dropped by 94% from an average of 1968 daily arri-vals in February before the agreement to an average of 122 daily arrivals in April[67].

Furthermore, the apprehensions and interceptions by the Turkish Coast Guard signifi-cantly decreased after the agreement[68]. There are several reasons for the deterrent effect, at least

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[63] Participants of the EU - Turkey Meeting. (2016). EU-Turkey statement, 18 March 2016. Presented at the EU - Turkey Meeting, at 1. Retrieved from http://www.consilium.europa.eu/press-releases-pdf/2016/3/40802210113_en.pdf
[64] Ibid, at 1.
[65] Ibid.
[66] Ibid.
[67] UNHCR. (2016, March 31). Greece data snapshot - 31 March 2016. Retrieved from http://data.unhcr.org/mediter-ranean/download.php?id=988
[68] UNHCR. (2016, June 7). Turkey - Mediterranean Sea and Western Border Operations. Retrieved from https://data.unhcr.org/mediterranean/download.php?id=1457

in the short run. First, with the new return mechanism in place, the Turkish authorities were expected to increase their efforts to combat migrant smuggling to Greece. Second, the prospect of being returned to Turkey after a perilous journey across the Aegean Sea might discourage refugees to travel to Europe via Greece[69]. It is important to recall that most refugees seek to file their asylum applications in Northern European countries such as Germany or Sweden instead of Greece, which has been a transit country on their route. Now that the return mechanism is in place, however, migrants risk detention[70] and deportation if they decide not to file an asylum application with the Greek authorities. Therefore, traveling from Turkey to Northern Europe via Greece has become a less attractive migration route, which is reflected in the low arrival numbers.

Nevertheless, the agreement has been harshly criticized by the United Nations High Commissioner for Refugees (UNHCR), the Council of Europe's (CoE) Commissioner for Human Rights, NGOs offering humanitarian assistance, and think tanks for both moral and legal reasons. Amnesty International considers the EU-Turkey agreement a "historic blow to rights" and John Dalhuisen, Amnesty International's Director for Europe and Central Asia, goes so far as to conclude that the EU "wilfully ignore(s) its international obligations"[71]. Two elements of the EU-Turkey deal have been especially controversial—whether Turkey can be considered "safe" for return operations and the possibility of mass expulsions.

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[69] Why the EU-Turkey deal is controversial. (2016, April 11). The Economist. Retrieved from http://www.economist.com/blogs/economist-explains/2016/04/economist-explains-5

[70] European Commission. (2016, April 4). European Commission - Press release - Implementing the EU-Turkey Agreement – Questions and Answers. Retrieved from http://europa.eu/rapid/press-release_MEMO-16-1221_en.htm

[71] Amnesty International. (2016, March 18). EU-Turkey refugee deal a historic blow to rights. Retrieved from https://www.amnesty.org/en/latest/news/2016/03/eu-turkey-refugee-deal-a-historic-blow-to-rights/

In accordance with Article 33 (2) b)-c) of the Asylum Procedures Directive, an asylum application of a refugee arriving in Greece from Turkey is considered inadmissible, and the applicant subject to return, if Turkey can be considered a "European safe third country" or a "first country of asylum" [72]. Article 39 (2) a) requires that a country considered a "European safe third country" must "(have) ratified and observe the provisions of the Geneva Convention without any geographical limitations". Turkey ratified the Geneva Refugee Convention of 1951 and the protocol of 1967, but it remains the only country in the world to maintain the 1951 convention's geographical limitation on the definition of refugees to Europeans[73]. Furthermore, apart from Bulgaria, no EU country has ever considered Turkey part of a national list of safe countries of origin[74]. This position is strengthened as Turkey has informed the CoE's Secretary General Thorbjørn Jagland about its decision to "temporarily suspend" its commitments under the ECHR on July 21, 2016, according to Article 15 ECHR[75]. Therefore, the argument that Turkey is a "European safe third country" is hard to make. To be considered a "first country of asylum", however, Article 35 requires the availability of asylum (a) and sufficient protection, including through the observance of the principle of non-refoulement (b). Human Rights Watch denies

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[72] See supra note 19 (European Parliament and Council of the European Union 2013).

[73] United Nations. (n.d.). United Nations Treaty Collection. Retrieved July 13, 2016, from https://trea-ties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en, Human Rights Watch. (2016, March 3). Q&A: The EU-Turkey Deal on Migration and Refugees. Retrieved from https://www.hrw.org/news/2016/03/03/qa-eu-turkey-deal-migration-and-refugees

[74] European Commission. (n.d.). An EU "Safe Countries of Origin" List. Retrieved from http://ec.eu-ropa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-infor-mation/docs/2_eu_safe_countries_of_origin_en.pdf, Asylum Information Database. (2015). Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis - Annual Report 2014/2015. Retrieved from http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annualreport_2014-2015_0.pdf

[75] Council of Europe. (2016, July 21). Turkey announces decision to suspend "temporarily" European Convention on Human Rights commitments. Retrieved from http://www.humanrightseurope.org/2016/07/turkey-announces-de-cision-to-temporarily-suspend-the-european-convention-on-human-rights/, European Convention on Human Rights (1950). Retrieved from http://www.echr.coe.int/Documents/Convention_ENG.pdf , at Article 15.

these requirements are met in the case of Turkey and has reported pushbacks of Syrian refugees[76].

The second major objection to the deal is that mass expulsions are prohibited by the ECHR in Protocol 4 Article 4[77]. Not all EU member states are parties to the supplementary Protocol 4[78]. Nevertheless, it has been argued that the prohibition of arbitrary and discriminatory mass expulsions, which is part of all three regional human rights conventions and the ICCPR, binds the international community as international customary law[79]. Furthermore, Nils Muižnieks, the CoE's Commissioner for Human Rights, fears that "automated procedures" violate the procedural requirements to objectively assess each individual case that are part of international law and have been elaborated upon by the ECtHR[80].

The UNHCR has clearly distanced itself from the EU-Turkey agreement and suspended its activities on the Greek islands[81]. Likewise, Doctors Without Borders / Médecins Sans Fron-

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[76] Human Rights Watch. (2016, March 8). EU/Turkey: Mass, Fast-Track Returns Threaten Rights. Retrieved from https://www.hrw.org/news/2016/03/08/eu-turkey-mass-fast-track-returns-threaten-rights, Human Rights Watch. (2015, November 23). Turkey: Syrians Pushed Back at the Border. Retrieved July 13, 2016, from https://www.hrw.org/news/2015/11/23/turkey-syrians-pushed-back-border

[77] See supra note 75 (European Convention on Human Rights 1950).

[78] EU Member States that have currently not ratified Protocol 4 ECHR are Greece and the United Kingdom. See Council of Europe. (2016, June 16). Chart of signatures and ratifications of Treaty 046. Retrieved June 16, 2016, from http://www.coe.int/web/conventions/full-list

[79] Henckaerts, J.-M. (1995). *Mass Expulsion in Modern International Law and Practice*. Martinus Nijhoff Publishers, at 45-47.

[80] Nils Muižnieks. (2016, March 16). Diese Pläne sind schlicht illegal. Retrieved from http://www.coe.int/en/web/commissioner/view/-/asset_publisher/ugj3i6qSEkhZ/content/diese-plane-sind-schlicht-illegal

[81] Melissa Fleming. (2016, March 22). UNHCR redefines role in Greece as EU-Turkey deal comes into effect. Retrieved from http://www.unhcr.org/en-us/news/briefing/2016/3/56f10d049/unhcr-redefines-role-greece-eu-turkey-deal-comes-effect.html

tières joined this position and suspended their activities on the same day to "not allow (their) assistance to be instrumentalized for a mass expulsion operation"[82]. Some members of the European Parliament have criticized the recent political unrest in Turkey, such as the violation of political freedoms and the suspension of the constitution and fundamental rights. In the light of these developments, members of the EP have warned that "with the opposition in prison and rule of law principles neglected, Turkey should not expect to get an EU visa-free regime any time soon"[83]. The long-term enforcement and consequences of the EU-Turkey deal became even more uncertain following the Turkish military coup in July 2016 and imposition of martial law.

Africa: The Valetta Summit

Due to the development differential between the two continents, migration from Africa to Europe has increased since the 1960s[84]. In 2014, around 177,000 migrants entered the EU illegally via the Western and Central Mediterranean routes, accounting for about 60% of the total detected illegal border crossings and outnumbering irregular migrants on the Eastern Mediterranean route by more than 3:1[85]. In 2015, however, the number of migrants on the Eastern Mediterranean route had multiplied to outnumber migrants from Africa on the Eastern and Central Mediterranean routes 5:1[86]. Nevertheless, the main migration routes from Africa remain a

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[82] Doctors Without Borders/Médecins Sans Frontières. (2016, March 22). Greece: MSF ends activities inside the Lesvos "hotspot." Retrieved from http://www.msf.org/en/article/greece-msf-ends-activities-inside-lesvos-%E2%80%9Chotspot%E2%80%9D

[83] European Parliament. (2016, June 14). No EU visa-free travel for Turks, if rule of law is undermined, say MEPs. Retrieved from http://www.europarl.europa.eu/news/en/news-room/20160614IPR32254/no-eu-visa-free-travel-for-turks-if-rule-of-law-is-undermined-say-meps

[84] Flahaux, M.-L., & De Haas, H. (2016). African migration: trends, patterns, drivers. *Comparative Migration Studies*, *4*(1), at 13.

[85] FRONTEX. (2016, March). Detections of illegal border crossings at the EU's external borders, 2015. Retrieved from http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf, at 16.

[86] Frontex. (2016). *Risk Analysis for 2016* (No. 2499/2016). Warsaw, at 16. Retrieved from http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf

concern because despite becoming less frequented, they remain the most dangerous. Relative to all other migration routes, the Central Mediterranean route accounted for three out of four fatalities in both 2014[87] and 2015[88] and thus for far more than all other migration routes combined. In the shipwreck off the Libyan coast on April 19, 2015 alone, around 800 migrants died, which is equal to the total death toll on the Eastern Mediterranean route in 2015. The most recent estimates for migrant fatalities in 2016 on the Central Mediterranean route (2,440 fatalities) indicate that in the first half of the year the death toll has almost climbed to the total number of migrant deaths in the previous year[89]. Controlling migration from Africa via the Mediterranean Sea remains a priority for EU decision makers.[90]

To address the growing problem of increasing migration flows across the Mediterranean Sea, an international summit took place in Valletta on November 11-12, 2015. European and African leaders pledged to step up their cooperation to improve the management of migration flows[91]. Their agreement focused on five key areas: addressing the root causes of migration, establishing legal migration channels, protecting migrants and asylum seekers en route, combat human trafficking, and cooperating on the return and readmission of migrants[92].

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[87] BBC. (2015, April 22). Mediterranean migrant deaths per route. Retrieved from http://www.bbc.com/news/world-europe-32387224

[88] International Organization for Migration. (2015, December 31). Mediterranean Update - Migration Flows Europe: Arrivals and Fatalities. Retrieved from https://www.iom.int/sites/default/files/press_release/pictures/Mediterranean_Update_31_December_0.png

[89] International Organization for Migration. (2016, June 21). Mediterranean Update - Migration Flows Europe: Arrivals and Fatalities. Retrieved from http://missingmigrants.iom.int/sites/default/files/Mediterranean_Update_21_June_2016_1.pdf

[90] See Lavenex and Kunz 2008 for this history and Andersson 2014 for a rich ethnographic account.

[91] Participants of the Valletta Summit on Migration. (2015). Political Declaration. Presented at the Valletta Summit on Migration, Valletta. Retrieved from http://www.consilium.europa.eu/en/meetings/international-summit/2015/11/FINAL_DECL_EN-(2)_pdf/

[92] Participants of the Valletta Summit on Migration. (2015). Action Plan. Presented at the Valletta Summit on Migration, Valletta. Retrieved from http://www.consilium.europa.eu/en/meetings/international-summit/2015/11/ACTION_PLAN_EN_pdf/

With regard to addressing the root causes of migration, the EU-Africa Action plan includes a 1.8 billion euro "EU Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa", decreasing the costs of remittance transfers, and deepening economic integration. The enhanced economic potential is supposed to benefit state building, conflict prevention, the fight against terrorism, and improvements in the situation of vulnerable population groups and displaced persons – a tall order for relatively modest spending[93]. In the area of legal migration channels, the Action Plan aims to improve the available regular channels of migration, especially for enterprising migrants such as students, researchers, and entrepreneurs. Moreover, the participants commit to facilitating legal visa procedures, particularly with short-term visa programs and family reunification in mind[94]. In the area of migrant protection, the importance of search and rescue operations at sea was emphasized as well as the resettlement of long-term refugees and the provision of humanitarian assistance[95].

The most important measure from the point of view of establishing remote control was the continued capacity-building in African countries. These measures include supporting the drafting of new legislative and institutional frameworks to ensure the control of land, sea and air borders in accordance with applicable international law[96]. The EU will provide equipment and "anti-trafficking" training and law enforcement will share intelligence[97]. Irregular migrants are framed as victims to be protected. The Action Plan aims to increase efforts to protect trafficking victims by establishing standard procedures to provide consular assistance and facilitate the re-

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[93] Ibid.
[94] Ibid, at section 2.
[95] Ibid, at section 3.
[96] Ibid, at section 4.
[97] Ibid.

turn to countries of origin as well as support for local authorities to provide psychological coun-

seling for effective reintegration[98]. Potential migrants are to be provided with access to credible

information in their countries of origin about legal migration channels and the dangers of irregu-

lar migration[99]. The language of the agreement propagates the false notion that irregular migrants

could travel legally if they wished to, when in fact, for the vast majority of them, there is no legal

avenue for their safe movement.

The provisions concerning the return and readmission of irregular migrants form another

important part of the Action Plan. It emphasizes the Cotonou Agreement of 2000 between the

European Union and the African, Caribbean and Pacific Group of States (ACP States), which

provides in Article 13 that each must readmit its own nationals who are illegally present on the

territory of an EU Member State[100]. The EU especially emphasizes the need to strengthen the lo-

cal authorities' bureaucratic capacities with regard to the issuance of travel documentation, digi-

talization of fingerprints, and timely responses to readmission applications, which have in the

past been major challenges in deportation and readmission procedures involving irregular mi-

grants from Africa[101].

African leaders had hoped for more legal migration channels[102]. EU leaders had hoped

for a firmer commitment to readmission, and some even proposed to establish 'transit centers' or

'fast track' procedures which were opposed by their African counterparts and not included in the

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[98] Ibid.
[99] Ibid.
[100] European Union - ACP States. Cotonou Agreement, Pub. L. No. L 317 (2000). Retrieved from http://www.euro-parl.europa.eu/document/activities/cont/201306/20130605ATT67340/20130605ATT67340EN.pdf
[101] See supra note 92 (Participants of the Valletta Summit on Migration 2015), at Section 5.
[102] Gatto, A. (2015, November 19). Outcome of the Valletta Summit on Migration. European Parliamentary Research Service. Retrieved from http://www.europarl.europa.eu/Reg-Data/etudes/ATAG/2015/572779/EPRS_ATA(2015)572779_EN.pdf

action plan[103]. Furthermore, the participants disagreed on the merits of the "more-for-more" ap-

proach of development aid for migration control[104].

Even before the Valletta Summit, human rights organizations raised concerns about the

EU-Africa agenda. "Seemingly intent on enlisting African nations as proxy gatekeepers, the Val-

letta summit is likely to result in a one-sided border control contract dressed up as a cooperation

agreement," warned Iverna McGowan, Acting Director of Amnesty International's European In-

stitutions Office[105]. The European Centre for Development Policy Management (ECDPM) de-

cried the European domination of the negotiations. It further criticized the "bilateral deals" Euro-

pean leaders sought to establish on the same occasion but separate from the joint agenda. Never-

theless, the ECDPM also notes the "skill and endurance" with which African leaders were able to

obtain concessions from their European partners[106].

Patrol and Liaison Agent Operations

European member states have conducted interdiction operations in international waters and even

the territorial waters of foreign states at least since 1997 in Albanian waters and 2004 in the wa-

ters of various states in Africa[107]. FRONTEX began coordinating maritime interdiction efforts

beginning with HERA off the coast of West Africa in 2006.[108] In 2015, three major operations

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[103] Dimitriadi, A. (2015, November). Lessons in compromise: A view of Valletta and Antalya. Retrieved from http://www.ecfr.eu/article/commentary_lessons_in_compromise_a_view_on_valetta_and_antalya
[104] See supra note 102 (Gatto 2015).
[105] Amnesty International. (2015, November 10). EU-Africa Summit in Valletta must not dress up border control as "co-operation." Retrieved from https://www.amnesty.org/en/latest/news/2015/11/eu-africa-summit-in-valetta/
[106] Knoll, A. (2015, November 13). The 2015 Valletta Summit on migration and mobility - A bond or a knot be-tween Europe and Africa? Retrieved from http://ecdpm.org/talking-points/valletta-summit-europe-africa-migration-part-one/
[107] Albahari, M. (2015). *Crimes of Peace: Mediterranean Migrations at the World's Deadliest Border*. University of Pennsylvania Press, at 66; European Migration Network. (2011). *Practical Measures to Reduce Irregular Immigra-tion: Spain*. European Migration Network.
[108] Lodge, A. (2010). *Beyond the frontiers: Frontex, the first five years*. Warsaw: Frontex.

were deployed in the Mediterranean Sea: the EU Naval Force Med Operation SOPHIA (EUNAVFOR MED), the FRONTEX Operation Triton, and the NATO's Standing Maritime Group 2 (SNMG2), which is deployed in the Aegean Sea.[109] New mechanisms have been proposed to coordinate these maritime patrol activities.

European Border and Coast Guard (EBCG)

In December 2015, the Commission presented a proposal for a European Border and Coast Guard (EBCG)[110]. In essence, the EBCG would consist of the European Border and Coast Guard Agency, an enhanced FRONTEX, and the national border authorities, which are to share responsibility for European integrated border management[111]. The original Commission proposal foresees new supervisory, monitoring, and operational tasks to strengthen the EBCG Agency's mandate and role. To implement these new elements, the EBCG Agency's budget is suggested to be based on the FRONTEX budget of 238 million euros for 2016 and increased by 31.5 million euros in 2017. Additionally, 602 staff members will be added to the Agency by 2020[112]. The EBCG Agency will remain headquartered in Warsaw[113]. The EP officially approved the draft

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[109] UK Parliament House of Lords European Union Committee. (2016, May 13). Naval operations to combat irregular migration on the EU's borders. Retrieved from http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeu-com/144/14407.htm

[110] In addition to the EBCG, the Borders Package also included a revision of the Schengen Borders Code, a Regulation on a European travel document for the return of illegally staying third-country nationals, a revised EUROSUR Handbook, and the 8th bi-annual report on the Schengen area. See European Commission. (2015, December 15). Press release - European Agenda on Migration: Securing Europe's External Borders. Retrieved from http://europa.eu/rapid/press-release_MEMO-15-6332_en.htm

[111] European Commission. Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, Pub. L. No. COM(2015) 671 final (2015). Retrieved from http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/legal-documents/docs/regulation_on_the_european_border_and_coast_guard_en.pdf, at Article 3, 5.

[112] Ibid, at 8.

[113] Ibid, at Article 55.

regulation on July 7, 2016, and on September 14, 2016, the Council approved the final act[114].
The EBCG Regulation (EU) 2016/1624[115] entered into force on October 6, 2016[116].

The EBCG Agency's supervisory role is entirely new and has never been a part of the original FRONTEX mandate. The EBCG Agency will conduct mandatory vulnerability assessments of the member states' border management, in particular, the member states' capacity to handle present and future threats[117]. Moreover, the EBCG Agency's Executive Director will have the authority to recommend, in consultation with the Member State concerned, necessary measures to be taken within a given timeframe by a member state with deficits in its border control. In case the member state fails to comply, the EBCG Agency's management board may issue a binding decision on measures the Member State shall implement. Finally, if a Member States non-compliance renders it necessary, the Council may authorize direct intervention by the EBCG Agency to safeguard the integrity of the Schengen area[118]. The EBCG Agency will have more

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[114] European Parliament / Legislative Observatory. (n.d.). Procedure File: 2015/0310(COD) European Border and Coast Guard. Retrieved August 17, 2016, from http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2015/0310%28COD%29&l=en#tab-0, European Parliament. (2016, July 6). MEPs back plans to pool policing of EU external borders. Retrieved from http://www.europarl.europa.eu/news/en/news-room/20160701IPR34480/meps-back-plans-to-pool-policing-of-eu-external-borders, Council of the European Union. (2016, September 14). European Border and Coast Guard: final approval - Consilium. Retrieved from http://www.consilium.europa.eu/en/press/press-releases/2016/09/14-european-border-coast-guard/

[115] European Parliament and Council of the European Union. Regulation (EU) 2016/1624, Pub. L. No. OJ L 251 (2016). Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R1624

[116] FRONTEX. (n.d.). European Border and Coast Guard. Retrieved October 2, 2016, from http://frontex.europa.eu/pressroom/faq/european-border-and-coast-guard/

[117] See supra note 115 (European Parliament and Council of the European Union 2016), at Article 13 (4). The Council had already suggested a similar approach by emphasizing the necessity to "assist the Member States concerned in respecting their legal obligation to perform adequate controls, to manage and to regain controls of the external borders and increase coordination of actions relating to border management" at its November 8, 2015 meeting. Justice and Home Affairs Council. (2015). Outcome of the Council Meeting (3422th Meeting). Presented at the 3422th Council meeting, Brussels. Retrieved from http://www.consilium.europa.eu/en/meetings/jha/2015/11/st13870_en15_pdf/, at 4.

[118] See supra note 115 (European Parliament and Council of the European Union 2016), at Article 13 (6), (8), Article 19 (1).

extensive monitoring tasks. It will deploy liaison officers to member states to facilitate cooperation and the mandatory exchange of information relevant to the EBCG Agency's monitoring and supervisory tasks[119].

Additionally, the operational tasks of the EBCG Agency will surpass those of the original FRONTEX mandate. The regulation grants the EBCG Agency the right to directly intervene in a member state that is ineffective at controlling its own borders. This may occur either because the member state failed to comply with the corrective measures ordered as the result of a "vulnerability assessment" or due to extraordinary migratory pressure. The implementing decision may authorize rapid border interventions, the deployment of European Border and Coast Guard Teams or technical equipment, the coordination of joint operations, and the organization of deportations[120]. However, rapid border interventions may only take place on the request of a member state or after a qualified majority decision by the Council based on a Commission proposal to safeguard the integrity of the Schengen area[121]. While the Commission's original proposal conferred this authority to the Commission, the EP's Civil Liberties Committee and the Council's COREPER decided to give the Council, instead of the Commission, authority over implementing decisions for direct interventions[122]. Furthermore, the regulation provides that internal border checks may be introduced if a member state fails to comply with the Council's decision[123]. In a

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[119] Ibid, at Article 12.
[120] Ibid, at Article 19 (1)-(3).
[121] Ibid, at Article 14, 15, 17, 19.
[122] European Parliament. (2016, May 30). Civil Liberties Committee backs new European Border and Coast Guard. Retrieved from http://www.europarl.europa.eu/news/en/news-room/20160530IPR29683/civil-liberties-committee-backs-new-european-border-and-coast-guard, Gatto, A. (2016, June). Briefing - European Border and Coast Guard system. European Parliamentary Research Service. Retrieved from http://www.europarl.europa.eu/Reg-Data/etudes/BRIE/2016/583818/EPRS_BRI(2016)583818_EN.pdf, at 7-8, COREPER. Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC - Mandate for negotiations with the European Parliament, Pub. L. No. 7649 / 16 (2016). Retrieved from http://data.consilium.europa.eu/doc/document/ST-7649-2016-INIT/en/pdf.
[123] See supra note 115 (European Parliament and Council of the European Union 2016), at Article 80.

similar vein, the EBCG Agency will collaborate with the Commission when a Member State requests support in a "hotspot" area by migration management support teams. To this end, the EBCG Agency may contribute to the screening and registration of arriving migrants, provide information to asylum seekers, and assist in return operations[124]. Furthermore, the EBCG Agency will assume more new responsibilities in the return of irregular migrants[125]. The EP's Civil Liberties Committee approves of the EBCG Agency's involvement in return operations but warns against return operations to third countries not considered safe[126]. In addition to inter-agency co-operation, the EBCG Agency will foster the operational cooperation between member states and third countries through joint operations, liaison officers, and return agreements. To this end, the EBCG Agency will also be authorized to work on the territory of neighboring third countries[127].

The regulation furthermore enables the EBCG Agency to fulfill its expanded tasks by providing it with additional resources, such as a rapid reserve pool of border control experts. While FRONTEX does not have a permanent pool of professionals at its disposal, the EBCG Agency will have a standing corps of national border guards at its immediate disposal. To this end, the member states are to contribute a number of border guards to make a rapid reaction pool of border guards available to the EBCG Agency [128]. Furthermore, the EBCG Agency will have its own pool of technical equipment available and the right to acquire equipment when necessary. Member states will still be required to contribute to the technical equipment pool by making equipment available at the request of the agency[129].

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[124] Ibid, at Article 18.
[125] Ibid, at Article 27.
[126] See supra note 122 (Gatto 2016).
[127] See supra note 115 (European Parliament and Council of the European Union 2016), at Article 54.
[128] Ibid, at Article 20 (5).
[129] Ibid, at Article 38-39.

The EBCG proposal has been criticized by some observers for holding too much autonomy while others argue it would not be independent enough. On the one hand, Analysts have questioned whether the proposal is an infringement of the member states' ultimate responsibility regarding the "maintenance of law and order and the safeguarding of internal security" (Article 72 TFEU). Furthermore, it is questioned whether the proposal respects the member states' "essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security" (Article 4 (2) TEU)[130]. On the other hand, the Centre for European Policy Studies (CEPS) argues that Article 77 (2) (d) TFEU clearly specifies that the EP and the Council are to take "any measure" to achieve integrated border management. The CEPS goes further in arguing that the proposal does not go far enough in granting the EBCG autonomy because the border guards at its disposal are still not its own but part of a pool provided by the member states[131]. This criticism with regard to permanent agency border guards is echoed by the European Council on Foreign Relations (ECFR)[132]. The EU's constituents have also expressed their expectations regarding effective border management as 71% responded that they would like to see more EU interventions in the protection of external borders[133].

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[130] Peers, S. (2015, December 16). EU Law Analysis: The Reform of Frontex: Saving Schengen at Refugees' Expense? Retrieved from http://eulawanalysis.blogspot.com/2015/12/the-reform-of-frontex-saving-schengen.html, Consolidated version of the Treaty on the Functioning of the European Union, Pub. L. No. OJ C 326 (2012). Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT, Consolidated version of the Treaty on European Union, Pub. L. No. OJ C 326 (2012). Retrieved from http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A12012M%2FTXT.

[131] Carrera, S., Hertog, L. den, & Centre for European Policy Studies (Brussels, B. (2016). *A European border and coast guard: what's in a name?* Retrieved from https://www.ceps.eu/system/files/LSE%20No%2088%20SC%20and%20LdH%20EBCG.pdf, at 12.

[132] Dimitriadi, A. (2016, June 2). The European border guard: New in name only? Retrieved from http://www.ecfr.eu/article/commentary_the_european_border_guard_new_in_name_only_7035

[133] Gatto, A., D'Alfonso, A., & Dobreva, A. (2016, July). Briefing - Protection of external borders. European Parliamentary Research Service. Retrieved from http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586589/EPRS_BRI(2016)586589_EN.pdf, at 1.

Furthermore, the ECFR raises the concern that "the proliferation of actors involved in maritime surveillance and border controls means that the governance of the external borders is increasingly blurry", which leads to a lack of accountability to the detriment of victims of fundamental rights violations[134]. With regard to the mechanisms to ensure the protection of fundamental rights, the International Commission of Jurists, the ECRE, and Amnesty International criticize that the complaint mechanism should "be entrusted to a body independent from the management structure of the Agency" to guarantee its effectiveness[135].

Mediterranean Sea: FRONTEX Operations

FRONTEX launched Joint Operation Triton in November 2014 to "control irregular migration flows towards the territory of the [member states] of the EU and to tackle cross border crime"[136]. According to the operational objectives and concept, this includes, among others, border security and surveillance, contribution to Search and Rescue (SAR) missions, the collection of intelligence on migrant smuggling through debriefing teams, and promotion of cooperation and information exchange between concerned member states and agencies[137]. To fulfill its extensive obligations, Triton initially operated on a budget of 2.9 million euros per month[138]. Within its operational area in the SAR regions of Italy and Malta, it targets irregular migration from Libya,

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[134] Ibid.

[135] International Commission of Jurists, European Council on Refugees and Exiles, & Amnesty International. (2016). *Joint briefing on the European Border and Coast Guard Regulation – International Commission of Jurists, ECRE and Amnesty International*. Retrieved from http://www.amnesty.eu/content/assets/Docs_2016/Reports-Briefings/EBCGReg_Joint_briefing.pdf, at 6.

[136] FRONTEX. (2014, October 22). Operational Plan (Main Part) - EPN CONCEPT Joint Operation EPN Triton 2014 - 2014/SBS/09. Retrieved from https://www.asktheeu.org/en/request/2502/response/8802/attach/5/OPLAN%20TRITON%202014.pdf, at 6.

[137] Ibid, at 6-7.

[138] FRONTEX. (2014, October 31). Frontex launches Joint Operation Triton. Retrieved from http://frontex.europa.eu/news/frontex-launches-joint-operation-triton-JSYpL7

Egypt, and Turkey[139]. Italy acted as the operation's host country and worked with 16 EU members as well as Norway, Switzerland, and Iceland as Schengen-Associated Countries (SAC)[140]. The contributing member states maintained the operational command over their assets while all activities were coordinated by the International Coordination Centre or, in the case of SAR missions, by the competent Rescue Coordination Centre[141].

The numbers of migrants who died on their way to Europe reached 1800 in the first months of 2015, over 800 of whom lost their lives in the shipwreck of April 18, 2015, off the Libyan coast[142]. As an immediate consequence, the European Council tripled the funding for Triton to improve its SAR capacities[143]. A month later, Triton extended its operational area from 30 to 138 nautical miles from the coasts of Italy and Malta and augmented its resources and assets as well as its budget[144]. Supporting EU member states increased to 25, uniting almost the entire EU and Schengen Area behind the operation[145]. Moreover, Triton cooperated with the EU naval mission, EUNAVFOR Med, which is deployed in the same operational area[146]. According to Amnesty International, the additional resources lowered the death rate of migrants crossing the

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[139] FRONTEX. (2014, October 22). Annexes of the operational Plan - EPN CONCEPT Joint Operation EPN Triton 2014 - 2014/SBS/09. Retrieved from https://www.asktheeu.org/en/request/2502/response/8802/attach/6/ANEXXES%20O
PLAN%20TRITON%202014.pdf, at 3.

[140] FRONTEX. (2016). *General Report 2015*. Warsaw. Retrieved from http://frontex.europa.eu/assets/About_Frontex/
Governance_documents/Annual_report/2015/General_Report_2015.pdf, at 49.

[141] See supra note 138 (FRONTEX 2014), at 10-11.

[142] Scammell, R. (2015, July 10). Italian rescue effort gives dignified burial to refugee shipwreck victims. Retrieved from http://www.unhcr.org/en-us/news/latest/2015/7/559fd26d6/italian-rescue-effort-gives-dignified-burial-refugee-shipwreck-victims.html

[143] European Council. (2015, April 23). Special meeting of the European Council, 23 April 2015 - Statement. Retrieved March 8, 2016, from http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/

[144] FRONTEX. (2015, May 26). Frontex expands its Joint Operation Triton. Retrieved from http://frontex.europa.eu/news/frontex-expands-its-joint-operation-triton-udpbHP, Amnesty International. (2015, July 9). A safer sea: The impact of increased search and rescue operations in the central Mediterranean. Retrieved from https://www.amnesty.org/download/Documents/EUR0320592015ENGLISH.pdf, at 2.

[145] Ibid.

[146] See supra note 140 (FRONTEX 2016), at 19.

Mediterranean Sea from 1 in 16 in the four months before the expansion to 1 in 427 in the two months after the expansion[147].

While Triton's operations are conducted in the Central Mediterranean, FRONTEX's Poseidon Sea has patrolled in the Eastern Mediterranean since 2012[148]. Poseidon is hosted by Greece, which is supported by 28 countries, including 24 EU member states, Norway and Iceland as SAC, as well as Albania and Ukraine[149]. On April 23, 2015, the European Council tripled the funding for Poseidon Sea to an annual budget of 18 million euros[150].

To cope with increasing migration pressure in the Eastern Mediterranean, Greece requested FRONTEX to launch a Rapid Border Intervention Teams (RABIT) mechanism on December 3, 2015. The purpose of the RABIT mechanism is to mandate EU member states and SAC to provide emergency operational assistance to the requesting member state which faces exceptional migration pressure[151]. On December 10, 2015, FRONTEX accepted Greece's request and replaced Poseidon Sea with a new iteration named Poseidon Rapid Intervention, which effectively increased the available officers and technical equipment[152]. Initially, 293 officers and 15 vessels were deployed to Greece with a plan to gradually increase the number of officers to

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[147] See supra note 144 (Amnesty International 2015), at 3.
[148] FRONTEX. (n.d.). Archive of operations - Poseidon Sea. Retrieved August 8, 2016, from http://frontex.europa.eu/operations/archive-of-operations/sLGWbY
[149] FRONTEX. (n.d.). Archive of operations - JO EPN Poseidon Sea (as of 28.12.2015 - Poseidon Rapid Intervention). Retrieved August 8, 2016, from http://frontex.europa.eu/operations/archive-of-operations/7UtaOZ
[150] See supra note 148 (FRONTEX 2015).
[151] FRONTEX. (2015, December 4). Greece asks Frontex for rapid intervention teams in the Aegean islands. Retrieved from http://frontex.europa.eu/news/greece-asks-frontex-for-rapid-intervention-teams-in-the-aegean-islands-0swm9L
[152] FRONTEX. (2015, December 10). Frontex accepts Greece's request for Rapid Border Intervention Teams. Retrieved from http://frontex.europa.eu/news/frontex-accepts-greece-s-request-for-rapid-border-intervention-teams-amcPjC

over 400[153]. Poseidon Rapid Intervention cooperates with NATO vessels deployed in the same area[154].

In the mid-2010s, migration via the Western Mediterranean route took place on a much smaller scale than via the Central and Eastern Mediterranean routes. Nevertheless, FRONTEX cooperated with host country Spain on three joint operations in 2015: Indalo, Hera, and Minerva. Operation Minerva is the largest of the three. Host country Spain is supported by 13 countries, 11 of which are EU member states, as well as Norway and Switzerland. Its annual budget is 400,000 euros[155]. Indalo, with an annual budget of 5 million euros and 10 supporting countries, including 7 EU member states and Norway, Iceland, and Switzerland, is the second largest operation[156]. The smallest operation, Hera, operates on an annual budget of 1.5 million euros and two EU member states as supporting countries[157].

Mediterranean Sea: 'EUNAVFOR Med'

Libya and its territorial waters are a major conduit across the Mediterranean. In May 2015, the EU's High Representative of the Union for Foreign Affairs and Security Policy, Federica Mogherini, asked for the UN Security Council's cooperation and support for an EU naval operation to

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[153] FRONTEX. (2015, December 29). Frontex launches rapid operational assistance in Greece. Retrieved from http://frontex.europa.eu/news/frontex-launches-rapid-operational-assistance-in-greece-u3rqPy

[154] FRONTEX. (2016, March 6). Frontex and NATO to cooperate in the Aegean Sea. Retrieved from http://frontex.europa.eu/news/frontex-and-nato-to-cooperate-in-the-aegean-sea-nZMSYr

[155] FRONTEX. (n.d.). Archive of operations - Joint Operation EPN Minerva. Retrieved August 8, 2016, from http://frontex.europa.eu/operations/archive-of-operations/q1RyOO

[156] FRONTEX. (n.d.). Archive of operations - Joint Operation EPN Indalo. Retrieved August 8, 2016, from http://frontex.europa.eu/operations/archive-of-operations/7KfiiL

[157] FRONTEX. (n.d.). Archive of operations - Joint Operation EPN Hera. Retrieved August 8, 2016, from http://frontex.europa.eu/operations/archive-of-operations/LKezB3

combat migrant smuggling[158]. The EU Foreign Affairs Council agreed to implement a new mission called EU Naval Force Med (EUNAVFOR Med) as a "military crisis management operation contributing to the disruption of the business model of human smuggling and trafficking networks" in an operational area loosely defined as "Southern Central Mediterranean"[159]. The operation has mandates for three phases. The first phase is to focus on gathering information and patrolling, the second phase on the seizure of smuggling vessels, and the third phase on the destruction of smuggling vessels. Any action taken in international waters or foreign territorial waters must be approved by an "applicable UN Security Council Resolution or consent by the coastal State concerned", which implies a partnership with Libyan authorities[160].

On June 22, 2015, the Council officially launched the 11.8 million euro operation[161]. In Phase I, the force consisted of one Italian aircraft carrier and helicopters, two German ships, one British ship and helicopter, and an aircraft provided by Luxemburg[162]. The forces became acquainted with regular maritime traffic, determined smuggling hubs, conducted rescues/detentions of 3078 migrants, and interviewed detainees to gather intelligence[163].

The second phase was launched on October 7, 2015 and renamed "Operation Sophia" in honor of a baby born to a Somali mother on board a German frigate that had rescued the mother

[158] Mogherini, F. (2015, May). High Representative/Vice-President Federica Mogherini's remarks at the UN Security Council, New York. New York. Retrieved from http://www.eeas.europa.eu/statements-eeas/2015/150511_03_en.htm

[159] Council of the European Union. Council Decision (CFSP) 2015/778, Pub. L. No. L 122/31 (2015). Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D0778&from=EN, at Article 1.

[160] Ibid, at Article 2.

[161] Foreign Affairs Council. (2016). Outcome of the Council Meeting (3400th Meeting). Presented at the 3400th Council meeting, Luxembourg. Retrieved from http://www.consilium.europa.eu/en/meetings/fac/2015/06/Outcome-of-the-Council-meeting_EN_pdf/, at 9.

[162] Operation Commander Rear Admiral Enrico Credendino. (2016). *EUNAVFOR MED - Op SOPHIA - Six Monthly Report 22 June - 31 December 2015* (No. EEAS (2016) 126). Brussels: European External Action Service (EEAS). Retrieved from https://migrantsatsea.files.wordpress.com/2016/02/eeas-2016-126.pdf, at 9.

[163] Ibid.

and 453 other migrants in late August[164]. The legal basis for the operation was strengthened by

UN Security Council Resolution 2240 passed on October 9, 2015, that granted UN member

states authorization to inspect vessels suspected of migrant smuggling on the high seas off Libya

for one year[165]. The EUNAVFOR Med force was joined by five ships contributed by France,

Spain, Belgium, and the UK[166]. The operation achieved "near persistent presence" in some oper-

ational areas, destroyed 67 migrant vessels, and rescued/detained 5258 more migrants[167]. In the

winter season, the force was reduced as a total of three British, French, and Belgian ship with-

drew[168].

Two legal considerations posed a challenge as of this writing to a transition to operations

in Libyan territorial waters. First, to be active in Libyan territorial waters, an invitation by the

Libyan government and another UN Security Council resolution are necessary[169]. According to

UN Security Council Resolution 2259 (2015), the Government of National Accord is the "sole

legitimate government of Libya"[170]. Therefore, a transition to the next planned phases of

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[164] Ibid, European External Action Service. (2016, May 19). European Union Naval Force – Mediterranean Operation Sophia. Retrieved from http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/fact-sheet_eunavfor_med_en.pdf, at 2.

[165] United Nations Security Council. Resolution 2240 (2015), Pub. L. No. S/RES/2240 (2015) (2015). Retrieved from http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2240(2015), at Paragraph 7. The PSC made the decision to authorize EUNAVFOR Med to implement UN Security Council Resolution 2240 (2015) on January 20, 2016, after the Council the Council assessed on January 18, 2016 all conditions had been met. Political and Security Committee. Political and Security Committee Decision (CFSP) 2016/118, Pub. L. No. L 23/63 (2016). Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D0118&qid=1454343903616&from=EN , Foreign Affairs Council. (2016). Outcome of the Council Meeting (3443th Meeting). Presented at the 3443th Council meeting, Brussels. Retrieved from http://www.consilium.europa.eu/en/meetings/fac/2016/01/Outcome-of-the-FAC-Council-meeting_pdf/, at 12.

[166] See supra note 162 (Operation Commander Rear Admiral Enrico Credendino 2016), at 10.

[167] Ibid, at 11.

[168] Ibid.

[169] Russia and China have declared they would veto any resolution authorizing military action in Libyan territorial waters without Libyan consent, See supra note 164 (Operation Commander Rear Admiral Enrico Credendino 2016), at 20.

[170] United Nations Security Council. Resolution 2259 (2015), Pub. L. No. S/RES/2259 (2015) (2015). Retrieved from http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2259(2015), at Paragraph 3.

EUNAVFOR Med is conditional on the effective implementation of the Libyan Political Agreement and the newly formed, fragile Government of National Accord making a crackdown on irregular migration a priority[171]. In the meanwhile, the Council extended EUNAVFOR Med's mandate until July 27, 2017. In lieu of immediate action inside Libyan waters, it added the tasks of training and building up the Libyan coastguard and navy[172].

EUNAVFOR Med is the first EU operation with a proactive "potential(ly) openly coercive mandate"[173]. The European Union Institute for Security Studies (EUISS) acknowledges this as a "qualitative shift" in the EU security policy towards peace enforcement[174]. Furthermore, the EUISS maintains that this move causes tensions within the UN Security Council as Russia views the shift with reluctance[175]. The fact that this step was taken in the area of migration management attests to the urgency of migration deterrence in EU policy in the face of the current migration crisis. According to the EUISS' analysis, the mission has the potential to alter migration choices and shift migration routes which would not necessarily reduce migration flows but redirect them via land instead of sea routes and thus attain its objective to "prevent further loss of life at sea"[176]. UN Secretary General Ban Ki-moon emphasized to the European Parliament the need to create "safe alternatives for dangerous voyages" which ought to go hand in hand with tackling migrant smuggling[177]. The Meijers Committee of independent experts on EU law warned that the

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[171] Participants in the Libyan Political Dialogue. Libyan Political Agreement (2015). Retrieved from https://unsmil.unmissions.org/LinkClick.aspx?fileticket=miXuJYkQAQg%3D&tabid=3559&mid=6187&language=fr, at 5, 24.

[172] Council of the European Union. Council Decision (CFSP) 2016/993, Pub. L. No. L 162/18 (2016). Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D0993&from=EN, at Article 1 (3)(5).

[173] Tardy, T. (2015). Operation Sophia: Tackling the Refugee Crisis with Military Means. EUISS ISSUE Briefs, 2015(30), 1–4, at 1.

[174] Ibid, at 3.

[175] Ibid.

[176] Ibid, at 4.

[177] Ban Ki-Moon. (2015, May 27). Secretary-General's remarks to the European Parliament [As prepared for delivery]. Retrieved from https://www.un.org/sg/en/content/sg/statement/2015-05-27/secretary-generals-remarks-european-parliament-prepared-delivery

division of responsibilities for potential human rights violations is notoriously complicated for joint operations. Article 24 (1) TEU maintains that the Court of Justice of the European Union does not have jurisdiction over the EU's common foreign and security policy,[178] which implies that only the participating member states can potentially provide legal remedies to rights violations[179].

Aegean Sea: NATO Involvement

In the face of increased flows through the Eastern Mediterranean route, German Chancellor Angela Merkel and Turkish Prime Minister Ahmet Davutoğlu announced on February 8, 2016 their intention to seek the support of the North Atlantic Treaty Organization (NATO) to combat migrant smuggling[180]. NATO collectively has greater radar and other naval capabilities than EU member state forces and provides a mechanism for Turkey to cooperate with the EU, as Turkey is a member of NATO but not the EU. Although Greece is a member of both NATO and the EU, Greek authorities were initially reluctant to agree to NATO involvement in the Aegean Sea due to concern for potential infringements of Greek territorial sovereignty[181]. Nevertheless, Germany, Turkey, and Greece requested NATO support for its member states' efforts in the Aegean Sea on February 8, 2016[182]. A day later, NATO's Supreme Allied Commander Europe ordered

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[178] See supra note 132 (TEU), at Article 24.

[179] Meijers Committee. (2015, September 23). Military action against human smugglers: legal questions concerning the EUNAVFOR Med operation. Retrieved from http://www.statewatch.org/news/2015/sep/eu-meijers-cttee-eunavfor.pdf, at 4.

[180] German Federal Government. (2016, February 8). Angela Merkel offers Turkey assistance for border region. Retrieved from https://www.bundesregierung.de/Content/EN/Reiseberichte/2016/2016-02-08-merkel-ankara_en.html

[181] Kammenos sets out conditions for NATO to sweep Aegean. (2016, February 11). Kathimerini English Edition. Retrieved from http://www.ekathimerini.com/205872/article/ekathimerini/news/kammenos-sets-out-conditions-for-nato-to-sweep-aegean

[182] Moon, M. (2016). *Draft Report - NATO and the Future Role of Naval Power* (Draft Report No. 038 DSCFC 16 E). NATO Parliamentary Assembly - Defense and Security Committee. Retrieved from http://www.nato-pa.int/Default.asp?SHORTCUT=4168, at 10.

the first ships to the Aegean Sea[183]. NATO Secretary General Jens Stoltenberg formally announced on February 9-11, 2016, that NATO had agreed to "participate in the international efforts to stem the illegal trafficking and illegal migration in the Aegean"[184].

NATO assigned its Standing Maritime Group 2 (SNMG2) to reconnaissance and surveillance tasks and to rescue/detain people in distress at sea[185]. NATO firmly asserts that rescued migrants who came via Turkey will be taken back to Turkey[186]. Several NATO member states contributed to SNMG2's mission in the Aegean by summer 2016. Greece provided three frigates; the United States, Turkey, and Poland each provided one frigate; the UK provided a landing ship dock; and Germany provided the flagship[187]. However, the participating member states frequently change: Canada had also provided a frigate at the outset of the operation until it left the Aegean for a temporary deployment in the Black Sea on March 30, 2016[188]. The Netherlands and France temporarily joined the mission in March 2016[189]. The operational area for the deployment was initially limited to international waters but was extended to the territorial waters of

[183] Ibid.

[184] Stoltenberg, J. (2016, February). *Press conference by NATO Secretary General Jens Stoltenberg following the meeting of the North Atlantic Council at the level of Defence Ministers*. Brussels. Retrieved from http://www.nato.int/cps/en/natohq/opinions_127972.htm

[185] NATO. (2016, June 27). Assistance for the refugee and migrant crisis in the Aegean Sea. Retrieved August 10, 2016, from http://www.nato.int/cps/en/natohq/topics_128746.htm, Zhukov, Y. M. (2016, February 21). NATO's Mediterranean Mission. *Foreign Affairs*. Retrieved from https://www.foreignaffairs.com/articles/europe/2016-02-21/natos-mediterranean-mission

[186] Stoltenberg, J. (2016, February 26). Secretary General Stoltenberg's opinion piece – NATO and Europe's refugee and migrant crisis. Retrieved from http://www.nato.int/cps/en/natohq/opinions_128645.htm

[187] NATO. (2016, June). NATO's Deployment in the Aegean Sea. Retrieved from http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2016_07/20160627_1607-factsheet-aegean-sea-eng.pdf, at 1, NATO. (2016, July 5). Polish frigate joins SNMG2. Retrieved from http://www.mc.nato.int/PressReleases/Pages/Polish-frigate-joins-SNMG2.aspx

[188] NATO. (2016, March 31). SNMG2 Task Unit Begins Operations in the Black Sea. Retrieved from http://www.mc.nato.int/PressReleases/Pages/SNMG2-Task-Unit-Begins-Operations-in-the-Black-Sea.aspx

[189] NATO. (2016, March 18). French and Dutch ships join NATO's deployment in the Aegean. Retrieved from http://www.mc.nato.int/PressReleases/Pages/French-and-Dutch-ships-join-NATO%E2%80%99s-deployment-in-the-Aegean.aspx

Greece and Turkey in early March 2016[190]. NATO forces cooperate with the Greek and Turkish authorities as well as FRONTEX[191]. Greek and Turkish vessels deployed with SNMG2 only operate within their own territorial waters to avoid confrontations[192].

Concerns about a military response to the refugee and migration crisis as well as its deterrent effect have been voiced from humanitarian and utilitarian standpoints. While from the humanitarian perspective the mission's deterrent effect is serious enough to undermine refugees' access to safety in Europe, the utilitarian position criticizes the NATO operation for being ineffectual.

On the one hand, the director of Human Rights Watch's Refugee Program, Bill Frelick, fears that NATO vessels might deter refugees from leaving Turkish territorial waters or simply return them to Turkey, which would, de jure, not be considered an expulsion because the refugees never left Turkey's territory[193]. Amnesty International's Head of the European Institutions Office Iverna McGowan warns that pushing migrants back to an overstrained Turkey "would be a serious violation of their right to claim asylum, and would fly in the face of international law"[194]. The German human rights organization Pro Asyl further warns that push backs to Turkey violate the norm of non-refoulement because Turkey is arguably not a safe third country[195]. On the other hand, the Greek government has complained to NATO about the mission's minimal effect. According to the Greek government, NATO vessels only identified a fraction of the boats

[190] Ibid, NATO. (2016, August 3). Standing NATO Maritime Group 2 expands area of activities. Retrieved from http://www.mc.nato.int/PressReleases/Pages/Standing-NATO-Maritime-Group-2-expands-area-of-activities.aspx

[191] See supra note 187 (NATO 2016), at 1.

[192] See supra note 182 (Moon, 2016), at 10.

[193] Frelick, B. (2016, February 18). NATO enters the migration control business. Retrieved from https://www.hrw.org/news/2016/02/18/nato-enters-migration-control-business

[194] Amnesty International. (2016, February 11). Refugees: NATO's operations in Aegean Sea must focus on rescue. Retrieved from https://www.amnesty.org.uk/press-releases/refugees-natos-operations-aegean-sea-must-focus-rescue

[195] PRO ASYL. (2016, November 2). NATO-Einsatz gegen Flüchtlinge. Retrieved from https://www.proasyl.de/pressemitteilung/nato-einsatz-gegen-fluechtlinge/

carrying migrants to Greece and instead of stemming the flow merely redirected it to different destinations within Greece[196]. According to UNHCR data, a steady downward trend in daily arrivals in Greece is observable after the NATO mission launch[197]. Nevertheless, the mission's observable deterrent effect is not comparable to the much larger immediate downturn observed after the EU-Turkey agreement of March 20, 2016.

Conclusion

In September 2015, Aylan Kurdi, a three-year-old Syrian boy, was found dead on a Turkish beach. He had lost his life in an accident at sea when his family attempted to cross the Aegean Sea from Turkey to Greece to apply for asylum in Canada. Without any legal options to enter Greece, his family had hired Turkish smugglers who charged 4000 euros to provide them with a rubber raft and no life jackets[198]. The image of the boy who drowned shook an entire continent and tragically illustrated the fatal consequences of the asylum paradox: a combination of policies that protect refugees who reach EU territory and efforts to keep them away from EU territory where they can enjoy those rights.

Some of the remote control measures comprised in the EU's policy response to the political dilemma of the migration crisis, which were outlined in this report, may have contributed to the tragic death of Aylan Kurdi, while the rescue aspects of maritime operations may have prevented other tragedies. Through the establishment of safe-third-country agreements and the EU common safe countries of origin list, the EU seeks to minimize the numbers eligible for asylum

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[196] Nedos, V. (2016, April 16). Athens says impact of NATO patrols in Aegean is minimal. *Kathimerini English Edition*. Retrieved from http://www.ekathimerini.com/207999/article/ekathimerini/news/athens-says-impact-of-nato-patrols-in-aegean-is-minimal

[197] UNHCR. (2016, June 9). Greece data snapshot - 09 June 2016.

[198] Barnard, A., & Shoumali, K. (2015, September 3). Image of Drowned Syrian, Aylan Kurdi, 3, Brings Migrant Crisis Into Focus. *The New York Times*. Retrieved from http://www.nytimes.com/2015/09/04/world/europe/syria-boy-drowning.html

in Europe and deter those who seek to enter without meeting legal protection criteria. However, these measures may jeopardize the rights for asylum seekers from countries called "safe." The EU aims to improve the capabilities of countries of origin in Africa and transit countries such as Turkey to improve the countries' control of their own borders through capacity building. Patrol operations organized by the border agency FRONTEX or the new EBCG Agency, the EUNAVFOR Med mission, and the NATO operation are publicly framed as a fight against criminal trafficking networks, but illegal businesses exist because other EU policies make it impossible for asylum seekers and other migrants to get the visas to travel to Europe legally. As the EU created new ways of externalizing its borders in 2015 and 2016, the collision continued between the exercise of sovereign control over the movement of people and the fulfillment of rights obligations and humanitarian norms.

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