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COMMENT

When Stopping the Smuggler Means Repelling the Refugee: International Human Rights Law and the European Union's Operation To Combat Smuggling in Libya's Territorial Sea

Over the past three years, the number of human tragedies on the Mediterranean Sea has reached an unprecedented level.[1] The now-iconic image of a German rescue worker cradling a drowned migrant baby in his arms in the sea between Libya and Italy remains a disturbing reminder of the over 5,000 migrants and refugees who died attempting to cross the Mediterranean in 2016 alone.[2] Of the European Union's (EU) responses to this humanitarian crisis, perhaps the most controversial has been Operation Sophia: a naval mission to combat human smugglers and traffickers operating in the Mediterranean, in particular off the coast of Libya.[3] As part of Operation Sophia, the EU is now supporting and training the Libyan Navy and Coastguard to combat smuggling and stop migrant departures within Libya's territorial sea—waters within

1. *See* Nick Cumming-Bruce, *'Worst Annual Death Toll Ever': Mediterranean Claims 5,000 Migrants*, N.Y. TIMES (Dec. 23, 2016), http://www.nytimes.com/2016/12/23/world/europe/migrant-death-toll-mediterranean-europe.html [http://perma.cc/QNY4-WJ4H]; Gaia Pianigiani & Delcan Walsh, *Can E.U. Shift Migrant Crisis to the Source? In Libya, the Odds Are Long*, N.Y. TIMES (Feb. 17, 2017), http://www.nytimes.com/2017/02/17/world/europe/can-eu-shift-migrant-crisis-to-the-source-in-libya-the-odds-are-long.html [http://perma.cc/AR9S-7JFZ]; U.N. High Comm'r for Refugees, *Mediterranean Death Toll Soars, 2016 Is Deadliest Year Yet* (Oct. 25, 2016), http://www.unhcr.org/en-us/news/latest/2016/10/580f3e684/mediterranean-death-toll-soars-2016-deadliest-year.html [http://perma.cc/QT29-7DRC].

2. Cumming-Bruce, *supra* note 1; Steve Scherer, *Drowned Baby Picture Captures Week of Tragedy in Mediterranean*, REUTERS (May 30, 2016, 5:10 PM EDT), http://www.reuters.com/article/us-europe-migrants-baby-iduskcnoyl18p [http://perma.cc/BQ5B-M24M].

3. Pianigiani & Walsh, *supra* note 1.

twelve nautical miles of Libya's nautical baseline. The EU simultaneously continues to seek permission for European Union Naval Force Mediterranean (EUNAVFOR MED) vessels and personnel themselves to enter Libya's territorial sea to seize and dispose of smuggling vessels. (These two components will hereinafter together be referred to as the Operation Sophia "territorial sea component.")

The EU's goal of decreasing the number of migrants[4] who reach the Mediterranean high seas is understandable, but the territorial sea component presents serious human rights concerns. Instead of traversing the high seas to possibly reach Europe and asylum, migrants will be turned back by the Libyan Coastguard—trained and supported by EUNAVFOR MED—to a country where they likely face prolonged detention, brutality, and persecution. There is also the possibility that migrants and refugees will be caught in the crossfire between the human smugglers and the Libyan Coastguard in collaboration with EUNAVFOR MED. This Comment considers whether the EU's activities in the territorial sea of Libya will occur within the framework of international human rights law, or whether there are gaps in protection for migrants impacted by the Operation.

While the EU heralds the Operation Sophia territorial sea component as a humanitarian endeavor, this Comment urges caution. This Comment argues that the design of the territorial sea component exploits gaps in the human rights accountability framework while contributing to a concerning norm of militarized extraterritorial border control. The Comment specifically demonstrates how in collaborating with the Libyan Coastguard, European states operate in a legal grey area where the jurisdiction of the European Court of Human Rights (ECtHR) may not extend, and thus the application of human rights law is uncertain. Through this analysis, the Comment reveals how Operation Sophia instantiates a policy of *non-entrée*. *Non-entrée* is a notion in human rights scholarship describing responses to migration that allow states to purport to be consistent with human rights law—but only by preventing situations in which the state's human rights obligations might formally apply.[5]

The Comment proceeds in four Parts. Part I introduces Operation Sophia and the human rights issues implicated by the territorial sea component. Part II discusses the difficulty in establishing human rights jurisdiction under Europe-

4. In this Comment, the term "migrant" is used inclusively. A migrant may be a refugee or asylum seeker, or an individual crossing national borders due to other factors, such as economic ones.

5. Thomas Gammeltoft-Hansen & James C. Hathaway, Non-Refoulement *in a World of Cooperative Deterrence*, 53 COLUM. J. TRANSNAT'L L. 235 (2015); James C. Hathaway, *The Emerging Politics of* Non-Entrée, 91 REFUGEES 40 (1992).

an human rights law for the Operation Sophia territorial seas component. It identifies the existence of a human rights protection gap through analysis of the effective control standard in maritime operations, ECtHR jurisprudence on extraterritorial military engagements and territorial control, and the ECtHR's treatment of derived responsibility and joint conduct. Part III then contends that the territorial sea component makes significant and concerning contributions to an emerging norm of militarized, cooperation-based border control. Part IV proposes legal and policy prescriptions.

I. OPERATION SOPHIA AND HUMAN RIGHTS ON THE MEDITERRANEAN SEA

In recent years, observers and scholars have rightly called attention to European states' heightened implementation of border security protocols and restrictions on asylum access in response to the global migration crisis. The term "Fortress Europe" is now commonplace.[6] Over the past twenty years, European states have developed this practice by striking deals with African nations to support maritime interdictions in their territorial seas.[7] As a military operation designed to limit the number of migrants in reach of Europe's borders, Operation Sophia expressly follows in this trend. This Part provides background information on Operation Sophia (Section A) and highlights the human rights concerns at stake in the territorial sea component (Section B).

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6. *See, e.g.*, Abdullahi Elmi v. Malta, App. Nos. 25794/13 & 28151/13, ¶ 3 (Eur. Ct. H.R. Nov. 22, 2016), http://hudoc.echr.coe.int/eng?i=001-168780 [http://perma.cc/GJ8X-TBGB] (Pinto de Albuquerque, J., concurring) ("The human cost of the so-called 'fortress Europe' needs no scientific demonstration; it is exposed unsparingly on the daily news."); Stefan Lehne, *The Tempting Trap of Fortress Europe*, CARNEGIE EUR. (Apr. 21, 2016), http://carnegieeurope.eu/2016/04/21/tempting-trap-of-fortress-europe-pub-63400 [http://perma.cc/6ACZ-WQSF]; Preethl Nallu, *Fortress Europe: An Interactive Map of the EU's Growing List of Security Barriers*, HUFFINGTON POST (Jan. 4, 2017), http://www.huffingtonpost.com/entry/refugees-deeply-fortress-europe_us_570baf69e4b0885fb50d7b25 [http://perma.cc/GA9U-HZS8].

7. Hanson & Hathaway, *supra* note 5, at 250; *see also* Violeta Moreno-Lax, *Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea,* 23 INT'L J. REFUGEE L. 174, 200-06 (2011) (describing the EU's cooperation with third countries to address migration by sea); Samuel Cogolati et al., *Migrants in the Mediterranean: Protecting Human Rights*, EUR. PARLIAMENT 27-33 (Oct. 29, 2015), http://www.europarl.europa.eu/RegData/etudes/STUD/2015/535005/EXPO_STU(2015)535005_EN.pdf [http://perma.cc/J96B-B2CP] (describing recent EU migration management programs in the Mediterranean Sea).

A. The Territorial Sea Component in Context

The territorial sea component is the most recent stage of Operation Sophia, which was initiated in the summer of 2015 and constitutes one of the three EU Operations currently ongoing in the Mediterranean.[8] Operation Sophia's central objective is "the disruption of the business model" of smugglers and human traffickers,[9] and to "prevent the further loss of life at sea."[10]

Phase 1 of Operation Sophia, completed in 2015, involved surveillance of migration routes and smuggling activities to gain a comprehensive picture of the smuggling business.[11] Phase 2A is currently underway and involves seizing and diverting vessels suspected of smuggling on the high seas.[12] On the high seas, EUNAVFOR MED is authorized to use force both in its engagements with suspected smugglers and in order to "dispose" of (i.e., destroy) vessels identified as in use, or likely to be in use, for smuggling.[13] The United Nations Security Council (UNSC) authorized Phase 2A in October 2015 in Resolution 2240, under Chapter VII of the U.N. Charter, and has since extended authorization until October 2017.[14] Resolution 2240 is the first UNSC authorization of high seas interceptions and inspections for the purpose of fighting human

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8. *EU Operations in the Mediterranean*, EUR. EXTERNAL ACTION SERV. (Sept. 14, 2016), http://eeas.europa.eu/sites/eeas/files/5_euoperationsinmed_2pg.pdf [http://perma.cc/NQZ5-LD7R].

9. Council Decision 2015/778, art. 1, 2015 O.J. (L 122) 31, 32 (EU); *see also European Union Naval Force—Mediterranean Operation Sophia*, EUR. EXTERNAL ACTION SERV. 1 (Sept. 15, 2016) [hereinafter *EU Naval Force*], http://eeas.europa.eu/sites/eeas/files/factsheet_eunavfor_med_en_0.pdf [http://perma.cc/54JN-R32K] (describing the mission of Operation Sophia).

10. *EU Naval Force*, *supra* note 9, at 1; *see also EUNAVFOR MED Op SOPHIA—Six Monthly Report*, EUR. EXTERNAL ACTION SERV. 11-12 (Nov. 30, 2016) [hereinafter *Operation Sophia Six-Monthly Report (Nov. 2016)*], http://statewatch.org/news/2016/dec/eu-council-eunavform ed-jan-oct-2016-report-restricted.pdf [http://perma.cc/B28T-9PFB].

11. *EUNAVFOR MED Op SOPHIA—Six Monthly Report*, EUR. EXTERNAL ACTION SERV. 9 (Jan. 28, 2016) [hereinafter *Operation Sophia Six-Monthly Report (Jan. 2016)*], http://wikileaks.org/eu-military-refugees/EEAS/EEAS-2016-126.pdf [http://perma.cc/A7QC-ZYJY].

12. S.C. Res. 2240 (Oct. 9, 2015); *Operation Sophia Six-Monthly Report (Jan. 2016)*, *supra* note 11, at 10. "High seas" in the context of the Operation Sophia authorization refers to waters beyond Libya's 12-mile territorial sea. *See* Brian Wilson, *The Mediterranean Migrant Crisis: Key Considerations for the UN Security Council*, HARV. NAT'L SECURITY J. (Oct. 9, 2015),http://harvardnsj.org/2015/10/mediterranean-migrant-crisis/ [https://perma.cc/48KG-WMHQ]. This could include areas Libya considers part of its exclusive economic zone.

13. *See* S.C. Res. 2240, *supra* note 12, ¶ 8.

14. S.C. Res. 2312 (Oct. 6, 2016) ¶ 7; S.C. Res. 2240, *supra* note 12, ¶ 8.

smuggling.[15] The Resolution "urges" states to comply with international human rights obligations, although commentators have emphasized that the text does not provide for substantive mechanisms to achieve this end.[16]

Phase 2B of Operation Sophia will allow EUNAVFOR MED to enter Libya's territorial sea to board, seize, divert, and potentially destroy vessels suspected of smuggling in that maritime zone. "Phase 2B" will only begin with a UNSC Resolution and official invitation by the Libyan Government.[17] While at the time of writing, these steps have not yet occurred, EUNAVFOR MED aims to proceed to this stage.[18] As the EU awaits Libya's invitation, the EU has effectively extended Operation Sophia into Libya's territorial sea through a program of training and funding the Libyan Coastguard beginning in the summer of 2016. On June 20, 2016, the European Council expanded the Operation's mandate to include capacity-building and training of the Libyan Coastguard and Navy, as well as information sharing with them.[19]

By training the Libyan Coastguard, EUNAVFOR MED aims to enhance the Libyan Coastguard's own ability to disrupt smuggling in the Libyan territorial sea and enhance their search-and-rescue capacity.[20] While European states have previously funded African states to support maritime interdictions,[21] the most recent effective agreement with Libya occurred before the Libyan government

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15. Efthymios Papastavridis, *EUNAVFOR Operation Sophia and the International Law of the Sea*, 2 MAR. & SECURITY L.J. 57, 63-64 (2016).

16. *See, e.g.*, Douglas Guilfoyle, *Transnational Crime and the Rule of Law at Sea*, *in* 'BOAT REFUGEES' AND MIGRANTS AT SEA: A COMPREHENSIVE APPROACH: INTEGRATING MARITIME SECURITY WITH HUMAN RIGHTS 169, 183-85 (Violeta Moreno-Lax & Efthymios Papastavridis eds., 2016).

17. *Operation Sophia Six-Monthly Report (Nov. 2016)*, *supra* note 10, at 22-23.

18. *Id.* at 22.

19. Council Decision 2016/993, 2016 O.J. (L 162) 18 (EU); *see* Press Release 161027_11, Eur. Union, EUNAVFOR MED Operation Sophia Starts Training of Libyan Navy Coast Guard and Libyan Navy (Oct. 27, 2016), http://eeas.europa.eu/topics/drugs/13195/eunavfor-med-operation-sophia-starts-training-of-libyan-navy-coast-guard-and-libyan-navy_en [http://perma.cc/K4DV-BLH9].

20. *See* Press Release 160823_01, Delegation of the Eur. Union to Cent. Afr. Rep., EUNAVFOR Med Operation Sophia Signs Agreement To Train Libyan Coast Guard and Navy (Aug. 23, 2016) [hereinafter Press Release, EUNAVFOR Signs Agreement], http://eeas.europa.eu/delegations/central-african-republic/8753/eunavfor-med-operation-sophia-signs-agreement-to-train-libyan-coast-guard-and-navy_en [http://perma.cc/99RS-JT2C]; *EU Training Libyan Coast Guard To Curb Refugee Flows*, EURACTIV (Oct. 27, 2016), http://www.euractiv.com//med-south/news/eu-training-libyan-coast-guard-to-curb-refugee-flows [http://perma.cc/RRE4-MDS4].

21. *See* Gammeltoft-Hansen & Hathaway, *supra* note 5, at 250; Cogolati et al., *supra* note 7, at 33.

disintegrated in 2011.[22] At present, the Libyan government lacks control of its coastline, and the Libyan Coastguard itself is disorganized, poorly resourced, and retains a poor human rights record.[23] EUNAVFOR MED's training of the Libyan Navy and Coastguard officially commenced in late October 2016 and occurs on EUNAVFOR MED vessels on the high seas.[24] The Libyans are trained on methods to tackle smuggling and reduce migration, as well as on international law and search and rescue.[25] In January 2017, European states decided to begin funding the Libyan Government to engage in antismuggling operations.[26]

The current training and funding program may signal a transition to Phase 2B (referring specifically to the deployment of EUNAVFOR MED officers and vessels themselves into Libya's territorial sea), which is also expected to involve close collaboration with the Libyans.[27] Should Phase 2B proceed, current discourse and past practice suggest that EUNAVFOR MED and the Libyan Coastguard may engage in operational coordination, including activities such as joint patrols and deployment of Libyan officers on European vessels (or vice versa) to assist and direct seizures, interdictions, and possible disposals.[28]

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22. Pianigiani & Walsh, *supra* note 1.

23. *See id.*; sources cited *infra* note 48.

24. Press Release, EUNAVFOR Signs Agreement, *supra* note 20.

25. Nick Buxton & Mark Akkerman, *The Deadly Consequences of Europe's Border Militarization*, TRUTHOUT (Dec. 31, 2016), http://www.truth-out.org/news/item/38909-the-deadly-consequences-of-europe-s-border-militarization [http://perma.cc/7KWJ-AVP2]; Dibie Ike Michael, *EU Trains Libyan Coast Guard To Curb Migrant Flows*, AFR. NEWS (Oct. 28, 2016, 1:29 PM), http://www.africanews.com/2016/10/28/eu-trains-libyan-coast-guard-to-curb-migrant-flows [http://perma.cc/675Z-VJ2B].

26. *EU Hikes Support for Libya Coast Guard To Stop Migrants*, BRIETBART LONDON (Jan. 25, 2017), http://www.breitbart.com/london/2017/01/25/eu-hikes-support-libya-coast-guard-stop-migrants [http://perma.cc/EE9D-JPXZ]; Patrick Wintour, *Libya May Allow EU Ships To Pursue People-Smugglers in Its Waters*, GUARDIAN (Feb. 1, 2017), http://www.theguardian.com/world/2017/feb/01/nato-eu-ships-tackle-people-trafficking-libya-mediterranean-refugees-migrants [http://perma.cc/MJ5V-ZB8A].

27. *Operation Sophia Six-Monthly Report (Nov. 2016)*, *supra* note 10, at 3 (noting that "[t]he start of training marks a milestone . . . and is . . . crucial for enhancing the ability of moving the operation forward into the next phases"); *see* Niels Frenzen, *EUNAVFOR MED-Six Month Report: No Indication of Refugee Protection Plan for EU Operations Within Libyan Territorial Waters and No Reports of Human Trafficking*, MIGRANTS AT SEA (Feb. 23, 2016, 5:01 AM), http://migrantsatsea.org/2016/02/23/eunavfor-med-six-month-report-no-indication-of-refugee-protection-plan-for-eu-operations-within-libyan-territorial-waters-and-no-reports-of-human-trafficking [http://perma.cc/7THC-2DMF]; Wintour, *supra* note 26.

28. *See* MAARTEN DEN HEIJER, EUROPE AND EXTRATERRITORIAL ASYLUM 256-57 (2011); Frenzen, *supra* note 27 (describing the possibility of joint patrols and ship riders in Phase 2B); Chris Stephen, *Libya Faces Influx of Migrants Seeking New Routes to Europe*, GUARDIAN (Apr. 9,

In addition to Operation Sophia, the EU continues to patrol the Central Mediterranean through border surveillance operations coordinated by the EU border agency, Frontex.[29] The current Frontex operation in the Central Mediterranean is Operation Triton, which was launched in 2014 to replace the more effective Italian-led search-and-rescue operation, Operation Mare Nostrum.[30] Triton retains a search-and-rescue component, although unlike Operation Mare Nostrum, its primary focus is border management.[31]

B. Human Rights at Stake

The Operation Sophia territorial sea component risks violating fundamental international human rights protected by various international conventions.[32] These include, in particular, the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), and the 1951 Refugee Convention.[33] The states of the European Union

2016, 4:45 PM), http://www.theguardian.com/world/2016/apr/09/libya-influx-migrants-europe [http://perma.cc/S3B8-HSVY] (describing a Phase 2B plan in which naval vessels operate in pairs, with one turning back migrants and the other employing force against the smugglers); *see also* Hirsi Jamaa v. Italy, App. No. 27765/09, 2012-II Eur. Ct. H.R. 37, ¶¶ 13, 19 (describing bilateral agreements between Italy and Libya).

29. *EU Operations in the Mediterranean*, *supra* note 8.

30. *See* Jean-Pierre Gauci & Patricia Mallia, *The Migrant Smuggling Protocol and the Need for a Multi-faceted Approach: Inter-sectionality and Multi-actor Cooperation*, *in* 'BOAT REFUGEES' AND MIGRANTS AT SEA: A COMPREHENSIVE APPROACH: INTEGRATING MARITIME SECURITY WITH HUMAN RIGHTS, *supra* note 16, at 119, 140-41; Itamar Mann, *Killing by Omission*, EJIL:TALK! (Apr. 20, 2016), http://www.ejiltalk.org/killing-by-omission [http://perma.cc/VZZ5-YSM2].

31. *See* Gauci & Mallia, *supra* note 30; Mann, *supra* note 30.

32. While this Comment focuses specifically on the Operation Sophia territorial sea component, the high seas component of the Operation—in particular Resolution 2240—has been identified as presenting human rights concerns as well. This Comment focuses on the territorial sea component because it raises a distinct set of policy and jurisprudential issues due to the collaboration with the Libyans and the fact that activity is occurring in the territory of another state. To the author's knowledge, EUNAVFOR MED has not pushed back to Libya migrants encountered on the high seas. Nevertheless, some of the use of force concerns mentioned in Section I.B are likely applicable to the high seas component in addition to the broader policy critiques outlined in the Comment.

33. Other early commentaries have provided a more thorough detailing of the human rights implicated by the Operation. *See, e.g.*, Melanie Fink, *Protecting Europe or Irregular Migrants?: The (Mis)use of Force in the Mediterranean*, EJIL:TALK! (May 15, 2015), http://www.ejiltalk.org/protecting-europe-or-irregular-migrants-the-misuse-of-force-in-the-mediterranean [http://perma.cc/QL44-GJHC]; Julian Lehmann, *The Use of Force Against People Smugglers: Conflicts with Refugee Law and Human Rights Law*, EJIL:TALK! (June 22, 2015), http://www.ejiltalk.org/the-use-of-force-against-people-smugglers-conflicts-with-refugee-law-and

are parties to all of these instruments and thus bound under international law by the obligations provided therein.[34]

The Operation Sophia territorial sea component is at odds with the principle of *nonrefoulement*, which holds that an individual may not be returned to a place where he or she faces risk of persecution.[35] The *nonrefoulement* principle is affirmed most clearly in Article 33 of the Refugee Convention and is also binding upon European states under the ECHR.[36] The ECtHR has also repeatedly clarified that despite the absence of an explicit *nonrefoulement* provision in the ECHR, such a prohibition was "already inherent in the general terms of article 3."[37] Additionally, the duty of *nonrefoulement* now arguably is customary international law,[38] and the overwhelming weight of international authority holds that states are prohibited from engaging in *nonrefoulement* practices when acting extraterritorially.[39]

Libya remains a place of possible persecution for the irregular migrants who seek to leave it. In Libya, migrants face possible torture, arbitrary detention, and other abuses.[40] Because Operation Sophia engagements seek to en-

-human-rights-law [http://perma.cc/Y28C-RDUD]; Sergo Mananashvili, *The Legal and Political Feasibility of the EU's Planned 'War on Smuggling' in Libya*, EJIL:TALK! (June 10, 2015), http://www.ejiltalk.org/the-legal-and-political-feasibility-of-the-eus-planned-war-on-smuggling-in-libya [http://perma.cc/KZZ9-M85Y].

34. *See, e.g.*, Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 339.

35. Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons art. 33, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention].

36. *Id.*

37. Soering v. United Kingdom, App. No. 14038/88, 161 Eur. Ct. H.R. (ser. A) ¶ 88 (1989); *see also* Hirsi Jamaa v. Italy, App. No. 27765/09, 2012 Eur.-II Ct. H.R. 37, ¶¶ 113-14.

38. *Compare* GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 211 (3d ed. 2007) (describing the principle of *nonrefoulement* as "embedded in customary international law"), *and* U.N. High Comm'r for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, REFWORLD (Nov. 1997), http://www.refworld.org/docid/438c6d972.html [http://perma.cc/KHD8-5A5U], *with* JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 365 (2005) (observing that *nonrefoulement* is not customary international law).

39. According to the 1967 Protocol accompanying the Refugee Convention, Article 33 "shall be applied by the States Parties hereto without any geographic limitation." Protocol Relating to the Status of Refugees art. 1, ¶ 3, Jan. 31, 1967, 606 U.N.T.S. 267; *see, e.g* GOODWIN-GILL & MCADAM, *supra* note 38, at 245-50; U.N. High Comm'r for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, REFWORLD (Jan. 26, 2007), http://www.refworld.org/pdfid/45f17a1a4.pdf [http://perma.cc/8BMP-ADL9].

40. *See, e.g.*, Judith Sunderland, *Why Cooperating with Libya on Migration Could Damage the EU's Standing*, HUM. RTS. WATCH (Nov. 7, 2016), http://www.hrw.org/news/2016/11/07/

sure that migrant vessels cannot leave Libya's coast, interception and diversion of vessels containing migrants and refugees imply that they may be forced to return to Libya.[41] In addition, the program of disposing of vessels used for smuggling may present *nonrefoulement* concerns, as these actions effectively ensure migrants seeking transportation cannot leave Libya. For similar reasons, territorial sea engagements may run up against the prohibition against collective expulsion. Affirmed in Article 4 of the Protocol 4 of the ECHR, collective expulsion is "any measure . . . compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group."[42]

In addition, because Operation Sophia involves the use of lethal force in the proximity of migrants, Operation Sophia's territorial sea component risks violating the right to life if force is used recklessly.[43] Under Article 6 of the ICCPR[44] and Article 2 of the ECHR, [45] an individual may not be arbitrarily deprived of his or her right to life. In using force during seizure and disposal of smuggling vessels, it is possible that force will be inadvertently directed at migrants. An internal EU document regarding EUNAVFOR MED produced in May 2015 specifically warned that "non-compliant boarding operations against smugglers in the presence of migrants has a high risk of collateral damage including the loss of life."[46] Of great concern, as documented by Amnesty International and Human Rights Watch, is that the Libyan Coastguard has historically employed overly aggressive and inhumane tactics in managing migration

why-cooperating-libya-migration-could-damage-eus-standing [http://perma.cc/M4NA-K46K]; *'Libya is Full of Cruelty,'* AMNESTY INT'L 6 (2015), http://www.amnesty.eu/content/assets/Reports_and_Briefings_2015/Libya_is_full_of_cruelty.pdf [http://perma.cc/62J5-F9LW].

41. Sunderland, *supra* note 40 (describing how migrants intercepted or rescued by the Libyan Coastguard are sent back to detention centers in poor conditions, with little prospect of legal recourse); Wintour, *supra* note 26 (same).

42. Protocol 4 to the European Convention on Human Rights, art. 4, Nov. 16, 1963, 46 Eur. T.S.

43. *See* Papastavridis, *supra* note 15, at 66 (2016) ("[E]ven though 'due regard precautions' have been included [in the Rules of Engagement], the idea that electronic warfare or even that the minimum use of force is permitted against a boat full of migrants is at least alarming." (footnote omitted)); Lehmann, *supra* note 33.

44. International Covenant on Civil and Political Rights art. 6, Dec. 19, 1966, 999 U.N.T.S. 171.

45. European Convention on Human Rights art. 2, Sept. 3, 1953, 213 U.N.T.S. 222.

46. Andrew Rettman, *EU To Expand Mediterranean Anti-Smuggler Force*, EU OBSERVER (Sept. 14, 2015), http://euobserver.com/justice/130258 [http://perma.cc/L2WN-H8XC].

and using force in its territorial sea.[47] For instance, in the week before the training operation began, a Libyan Coastguard unit recklessly boarded a migrant vessel, causing four migrants to drown, and beat other migrants with a stick.[48]

II. GAPS IN PROTECTION: FINDING HUMAN RIGHTS JURISDICTION IN LIBYA'S TERRITORIAL SEA

At the same time that the territorial sea component presents many human rights risks, the protections of human rights law may not apply to migrants impacted by the Operation. To trace this gap within the current human rights framework, this Section examines three main jurisdictional avenues by which European states could be held responsible for violations in Libya's territorial sea and argues that their application is uncertain at best. As the ECtHR remains the most active human rights enforcement body in Europe, this Section will focus in particular on the application of the protections afforded by the ECHR to the Operation.[49]

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47. *EU Risks Fuelling Horrific Abuse of Refugees and Migrants in Libya*, AMNESTY INT'L (June 14, 2016), http://www.amnesty.org/en/latest/news/2016/06/eu-risks-fuelling-horrific-abuse-of-refugees-and-migrants-in-libya [http://perma.cc/797F-TYF7]; Sunderland, *supra* note 40.

48. Ahmed Elumami, *Libya Naval Forces Deny Charges of Attack on Migrant Boat*, REUTERS (Oct. 22, 2016, 6:33 AM EDT), http://www.reuters.com/article/us-europe-migrants-libya-idUSKCN12M067 [http://perma.cc/8JAA-B5EE]. For similar reports, see Lizzie Deardon, *British Government Continues Support for Libyan Coastguard Despite Refugee 'Killings' and Attacks on Rescue Ships*, INDEP. (Jan. 18, 2017, 12:00 AM GMT), http://www.independent.co.uk/news/uk/home-news/refugee-crisis-libya-coastguard-uk-british-government-support-killing-shooting-rescue-ship-attacks-a7512071.html [http://perma.cc/45FD-CAVD]; and Karlos Zurutuza, *Europe's Libyan Gamble*, POLITICO (Mar. 1, 2017, 4:01 AM CET), http://www.politico.eu/article/europes-libyan-gamble-coast-guard-migration-refugees [http://perma.cc/5EVS-PJW8].

49. This Comment focuses on gaps in protection under the ECHR, based on ECtHR jurisprudence. It should be mentioned that the United Nations Committee Against Torture has heard a small number of cases involving migrants at sea and has applied the effective control standard to support findings of violations. *See* Fatou Sonko v. Spain, CAT/C/47/D/368/2008 (Committee Against Torture Nov. 25, 2011); J.H.A v. Spain, CAT/C/41/D/323/2007 (Committee Against Torture Nov. 21, 2008); Kees Wouters & Maarten den Heijer, *The* Marine I *Case*: *A Comment*, 22 INT'L J. REFUGEE L. 1 (2009). The jurisdictional gaps under the ECHR—even if obligations under other instruments may be found to be applicable—contribute to the "fragmentation" of human rights obligations at sea, a situation which allows states to comply with the least stringent interpretation of their obligations or avert responsibility by claiming that other states are under the relevant obligation. *See, e.g.*, Moreno-Lax, *supra* note 7.

A. Effective Control: Applying Hirsi Jamaa v. Italy *to the Territorial Sea Component*

Human rights obligations are "essentially territorial"[50] in application. When acting extraterritorially, states are bound to secure the rights and freedoms provided by international human rights law only to those individuals under the state's jurisdiction.[51] As affirmed in Article 1 of the ECHR, "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms . . . of this Convention."[52]

Whether a state possesses extraterritorial jurisdiction—and therefore human rights responsibility—is a factual analysis based on the level of a state's effective control over the relevant foreign person or territory.[53] On multiple occasions, the ECtHR Grand Chamber has applied the effective control test in the maritime context to determine whether a European state possesses jurisdiction over persons whom the state encountered extraterritorially.[54] In these cases, the existence of effective control depended on the level of physical control the European state had over the individuals themselves or their vessels.[55]

However, in cooperating with the Libyan Coastguard, the EU operates in a legal grey area—a situation where the application of European human rights law is nonexistent at worst, and uncertain at best.[56] The ECtHR's most robust

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50. *See* Banković v. Belgium, App. No. 52207/99, 2001-XII Eur. Ct. H.R. 333, ¶¶ 61, 67.

51. Hirsi Jamaa v. Italy, App. No. 27765/09, 2012 Eur.-II Ct. H.R. 37, ¶¶ 70-71; Soering v. United Kingdom, App. No. 14038/88, 161 Eur. Ct. H.R. (ser. A), ¶ 86 (1989).

52. European Convention on Human Rights, *supra* note 45, art. 1, 213 U.N.T.S. at 224.

53. *See* Al-Skeini v. United Kingdom, App. No. 55721/07, 53 Eur. H.R. Rep. 589, ¶¶ 130-49 (2011); *Banković*, App. No. 52207/99, ¶¶ 70-71. *See generally* MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY 118-66 (2011) (discussing generally the effective control test and both the personal and territorial models of jurisdiction).

54. *See Hirsi Jamaa*, App. No. 27765/09, ¶¶ 66-67, 81; Medvedyev v. France, App. No. 3394/03, 2010-III Eur. Ct. H.R. 61, ¶ 67.

55. *See Hirsi Jamaa*, App. No. 27765/09, ¶¶ 66-67, 81; *Medvedyev*, App. No. 3394/03, ¶ 67; Gammeltoft-Hansen & Hathaway, *supra* note 5, at 263 (noting the "emphasis being placed in such cases on the *de facto* control exercised over the individuals concerned"). On the importance of *Hirsi Jamaa*, see, for example, Maarten den Heijer, *Reflections on* Refoulement *and Collective Expulsion in the* Hirsi *Case*, 25 INT'L J. REFUGEE L. 265 (2013); and Irini Papanicolopulu, *European Convention on Human Rights—Article 3—Torture or Inhuman or Degrading Treatment—Forcible Repatriation of Asylum Seekers—Collective Expulsion—Right to a Remedy*, 107 AM. J. INT'L L. 417 (2013).

56. This Comment specifically considers accountability under the ECHR for individual EU member states in Operation Sophia, as opposed to the accountability of the EU itself. The EU is not a party to the ECHR, and the attribution of EUNAVFOR conduct to individual

and factually relevant instruction regarding the conditions under which effective control is established at sea comes from the 2012 landmark case of *Hirsi Jamaa v. Italy*, which also concerned migrants leaving Libya.[57] The *Hirsi* applicants were eleven Somali and thirteen Eritrean nationals who were part of a 200-person group that left Libya on three vessels and then were intercepted by Italian coastal authorities on the high seas. [58] The Italian Coastguard ultimately brought the migrants back to Libya, violating both *nonrefoulement* and the prohibition on collective expulsion.[59] In intercepting the migrant vessel, Italy was acting pursuant to a bilateral cooperation agreement signed with Libya.[60] Similar to Operation Sophia, Italy agreed to support Libyan personnel and engage in maritime patrols with crews from both countries.[61]

In *Hirsi*, the ECtHR pronounced that the interception and return of the migrant vessels established effective control (and thus de facto jurisdiction).[62] To find "effective control," the Grand Chamber looked at the location of the migrants and the length of time in which the migrants were subject to Italian control, in addition to the national composition of the crew. The emphasis on location and time is consonant with the Grand Chamber's approach in its prior leading extraterritorial maritime case, *Medvedyev v. France*.[63] In *Hirsi,* the Grand Chamber specifically observed that "the events [causing the human rights abuses] took place entirely on board ships of the Italian armed forces."[64] The migrants whose rights were violated had been physically placed on the Italian vessels themselves.[65] In addition, the Grand Chamber underscored the "continuous" nature of the interaction,[66] citing to *Medvedyev* in which "uninterrupted control" by the Member State for a multiday period established jurisdic-

member states remains unresolved, and may itself present an accountability problem. *See* Efthymios Papastavridis, *EUNAVFOR Operation Atalanta off Somalia: The EU in Unchartered Legal Waters?* 64 INT'L & COMP. L. Q. 533, 551-68 (2015).

57. *See generally Hirsi Jamaa*, App. No. 27765/09.

58. *Id.* ¶¶ 9-11.

59. *Id.* ¶¶ 138, 186.

60. *Id.* ¶¶ 13, 19-20.

61. *Id.*

62. *Id.* ¶¶ 9-14, 81-82.

63. App. No. 3394/03, 2010-III Eur. Ct. H.R. 61, ¶¶ 66-67.

64. *Hirsi Jamaa*, App. No. 27765/09, ¶ 81.

65. *Id.* ¶¶ 11, 64.

66. *See id.* ¶ 81.

tion.[67] In *Hirsi*, the Italian vessel retained full control over the migrants for roughly ten hours, without interruption.[68]

EUNAVFOR MED's collaboration with the Libyan Coastguard positions European states to take advantage of critical limits in the Court's reasoning. In the current training and funding stage of the territorial sea component, effective control under *Hirsi* would not help trigger human rights jurisdiction, and thus responsibility for European states, because European personnel and vessels are not themselves exerting any direct physical control, for any length of time, over migrant persons. Should Phase 2B proceed, operational coordination with the Libyan military provides European states with a great deal of leeway. The *Hirsi* Court provided no broad guidelines as to when control would be established.[69] Instead, the Grand Chamber's strong emphasis on the location of the migrants and uninterrupted length of time provides a holding that can be interpreted narrowly. At least one report indicates that the Phase 2B plan involves European states turning back vessels to Libya without taking migrants on board.[70] In joint patrols, European states could likewise easily avoid uninterrupted control over individual migrant persons. For instance, European vessels could assist in, or command, engagements in which the Libyan Coastguard retains physical control over the migrants on nearby Libyan vessels for all or a significant portion of the relevant time.

Perhaps of greatest significance, in a critical paragraph justifying its conclusion, the Grand Chamber underscored that the particular crew engaging in the prohibited acts in question was "exclusively" Italian.[71] A crew that is predominantly composed of Libyan coastal forces would certainly fail to meet this high threshold. If in Phase 2B, European states organize operations, as they have in the past, to involve a crew of mixed Libyan and European personnel (for instance, European officers stationed on Libyan-flagged vessels), the strong emphasis on exclusivity suggests that jurisdiction would remain uncertain. By

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67. *See id.* ¶ 80 (citing *Medvedyev*, App. No. 3394/03, ¶ 67). In *Medvedyev*, the applicants were not placed on the French vessels themselves, but rather the French commando team possessed "exclusive" control over the vessel in which the team confined the applicants for thirteen days. *Medvedyev,* App. No. 3394/03, ¶ 66.

68. *Hirsi Jamaa*, App. No. 27765/09, ¶¶ 66, 81.

69. *Accord* den Heijer, *supra* note 55, at 273 ("The Court, however, does not give further indications as to the wider issue of what intensity of control, or form of state activity, is required for satisfying the jurisdiction requirement under Article 1 of the Convention.").

70. Tim Harman, *Briefing on Operation Sophia,* QUAKER COUNCIL FOR EUR. AFF. ¶ 3.5 (May 9, 2016), http://www.statewatch.org/news/2016/jun/eu-briefing-operation-sophia-QCEA.pdf [http://perma.cc/F99B-JG56]; Stephen, *supra* note 28.

71. *Hirsi Jamaa*, App. No. 27765/09, ¶ 81.

outsourcing the potentially violative activities, European states may avoid attaining a sufficient level of "continuous and exclusive *de jure* and *de facto* control"[72] to trigger human rights obligations.

B. Attribution and the Territorial Model of Jurisdiction

While the *Hirsi* case offers the most factually relevant precedent for establishing jurisdiction over migrants impacted in Operation Sophia, there are other routes to jurisdiction. Human rights jurisdiction under Article 1 has been extended in military operations in two circumstances relevant to the territorial seas component (and which the Court itself has conflated in its case law): through the attribution of acts conducted by other entities to the European state or through the state's military control over territory abroad.[73] This case law would initially seem to be relevant because unlike in *Hirsi* and *Medvedyev*, European states are operating with military means in Libyan territory, as opposed to on the high seas. In the context of Operation Sophia, however, neither of these theories provides a solid jurisdictional trigger, furthering the protection gaps and room for discretionary state conduct left by the Court's maritime cases.

Based on its current jurisprudence, the ECtHR would need to embrace a lenient interpretation of the circumstances warranting attribution to hold European states accountable for actions taken by the Libyan Coastguard in the current training operation. In *Ilascu v. Moldova & Russia* before the Grand Chamber, the Court attributed the unlawful acts of Russian separatists to Russia.[74] However, this finding hinged on Russia's military and political contributions to the "creation of a separatist regime" and the "participation of its [own] military personnel in the fighting" on Moldovan territory.[75] Similarly, the ECtHR has attributed the acts of the Turkish occupying entity in Cyprus, the Turkish Republic of Northern Cyprus (TRNC), to Turkey,[76] but has un-

72. *Id.*

73. In leading cases, the ECtHR has conflated attribution with the territorial model of extraterritorial jurisdiction in a confusing manner. *See* MILANOVIC, *supra* note 53; Marko Milanovic, *Jurisdiction, Attribution and Responsibility in Jaloud*, EJIL:TALK! (Dec. 11, 2014), http://www.ejiltalk.org/jurisdiction-attribution-and-responsibility-in-jaloud [http://perma.cc/GH53-R497].

74. Ilascu v. Moldova & Russia, App. No. 48787/99, 2004-VII Eur. Ct. H.R. 89, ¶ 382.

75. *Id.*

76. Cyprus v. Turkey, App. No. 25781/94, 2001-IV Eur. Ct. H.R., ¶ 77; Loizidou v. Turkey, Preliminary Objections Decision, App. No. 15318/89, ¶ 60-64, Eur. Reports 1996-VI (Dec. 18, 1996).

derscored that the TRNC could only "survive[] by virtue of Turkish military and other support."[77] By contrast, the Libyan Coastguard can clearly function independently of EU financial and logistical support. Indeed, the EU expressly aims to promote the Libyan government's own ability to manage its coastline.[78] In addition, in the present training operation, unlike these leading cases, no EUNAVFOR MED personnel are present in Libya's territorial sea.

If European states proceed with the Phase 2B operation (the entrance of European vessels and officers themselves into Libyan waters), the presence of European military assets in foreign territory also raises the possibility of human rights jurisdiction based on effective territorial control. While physical control over migrant persons has served as the operative standard to date in the Court's maritime case law,[79] ECHR protections may also apply when a European state exercises control over territory and some of the "public powers" normally exercised by the host country.[80]

For conduct of the Libyan Coastguard in Phase 2B, however, the territorial model does not easily provide a basis for European state responsibility. The threshold for territorial control is very high. Cases in which the ECtHR has found jurisdiction over territory have involved military control and influence akin to a military occupation and administration, with many thousands of troops.[81] While a conclusive determination is difficult without further detail on

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77. *Cyprus*, App. No. 25781/94, ¶ 77.

78. *Operation Sophia Six-Monthly Report (Nov. 2016)*, *supra* note 10, at 22-23.

79. *See supra* notes 53-55 and accompanying text.

80. Al-Skeini v. United Kingdom, App. No. 55721/07, 53 Eur. H.R. Rep. 589 (2011). In *Al-Skeini*, during the course of the Coalition's occupation of Iraqi territory, the Court established jurisdiction by looking at the combination of control over the detained persons in addition to the fact that "the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the *public powers* normally to be exercised by a sovereign government." *Id.* (emphasis added). Not only does the meaning of the phrase "public powers" remain unclear, but the Court's reasoning in *Al Skeini* suggests that public powers may need to be exercised in conjunction with either personal or territorial control, neither of which easily apply to conduct of the Libyan Coastguard during Operation Sophia, as outlined *supra* in Sections II.A and II.B. *See* Marko Milanovic, Al-Skeini *and* Al-Jedda *in Strasbourg*, 23 EUR. J. INT'L L. 121, 130-31 (2012) (observing that in *Al-Skeini*, "had the UK *not* exercised such public powers, the personal model of jurisdiction would not have applied" and the "reasoning extends only to situations where the state using force exercises some kind of 'public powers,' whatever these may be").

81. *See, e.g.*, Chiragov & Others v. Armenia, App. No. 13216/05, 2015 Eur. Ct. H.R., ¶¶ 168-87 (2015); Catan & Others v. Moldova. & Russia, App. Nos. 43370/04, 8252/05 & 18454/06, 2012-V Eur. Ct. H.R. ¶¶ 103-15 (2012); *Al-Skeini*, App. No. 55721/07, ¶ 139 ("In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area . . . . Other indicators may also be relevant, such as the

the extent of EUNAVFOR MED deployment, the deployment of EUNAVFOR MED vessels and/or officers does not easily resemble an occupation in the numbers suggested by the high seas component. Importantly, the fact that the Libyan Coastguard will be a major actor in Phase 2B may also present an obstacle to jurisdiction under the territorial approach: the Court finds an extraterritorial jurisdictional link when the government of the "occupied" state does not exert control over the relevant area.[82] Moreover, uncertainty remains regarding what "effective territorial control" would actually look like in the marine context, as the Court's cases in this regard have all been terrestrial.[83] For potentially violative activities conducted by EUNAVFOR MED personnel themselves (or a mixed crew that perhaps is commanded by a EUNAVFOR MED officer), the Court's recent willingness in cases—notably *Al-Skeini v. United Kingdom*[84]—to look at physical control over persons *in conjunction with* territorial control may help provide a more promising basis for jurisdiction.[85] In those situations, jurisdiction would be highly fact-specific and depend in large part on the degree of physical control exercised by the EUNAVFOR MED personnel and vessel,[86] thus implicating the jurisdictional holes within the extraterritorial maritime jurisprudence discussed in Section II.A.

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extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region."); *Cyprus*, App. No. 25781/94, ¶¶ 13-16.

82. *See, e.g.*, *Al-Skeini*, App. No. 55721/07, ¶¶ 149-50; *Cyprus*, App. No. 25781/94, ¶¶ 16-17; *see also* Gammeltoft-Hansen & Hathaway, *supra* note 5, at 261-62 ("[T]he traditional territorial view of jurisdiction is, however, likely of little immediate value in contesting the new generation of cooperation-based non-entrée practices. Not only has the case law thus far focused only on obligations arising from military occupation, but to date there is no instance of non-entrée being implemented by way of the transfer of durable and exclusive control over territory.").

83. *Accord* Martin Faix, *Application of Human Rights to European Union Military Operations: Mission Impossible?*, SLOVAK J. INT'L L. 28, 43 (2013) (articulating a similar argument regarding the difficulty in applying the territorial model of jurisdiction to the high seas).

84. *Al Skeini*, App. No. 55721/07, ¶¶ 130-50.

85. *See* Milanovic, *supra* note 80, at 131 (describing the Court's approach as a "mix of the personal model with the spatial one"). This approach to extraterritorial jurisdiction seems to have been employed in *Jaloud v. Netherlands*. In *Jaloud*, the Court's finding of jurisdiction appeared to depend on the combination of the applicant's presence within an area in which Dutch troops had assumed security responsibilities (the territorial component) and the fact that the acts occurred at a particular security checkpoint under Dutch command (the personal control component). *See* Jaloud v. Netherlands, App. No. 47708/08, 2014 Eur. Ct. H.R. ¶¶ 149-53 (2014).

86. Judgments that could be potentially helpful in establishing jurisdiction for harmful activities conducted by EUNAVFOR MED crew include *Andreou v. Turkey*, App. No. 45653/99, 2009 Eur. Ct. H.R. ¶ 25 (2009) (applicant fell under Turkey's jurisdiction based on the "opening

C. European Accountability Based on Theories of Derived Responsibility and Joint Conduct

Finally, accountability for European states involved in Operation Sophia could be based on principles of shared responsibility, including derived responsibility and responsibility for joint conduct. Under a theory of derived responsibility, a state may be held responsible for the acts of another state if it aided or assisted in the commission of the internationally wrongful act, directed or controlled the commission of the act, or coerced another state into committing the wrongful act.[87] However, the Court's limited and obscure treatment of these issues further contributes to the ambiguous nature of the legal waters in which European states operate—with respect to both the current training operation and the prospective Phase 2B.

Finding European responsibility based on its equipping and training of the Libyan Coastguard would require pushing the bounds of current ECtHR law. The ECtHR has never expressly relied upon the notion of derived responsibility to hold a state accountable.[88] In its case law, the Court does not expressly refer to the rules of state responsibility expressed in Articles 16-18 of the International Law Commission's (ILC) Draft Articles on State Responsibility to support a finding of a violation.[89] The potentially relevant cases that do exist cast doubt on whether actions taken by the Libyan Coastguard could be attributed to European states. In *Karalyos v. Hungary*, the violation (unduly lengthy proceedings in a civil action) occurred in Hungarian territory, but Greek authorities contributed significantly to the circumstances amounting to

of fire on the crowd from close range"); *Women on Waves and Others v. Portugal*, App. No. 31276/05, 2009 Eur. Ct. H.R. (2008) (a non-extraterritorial maritime case in which the Convention was found applicable during the Portuguese vessel's interception of another vessel in Portugal's territorial sea, ostensibly without boarding).

87. *See* Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, arts. 16-18, U.N. Doc. A/56/10, at 65-70 (2001) [hereinafter Draft Articles on State Responsibility].

88. Maarten den Heijer, *Issues of Shared Responsibility Before the European Court of Human Rights* 26 (Amsterdam Ctr. for Int'l Law, Research Paper No. 2012-04, 2012).

89. *Id.* To the author's knowledge based on a review of cases and commentary since 2012, this conclusion remains valid. The Court has referred to Article 16 in identifying "Relevant International Law" at the beginning of its judgments, although it has not directly applied the Article in its reasoning. *See* El-Masri v. Macedonia, App. No. 39639/09, 2012-VI Eur. Ct. H.R. ¶ 97 (2012); Husayn (Abu Zubaydah) v. Poland, App. No. 7511/13, 2014 Eur. Ct. H.R. ¶ 201 (2014).

the violation.[90] The Court held that Greece's responsibility was not "a subject matter" before the Court, instead focusing on the liability of the primary actor, Hungary.[91] As Maarten den Heijer has persuasively articulated, it is unsatisfactory that the Court did not engage in an analysis regarding Greece's protective duties under an "aid and assistance" paradigm.[92] The Court could have questioned whether "the Greek authorities were aware of the duration of the proceedings" and "whether their failure to provide information contributed significantly to the delay of proceedings."[93]

In one of the few decisions by any international human rights body regarding the "aid and assistance" of a foreign government with a poor human rights record, the European Commission also did not signal that it would be receptive to the kind of reasoning that would be necessary to consider a European state responsible for reckless or otherwise harmful actions of the Libyan Coastguard. In *Tugar v. Italy*, a mine clearer in Iraq stepped on a mine that the Iraqi government had laid, but which it had illegally bought from an Italian company.[94] However, according to the European Commission, the case against Italy for failing to regulate the arms trade was ultimately inadmissible because of the lack of an "immediate relationship" between the Italian supply of mines and the actions of the Iraqi authorities.[95] Thus, so long as European states can show that the Libyan Coastguard's conduct constituted the violation's direct cause,[96] European responsibility may not be engaged for providing support—such as equipment or training—that may have contributed to the violation.[97]

In Phase 2B, the act of participation in a joint operation with the Libyan Coastguard would not itself trigger responsibility for actions taken by the Libyan Coastguard. The Court has yet to pronounce a clear statement regarding "joint conduct" (when two militaries act in concert), in situations distinct from

90. Karalyos v. Hungary, App. No. 75116/01, 2004 Eur. Ct. H.R. ¶¶ 13-17, 21-23 (Eur. Ct. H.R. Apr. 6, 2004), http://hudoc.echr.coe.int/eng?i=001-61693 [http://perma.cc/R66W-ES4W].

91. *Id.* ¶ 40.

92. den Heijer, *supra* note 88, at 28-29.

93. *Id.* at 29.

94. Tugar v. Italy, App. No. 22869/93, Eur. H.R. Rep. (1995).

95. *See id.*

96. *Id.*

97. The fact that EUNAVFOR officials decline to comment on how their coordination efforts address the salient fact that the Libyan Coastguard lacks a clear command structure may be indicative of the potential difficulty in demonstrating the existence of a close relationship between EUNAVFOR activity and specific instances of harmful conduct by the Libyan Coastguard. *See* Zurutuza, *supra* note 48.

the occupation cases described above.[98] In one major case that may be reflective of an approach applicable to situations in which EU personnel contribute to a vessel seizure, diversion to Libya, or disposal that is solely and predominantly carried out by Libyan personnel, the Court declined to find the United Kingdom responsible for a violation physically committed by U.S. forces despite the United Kingdom's major role in the overall operation in which the violation occurred.[99] The conclusion that contribution to a joint military operation is insufficient to trigger responsibility preserves uncertainty as to whether the *Hirsi* holding could be applied to cases where multiple military parties contribute to the activities harming the migrant person.[100] Moreover, the Court has also held in *Xhavara v. Italy* that the existence of a formal maritime interdiction agreement will not itself establish the liability of the non-acting party.[101] This finding casts doubt on whether the current Memorandum of Understanding[102] between the Libyan Coastguard and the EU could itself furnish a basis for European accountability for actions taken by the Libyan Coastguard.

In sum, at the same time that the territorial seas component presents significant human rights risks, the operation's design exploits the current bounda-

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98. den Heijer, *supra* note 88, at 23-24.

99. Hussein v. Albania, App. No. 23276/04, at 4 (Eur. Ct. H.R. Mar. 14, 2006), http://hudoc.echr.coe.int/eng?i=001-72789 [http://perma.cc/56RZ-EPEG]. In the more recent case of *Jaloud v Netherlands*, the Court did not make on pronouncement of the UK's jurisdiction for the actions of Dutch forces. *See* Jaloud v. Netherlands, App. No. 47708/08, 2014 Eur. Ct. H.R. ¶ 153 ("The Court has established jurisdiction in respect of the Netherlands. It is not called upon to establish whether the United Kingdom, another State Party to the Convention, might have exercised concurrent jurisdiction.").

100. Moreover, the fact that putative violations will occur in Libya's territorial sea, as opposed to on the high seas or in the territory of a European state, may weigh against jurisdiction under the current approach. In *El-Masri*, the Court found Macedonia responsible because Macedonian authorities had supported officials of another state (the United States) who had directly and physically committed the violation (ill treatment of El-Masri). But the Court underscored that "the acquiescence or connivance of its authorities" was for acts committed on its own territory. El-Masri v. Macedonia, App. No. 39639/09, 2014-VI Eur. Ct. H.R. ¶ 206 (2012). *See generally* André Nollkaemper, *The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?*, EJIL:TALK! (Dec. 24, 2012), http://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis [http://perma.cc/G7QM-X3FU].

101. The Court stated that the "Italian-Albanian Agreement cannot, by itself, engage the responsibility of [Albania] under the Convention for any action taken by Italian authorities in the implementation of this agreement." Xhavara v. Italy & Albania, App. No. 39473/98 (Eur. Ct. H.R. Jan. 11 2001), http://hudoc.echr.coe.int/eng?i=001-115583 [http://perma.cc/R46L-WVAR]. For the English translation, see Hansen & Hathaway, *supra* note 5, at 276.

102. Press Release, EUNAVFOR Signs Agreement, *supra* note 20.

ries on extraterritorial human rights protection. Not only do these protection gaps limit the possibility of human rights enforcement in particular instances of *refoulement* to Libya or overly aggressive use of force by the Libyan Coastguard, but as the next Part will demonstrate, they comprise the legal foundation for a broader policy of militarized border control in tension with human rights principles.

III. THE POLICY RESULT: NEXT GENERATION *NON-ENTRÉE*

As described in Part II, European states can make a strong claim that they are not responsible for instances of harm to migrants and violation of the *non-refoulement* principle in the territorial sea component because by cooperating with the Libyan Coastguard, the putative victims may not formally fall under European human rights jurisdiction. Operation Sophia is thus precisely premised on the "schizophrenic"[103] posture of *non-entrée*. The territorial seas component reflects in particular what Thomas Gammeltoft-Hansen and James Hathaway, who coined the concept *non-entrée*, classify as "next generation" *non-entrée*: cooperative practices between wealthy and poor countries through which wealthy countries (here, European states) avoid liability by ensuring the human rights violations occur under the jurisdiction of a poorer country (here, Libya).[104]

Ultimately, the territorial sea component of Operation Sophia makes dangerous contributions to the contemporary *non-entrée* norm. As an especially large example of European-African interdiction coordination, and one that expressly envisions the use of force, Operation Sophia is a significant example of state practice weighing in favor of militarized *non-entrée*. The multiple European Parliament Resolutions justifying Operation Sophia grant legal weight and legitimacy to Operation Sophia's model of militaristic border management.[105] The problem, however, is that by holding that the Operation will be implemented in accordance with international human rights law,[106] the European

103. Gammeltoft-Hansen & Hathaway, *supra* note 5, at 241, 248-58.

104. *Id.* at 248-57.

105. *See* Council Decision 2016/993, *supra* note 19; Council Decision 2015/778, *supra* note 9, art. 2.

106. *See* S.C. Res. 2312, *supra* note 14; Council Decision 2015/778, *supra* note 9, art. 2. UNSC Resolution 2312 is the reauthorization of Resolution 2240, which states that anti-smuggling activities should be conducted "in full compliance with international human rights law." S.C. Res. 2240, *supra* note 12, ¶ 10. Resolution 2312 "tak[es] note" of the June 20, 2016 decision extending the EUNAVFOR mandate to include training of the Libyan Coastguard and "encourages States . . . to increase and coordinate their efforts to deter acts of migrant smug-

Council and UNSC mask with a formalist legality a more complex reality in which international responsibility is circumventable due to protection gaps in the underlying human rights framework. Should the UNSC provide authorization in the coming months, the UNSC's legitimization of Phase 2B will further embolden the norm of next generation *non-entrée*. In pronouncing the legality of certain actions, the UNSC retains a unique "norm creating function."[107] The prospective Resolution would show that it is possible for states to receive Chapter VII authorization to use military force in furtherance of maritime, as well as next generation, *non-entrée*.

In addition to its legal effects, the territorial sea component provides a broader policy precedent that should be seriously questioned. While the search-and-rescue piece of Operation Sophia is certainly laudable, the concept of the territorial sea component on the whole straddles a dangerous line between humanitarianism and militarized border control. In a recent interview regarding the high seas component of Operation Sophia, a major European politician awkwardly admitted that "I think I am right in saying we have *turned back* about 200,000 migrants."[108] But after hurried prodding by a nearby diplomat, the politician corrected himself to present the more politically favorable interpretation: "Sorry, saved, saved. Thank you. We have *saved* 200,000 migrants."[109] The contention that militarized prevention of entry constitutes a form of "saving" is a politically salient justification for militarized border control. But in its rhetorical salience, the contention perverts the meaning of the time-honored maritime obligation of rescue at sea[110] and inappropriately glosses over the actual lived conditions in Libya for those purportedly "saved."

Indeed, empirical observations regarding the high seas component of Operation Sophia undercut the validity of the humanitarianframe. The detention

gling and human trafficking, in cooperation with Libya." S.C. Res. 2312, *supra* note 14, ¶ 4 (emphasis omitted).

107. *See, e.g.*, Rüdiger Wolfrum, *Sources of International Law*, MAX PLANCK ENCYCLOPEDIA PUB. INT'L L., ¶ 42 (May 2011), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1471 [http://perma.cc/QHB3-6FLA].

108. Katie Mansfield, *'Turn Them Back' Boris Johnson Says Migrant Boats Should Be Sent Straight Back to Libya*, EXPRESS (Sept. 16, 2016, 10:28 AM), http://www.express.co.uk/news/world/711131/Boris-Johnson-saysmigrant-boats-should-be-sent-straight-back-to-Libya [http://perma.cc/K4UY-FK5H] (emphasis added).

109. *Id.* (emphasis added).

110. A conceptually similarly argument has been articulated by the Australian and United States governments to justify immigration policies designed to block access to their territories. For an insightful discussion of the ethical issues implicated by these arguments, see Itamar Mann, *Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993-2013*, 54 HARV. J. INT'L L. 315, 374 (2013).

conditions for migrants brought back to Libya remain extremely poor,[111] the number of deaths at sea has not decreased since the inception of the Operation,[112] and the disposal of smuggling vessels has led smugglers to place migrants on even more hazardous vessels.[113] Against the background of the EU's response to the Mediterranean crisis more broadly, the purported humanitarian motivation may look even less appropriate. Operation Sophia only began after European states ceased funding Frontex's Operation Mare Nostrum, which unlike the current Frontex Operation Triton, was primarily a search-and-rescue mission as opposed to a border operation, with rescue operations extending further from Italy's territorial sea.[114]

On a case-by-case basis, the *non-entrée* nature of Operation Sophia implies that situations that can and should be evaluated as practically and normatively distinguishable from a human rights perspective may be treated equivalently. For instance, is the purposeful disposal of a smuggling vessel before it leaves port, but with migrants expecting to be smuggled on it, meaningfully different from a territorial sea interdiction and subsequent turn-back of migrants to Libya without individual consideration of asylum claims? Should European state responsibility for equipping and training the Libyan Coastguard be different for a situation in which the Libyan Coastguard turned back migrants who first needed to be rescued than for a situation in which no rescue attempt was necessary? In some scenarios, European states should be accountable for the fulfillment of human rights and refugee obligations. But the result of a *non-entrée* practice is that these distinctions may remain unaddressed.

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111. *See, e.g.*, sources cited *supra* note 40.

112. The U.N. High Commissioner for Refugees observed a more than doubling in the likelihood of death on the Mediterranean between 2015 and 2016. *See* U.N. High Comm'r for Refugees, *supra* note 1; *see also* Ingeborg Eliassen, *Operation Sophia: Mission Impossible in the Mediterranean*, INVESTIGATE EUR. (Jan. 2, 2017), http://www.investigate-europe.eu/en/operation-sophia-mission-impossible-in-the-mediterranean%E2%80%A8 [http://perma.cc/2S8F-6FCW]; *EU Policies Put Refugees at Risk: An Agenda To Restore Protectionism*, HUM. RTS. WATCH (Nov. 23, 2016, 12:01 AM), http://www.hrw.org/news/2016/11/23/eu-policies-put-refugees-risk [http://perma.cc/K2JX-SPJV]; Chris Jones, *Analysis: The EU's Military Mission Against Mediterranean Migration: What 'Deterrent Effect'?*, STATEWATCH 2-5 (Dec. 2016), http://www.statewatch.org/analyses/no-302-operation-sophia-deterrent-effect.pdf [http://perma.cc/X42A-6BVA].

113. *See, e.g.*, U.N. High Comm'r for Refugees, *supra* note 1;*see also* Glenda Garelli & Martina Tazzioli, *Warfare on the Logistics of Migrant Movements: EU and NATO Military Operations in the Mediterranean*, OPENDEMOCRACY (June 16, 2016), http://www.opendemocracy.net/mediterranean-journeys-in-hope/glenda-garelli-martina-tazzioli/warfare-on-logistics-of-migrant-movem [http://perma.cc/X726-SNCE]; Jones, *supra* note 112, at 3-4.

114. *See* sources cited *supra* note 30.

IV. STRENGTHENING THE APPLICATION OF HUMAN RIGHTS LAW TO OPERATION SOPHIA

Parts II and III of this Comment warned that as a policy matter the territorial sea component is best understood as a border-control program that exploits short-term protection gaps in the European human rights framework. While concerning, the *non-entrée* aspect does not imply that all antismuggling engagements in the Libyan territorial sea are necessarily unlawful. Rather, this Comment highlights the strong risk that European states create sufficient distance between themselves and migrants to avoid being accountable in the first instance (Part II), and demonstrates that the development overall emboldens a norm that runs counter to humanitarian principles (Part III).

Part IV now discusses recommendations to strengthen human rights law's application to the Operation and restrain the tendency toward militarized extraterritorial border control. Because states in the territorial sea component may be legally positioned to avoid considering the human rights effects of their activities, it is important at a minimum for European judges and policymakers to begin filling the extant jurisdictional gaps. This Comment in particular calls attention to the need for jurisdictional avenues to address situations of collaborative conduct in the maritime context. Section A of Part VI outlines doctrinal developments to advance more protective interpretations of jurisdiction in these situations. At the same time, a successful solution to the humanitarian crisis in the Mediterranean will require policy actions to promote compliance with human rights standards in the near term. Section B sketches a set of policy prescriptions to help further close the protection and accountability gap.

A. Toward More Protective Interpretations of Human Rights Jurisdiction

While gaps and areas of uncertainty remain, the ECtHR has overall embraced a functional approach toward extraterritorial jurisdiction.[115] Just recently, in December 2016, the Grand Chamber also reminded states that the human rights of transnational migrants must be protected "even in the context of a migration crisis."[116]

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115. *See, e.g.*, Hirsi Jamaa v. Italy, App. No. 27765/09, 2012-II Eur. Ct. H.R. 37, ¶ 178 (affirming that "the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention").

116. Khlaifia v. Italy, App. No. 16483/12, 2016 Eur. Ct. H.R. ¶ 106 (2016).

As suggested by the analysis in Part I, for situations of next generation *non-entrée*, the "continuous and exclusive" standard for effective control, as applied in *Hirsi*, may be inadequate. To promote human rights protection in a situation of next generation *non-entrée*, the circumstances amounting to physical control over a migrant person will need to be broadened. In future maritime cases, the Court could consider an interpretation of effective control that hinges on the relative power of the intercepting vessel over migrant persons.[117] Instead of looking to factors like how many hours the migrants were on a European vessel, the Court should emphasize the "physical presence and strength" of the intercepting vessel vis-à-vis the migrant as the operative condition establishing control.[118] Andreas Fischer-Lescano, Tillmann Löhr, and Timo Tohidipur have advanced such an interpretation of effective control, according to which diversions and interceptions of "smaller, more vulnerable" vessels trigger human rights responsibility.[119] While the Court would need to consider limits based on the degree of power over the migrant person, the approach overall offers flexibility to expand the *Hirsi* reasoning to situations of collaborative conduct.[120]

Emphasis on physical power over migrant persons would help close the existing protection gaps for interdictions conducted by both the Libyan Coastguard and EUNAVFOR MED vessels. Under this interpretation, a vessel containing one EU officer, even if the vessel has a Libyan flag, could help establish jurisdiction, because EU command and strategy contributes to the relative strength of the interdicting vessel. Likewise, Libyan vessels—based on training, equipment, logistical support, and funding from the EU—could be regarded as

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117. *See* Andreas Fischer-Lescano, Tillmann Löhr & Timo Tohidipur, *Border Control at Sea: Requirements Under International Human Rights and Refugee Law*, 21 INT'L J. REFUGEE L. 256, 275-76 (2009); Natalie Klein, *Assessing Australia's 'Push Back the Boats' Policy Under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants*, 15 MELB. J. INT'L L. 414, 422 (2014).

118. Fischer-Lescano et al., *supra* note 117, at 275.

119. *Id.* at 276.

120. The Court's decision in *Xhavara v. Italy* could also be interpreted in a manner that supports this power-based interpretation of "control." Most maritime and extraterritorial jurisdiction cases establish effective control due to the lengthy detention of migrants in a European vessel or facility. By contrast, in *Xhavara*, the ECtHR did not question whether Italy possessed jurisdiction over migrants who drowned due to the accidental collision of the Italian vessel and an Albanian patrol boat carrying Albanian migrants. The relative strength and size (i.e., power) of the Italian warship operating as part of a naval blockade could be viewed as having been disproportionate to the threat presented by the risk of unauthorized migration by the applicants, helping establish jurisdiction. *See* Xhavara v. It. & Alb., App. No. 39473/98 (Eur. Ct. H.R. Jan. 11 2001), http://hudoc.echr.coe.int/eng?i=001-115583 [http://perma.cc/R46L-WVAR].

relatively "powerful" with respect to a victim migrant. This interpretation also draws support from the ECtHR's emphasis in *Al-Skeini and Others v. United Kingdom* that the "exercise of *physical power* and control over the person in question" can furnish extraterritorial jurisdiction.[121]

In addition to this power-based theory, the Court could embrace a jurisdictional theory based more expressly on Article 16 of the ILC's Draft Articles on State Responsibility, which provides for responsibility based on aiding or assisting an internationally wrongful act.[122] While to date Article 16 has not figured prominently in the Court's case law, an "aiding and assisting" theory offers an important jurisprudential means to ensure European responsibility in situations of cooperative *non-entrée*.[123] Under the standard maintained by the International Court of Justice, attribution of the internationally wrongful act to the assisting state requires evidence of the assisting state's control over the discrete operational engagement in which the alleged violations occurred.[124] But the ECtHR can consider articulating a broader interpretation of operational direction according to which particular levels of military and training assistance combined with knowledge of the circumstances in which they may unlawfully be used, helps trigger jurisdiction and thus human rights duties in foreign territory.[125] Indeed, the territorial sea component may reflect the need to expand jurisdiction for the acts of non-European states, supported and encouraged by European states, in extraterritorial military situations that do not rise to the level of occupation. In practice, the potential for liability under an "aid and assist" paradigm could oblige EUNAVFOR MED to consider the risk of *refoulement* in individual anti-smuggling engagements, regulate provision of equipment to ensure they do not end up in the hands of un-vetted Coastguard units, and require that the Libyan Coastguard incorporate processes for identifying migrants with bona fide refugee claims into their interdiction program.

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121. Al-Skeini v. United Kingdom, App. No. 55721/07, 53 Eur. H.R. Rep. 589, ¶¶ 130-49 (2011) (emphasis added).

122. Draft Articles on State Responsibility, *supra* note 87.

123. *See* DEN HEIJER *supra* note 28, at 99-101; Gammeltoft-Hansen & Hathaway, *supra* note 5, at 276-82.

124. *See*, *e.g.*, Antonio Cassese, *The* Nicaragua *and* Tadić *Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT'L L. 649, 653 (2007); Oona A. Hathaway et al., *Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors*, 95 TEX. L. REV. 539, 550 (2017).

125. *See* DEN HEIJER *supra* note 28, at 96-101 (explaining how the Commission's reasoning in *Tugar* goes against the triggering of due diligence obligations for aid and assistance of activities occurring in foreign territory, and discussing generally the Article 16 intent requirement).

The paradigm would also compel states to improve the conditions of migrants forced to return to Libya as the EU's level of anti-smuggling support increases.

In Phase 2B, should EUNAVFOR MED place officers on Libyan vessels or engage joint patrols, an embrace of Article 16 will be especially helpful. In a concurring opinion in *Hirsi*, Judge Pinto de Albuquerque rightly pointed to Article 16 to describe a jurisdictional theory according to which "the presence of an agent from a Contracting Party on board a warship of a non-contracting party or a navy under the effective control of a non-Contracting Party makes the cooperating Contracting Party responsible for any breaches of the Convention standard."[126] While the Judgment itself may not easily lend itself to this interpretation, this reasoning can be used to help overcome the limits of the current "continuous and exclusive" effective control standard.

B. Policy Actions To Embolden the Application of Human Rights Law to Operation Sophia

As the doctrinal developments suggested above crystalize in the case law, both the EU and the UNSC can take actions to ameliorate the human rights accountability gap. The EU's goal of addressing migration closer to the source through the territorial sea component is not itself misguided. But smugglers should be viewed as symptoms of the political and economic conditions that compel individuals to leave their homes in the first place. In furtherance of the goal of saving lives, therefore, European states must prioritize amelioration of the root causes of migration and the prevention of dangerous passage by facilitating access to legal and safe migration routes.

In the immediate term, European states should embrace a more expansive view of their human rights obligations by minimizing the risk of *refoulement* and instances of overly aggressive use of force by the Libyan Coastguard. To this end, the EU should commit resources to improve the conditions of migrant detention facilities in Libya and pressure Libya to sign the 1951 Refugee Convention. EUNAVFOR MED should also take affirmative steps to ensure that the human rights practices it shares with the officers it vets for training are implemented by the Libyan Coastguard as a whole.[127] Further, EUNAVFOR MED should provide transparency into the nature of its interaction with the Libyan Coastguard in order to ensure that the private nature of collaborative

126. Hirsi Jamaa v. Italy, App. No. 27765/09, 2012-II Eur. Ct. H.R. 37, 59 (Pinto de Albuquerque, J., concurring).

127. On the vetting of trainees, see *Operation Sophia Six-Monthly Report (Nov. 2016)*, *supra* note 10, at 14-15.

agreements does not foreclose future enforcement of human rights obligations,[128] in particular by the ECtHR.

Should Phase 2B proceed, the UNSC's authorization of Phase 2B risks further emboldening the militarized approach to migration advanced by Operation Sophia, and so constraints must be considered. Current discourse reveals that the UNSC will rely on the series of Resolutions authorizing EUNAVFOR MED to enter Somalia's territorial sea to combat piracy and armed robbery (Operation Atalanta) as the legal blueprint for the prospective Phase 2B Resolution.[129] However, while the Atalanta resolutions may serve as an appropriate precedential basis for a policy of law enforcement in a foreign state's territorial sea, this framing should not overshadow an underlying distinction: the effort to fight smuggling, unlike piracy, is a policy directed at a human rights issue—irregular migration.

The human rights consequences of vessel seizures, boarding, and disposals should be robustly reflected in the Chapter VII authorization. When force is used against pirate vessels and armed robbers, any aggressive action risks harming pirates (suspected criminals). By contrast, force directed against smugglers in Operation Sophia engagements present a risk to unarmed migrants, whose presence in Libya's territorial sea is not a crime. To limit the prospective territorial sea Resolution's contribution to a customary norm of next generation *non-entrée*, it should underscore its application only "with respect to the situation of migrant smuggling and human trafficking . . . off the coast of Libya and [shall] not affect the rights or obligations or responsibilities of Member states under international law."[130] In addition, to ameliorate the extant jurisdictional ambiguities, the United Nations could specify how to determine which state possesses international responsibility when joint patrols and coordinated engagements run afoul of the *nonrefoulement* principle. It could also clarify which particular actions—such as diversions and disposals—trigger human rights obligations. Whereas Resolution 2240 only briefly gestured to international human rights law's applicability, the significant jurisdictional gaps created by European activities in Libyan territory warrant a more detailed ar-

128. See DEN HEIJER *supra* note 28, at 256 (indicating that "[a] notorious problem with pronouncing on the international responsibility for possible international wrongs committed by EU Member States in the course of joint patrols with and pursuant to agreements with third countries is the lack of accurate information on the relevant legal arrangements and their manner of implementation").

129. *Operation Sophia Six-Monthly Report (Nov. 2016)*, *supra* note 10, at 14-15; *see* Mananashvili, *supra* note 33.

130. S.C. Res. 2240, *supra* note 12, ¶ 11.

ticulation of the substantive human rights obligations states possess when combatting human smuggling.

CONCLUSION

This Comment has argued that the design of the territorial sea component unfortunately opens significant protection gaps for migrants. Against the global rise in extraterritorial police operations with host state consent,[131] this Comment's analysis has highlighted one set of ways in which such engagements risk circumventing international human rights law.

In extending anti-smuggling efforts in Libya's territorial sea, European states are positioned to skirt the European human rights accountability framework while instigating morally and legally questionable practices. As the Operation continues, judges and policymakers must help ensure that European human rights obligations do not, like all too many migrants and refugees, become lost at sea.

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131. *See* Oona A. Hathaway et al., *Consent Is Not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict*, 165 U. PA. L. REV. 1 (2016).

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