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The Mediterranean Sea as a Site of Enforced Disappearances?

International Responsibility of European States in the Context of Migration

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Summary

This thesis explores the question of whether European States, with a specific emphasis on European Union (EU) Member States, can be held responsible for the enforced disappearance of migrants in the Mediterranean Sea under the European Convention on Human Rights (ECHR).

Following the migration crisis of 2015, EU policy and measures on migration revealed a strong focus on protecting the external border of the EU, rather than prioritizing the lives of migrants. As a consequence, the Mediterranean is one of the deadliest migration routes in the world. Nonetheless, the externalization of border controls done by the EU to third states has led to a lack of accountability for these deaths. This situation prompts inquiry into how international law could address the responsibility of EU Member States.

This thesis proposes a possible solution to the rightlessness of migrants in the Mediterranean by analyzing if their situation corresponds to the concept of enforced disappearances in international human rights law. The difficulties in fitting missing migrants into the current framework on enforced disappearances is highlighted, but nonetheless, the thesis contends that there are plausible scenarios where the definitional elements of enforced disappearances are met by missing migrants in the Mediterranean. To this end, the jurisdictional issue of whether migrants fall within the jurisdiction of European States within the meaning of the ECHR is also addressed. Different jurisdictional approaches are explored, presenting arguments for establishing a jurisdictional link to hold European States responsible for violations of the rights and freedoms guaranteed by the ECHR. This scrutiny particularly emphasizes the positive obligations of EU Member States toward migrants in the Mediterranean as a result from search and rescue operations, border control measures and cooperation with third states.

Despite challenges, the thesis argues that labeling missing migrants as enforced disappearances could reinforce investigatory duties and enhance accountability. The Mediterranean's tragic numbers of disappearances and deaths underscore the need to guarantee migrants' rights and overcome impunity. The evolving nature of international law may prompt an interpretation of the prohibition of enforced disappearance to better reflect contemporary cases of disappearances. This could involve broadening the scope of protection to include those who go missing in the Mediterranean.

The thesis highlights the complex legal landscape surrounding the responsibility of European States for enforced disappearance of migrants in the Mediterranean, emphasizing the need for nuanced approaches that balance accountability and effective human rights protection.

Preface

My interest for law very much begun in 2015 and was spurred by the unfairness, as I perceived it, against people on the move arriving to Europe. The misuse of law for deceitful purposes unsettled me. Nonetheless, from that moment and onwards, I have believed that law can be an instrument to achieve a greater society; one where adherence to human rights is not just an ideal but a reality. For such an end to be achieved, while political will is necessary, critical thinking towards the law as we find it today is also a prerequisite.

The journey of researching and writing this thesis has not been an easy one. The thousands of migrants who have died or gone missing in the Mediterranean in recent year is a number too high to actually grasp. During an exchange semester at Universidad de Buenos Aires, I became more familiar with the human rights violation of enforced disappearances, and thought myself to see some slight similarities with the situation of migrants in the Mediterranean. Hence, my curiosity to investigate further whether this established concept of international law could be used in novel way as to protect the human rights of migrants was awakened.

Despite the gravity of the subject matter, it has felt nothing but right to finish my law school studies by returning to the very topic that once awakened my interest for law. Looking forward, I hope to continue challenging prevailing notions and, perhaps, contribute to a more just world.

Barcelona, 26th of January 2024
Erika Josefsson

Abbreviations

1992 Declaration	Declaration on the Protection of all Persons from Enforced Disappearance
1994 Inter-American Convention	Inter-American Convention on Forced Disappearance of Persons
AFSJ	Area of Freedom, Security and Justice
ARSIWA	Draft articles on Responsibility of States for Internationally Wrongful Acts
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CoM	Committee of Ministers
ECHR or the Convention	European Convention on Human Rights
ECOSOC	United Nations Economic and Social Council
ECtHR or the Court	European Court of Human Rights
EU	European Union
EUBAM	EU Border Assistance Mission
EUTF	EU Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa
GAM	Global Approach to Migration
GAMM	Global Approach to Migration and Mobility
HRC	Human Rights Committee of the ICCPR
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
IHL	International Humanitarian Law
ILC	International Law Commission
MP	Mobility Partnerships

MPF	Migration Partnership Framework
MSR	Maritime Surveillance Regulation (Regulation (EU) No 656/2014)
OAS	Organization of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
RCC	Rescue Coordination Centers
SAR	International Convention on Maritime Search and Rescue
SASEMAR	Spanish Maritime Safety and Rescue Society
SOLAS	International Convention for the Safety of Life at Sea
UNCHR	United Nations Commission on Human Rights
UNHRC	United Nations Human Rights Council
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
WGEID	United Nations Working Group on Enforced or Involuntary Disappearances

1 Introduction

1.1 Background

The humanitarian crisis in the Mediterranean is not an event of the past but is very much a palpable everyday reality. On the 14th of June 2023, *Adriana*, a fishing boat carrying up to 800 people sank off the coast of Greece in international waters. Only 82 bodies were recovered. The remains of an estimated 500 people have disappeared into the sea. The Messenia tragedy of 2023 was one of the deadliest shipwrecks in the Mediterranean in years.[1] Unfortunately, it is not the only one, but it forms part of a long list of recorded shipwrecks where people fleeing war, persecution or simply looking for better conditions, disappear and die in the waters of the Mediterranean. Not uncommonly, these tragedies take place right before the eyes of European states, their coast guards receiving the distress calls, vessels supposed to carry out search and rescue operations observing the happenings, but often interfering too late,[2] or even causing the boats to capsize when attempting to tow it.[3] While some investigations are launched, most often, the perpetrators are rarely identified, and no one is held accountable. While some criminal proceedings have been launched against migrant smugglers, and even against NGOs offering humanitarian aid, the general lack of investigations, has resulted in a huge gap in responsibility. Likewise, the disappeared individuals are seldom identified, and the relatives are left in a permanent state of uncertainty as to the fate of their loved ones. More so, granted the systematic and extensive character of these deaths, the blame is not solely on the shoulder of migrant smugglers, but it should be shared with European states themselves. Through their restrictive migration policies – as developed within the European Union (EU) aiming at halting "irregular migration" – the shift in focus from saving lives at sea to strict border controls with minimal direct

[1] Emmanouilidou, L. (2023, June 22). Migrant Boat Disaster Has Greece and European Authorities Facing Criticism. *NPR*. https://www.npr.org/2023/06/22/1183842802/migrant-boat-disaster-has-greece-and-european-authorities-facing-criticism (accessed December 30, 2023); Smith, H. (2023, June 14). Scores Drown as Refugee Boat Sinks off Greece. *The Guardian*. https://www.theguardian.com/world/2023/jun/14/scores-drown-refugee-boat-sinks-off-greece (accessed December 30, 2023); Syed, A. (2023, June 23). What to Know About Greece's Deadliest Migrant Shipwreck in Years. *Time*. https://time.com/6287419/greece-deadly-migrant-shipwreck/ (accessed December 30, 2023).

[2] Both the Greek coastguards and Frontex have been accused of violating fundamental human rights in recent years by either carrying out of turning a blind eye to migrant pushbacks at sea. See EU watchdog launches investigation into Frontex's role in deadly Adriana shipwreck. (2023, July 26). *Euronews*. https://www.euronews.com/my-europe/2023/07/26/eu-watchdog-launches-investigation-into-frontexs-role-in-deadly-adriana-shipwreck (accessed December 30, 2023).

[3] Tagaris, K., & Papadimas, L. (2023, June 30). Greece migrant tragedy: Survivor accounts say coastguard rope toppled boat. *Reuters*. https://www.reuters.com/world/europe/greece-migrant-tragedy-survivor-accounts-say-coastguard-rope-toppled-boat-2023-06-30/ (accessed December 30, 2023).

contact with vessels carrying migrants so as to reduce arrivals, it can be claimed that European states are causing these deaths.

2023 has been the deadliest year for migrants in the Mediterranean since 2018, with 2 510 people recorded as dead or missing.[4] And since 2014, a total of an estimated 28 427 migrants have disappeared in the Mediterranean. That is 28 427 individuals, who had friends, family and relatives the majority of whom do not know what has happened to their dear ones. They can only assume that their loved ones have passed away, but many still live with the hope that they will one day hear from them.[5] This situation of uncertainty, and the indirect fault of European states, calls into mind the international law concept of enforced disappearance. Is it a concept that could shed any light on migrant disappearances at sea? Could it contribute to enhanced state accountability in the context of so many deaths?

The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) entered into force in 2010, but it is commonly understood that the prohibition of enforced disappearances is part of international customary law and also of *jus cogens* status.[6] It has been argued that the crime of enforced disappearances is a *sui generis* phenomenon due to its 'multiple and continuing offence as to the number of its victims'.[7] More so, when a person is made a victim of an enforced disappearance it affects a great extent of that person's human rights,[8] but it is also a form of violence felt by the relatives of the disappeared person, and even society at large. In this way, enforced disappearances have been used by states as a way to inflict

[4] International Organization for Migration, Missing Migrants Project – Mediterranean https://missingmigrants.iom.int/region/mediterranean (accessed December, 30 2023).

[5] 'In many cases, families demonstrate this ambiguity during the interview by saying both that they await the return of the missing and that they expect he is dead, demonstrating how they are trapped between hope and despair, seeking an answer but fearing it will be the worst answer. Families made many statements showing how they were constantly moving between these two contradictory understandings' See International Organization for Migration. Mediterranean Missing Project. (2016, September) *'Like a part of a puzzle which is missing': The impact on families of a relative missing in migration across the Mediterranean.* Report on the situation of families. p. 13.

[6] See Sarkin, J. (2012). Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law. *Nordic Journal of International Law*, 81(4), 537–584; and Cançado Trindade, A. A. (2012). Enforced Disappearances of Persons as a Violation of Jus Cogens: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights. *Nordic Journal of International Law*, 81(4), 507–536.

[7] Andreu-Guzmán, F. (2001, September). The Draft International Convention on the Protection of All Persons from Forced Disappearance. *ICJ Review: Impunity, Crimes Against Humanity and Forced Disappearance*, no. 62-63, 73–106, p. 74.

[8] The right to security, the right to protection under the law, the right not to be arbitrarily deprived of one's liberty, the recognition of the legal personality of every human being and the right to not be subject to torture or to other cruel, inhuman or degrading treatment or punishment, the right to life, the rights of the family and the child, of freedom of thought, expression, religion and association and the prohibition of discrimination. See Scovazzi, T., & Citroni, G. (2007). *The struggle against enforced disappearance and the 2007 United Nations convention*. Martinus Nijhoff Publishers, p. 1:

fear in the general public to not challenge the political rule, and from this it has been argued that enforced disappearances are most often not "exceptional" occurrences, but people are victims of enforced disappearance all over the world and the widespread use of enforced disappearances testifies to the deliberate state policy behind it.[9]

Nonetheless, the concept of enforced disappearances is changing. Historically mainly considered as this form of state policy whereby persons perceived as being in opposition to the government were kidnapped, detained and often murdered without the state acknowledging the acts, it has come to be adopted by criminal organizations to spread terror, potentially extending the possible perpetrators to non-state actors. More so, persons go missing in a lot of different contexts, and the lack of investigation into these disappearances results in leaving the families tormented for years not knowing the fate of their loved ones. In 2017, the UN Working Group on Enforced or Involuntary Disappearances (WGEID) presented a report on enforced disappearances in the context of migration. In this report the WGEID identified three situations in which enforced disappearance of migrants could occur: 1) as a result of abduction for political reasons; 2) during detention or deportation processes and; 3) as a consequence of smuggling and/or trafficking.[10] More so, it expressed concern that it had not been able to document a single case where state or non-state actors have been held accountable, despite the large number of human rights violations committed in the context of migration.[11]

Migrants find themselves in particularly vulnerable situations and are often victims of grave violations which are never investigated, nor brought to light. The fact that over 28 000 people have disappeared in the Mediterranean has already been mentioned, and the fate of each one of these individuals remains largely unknown; likewise, there has been no accountability for these deaths. This impunity calls for the need of not only holding individuals, migrant smugglers or coastguard officials accountable, but also to consider the role of European states in these deaths and accordingly hold them internationally responsible for violations of their human rights obligations. Migrants disappear in the Mediterranean Sea and the report of the WGEID has brought into attention that migrants can be victims of enforced disappearances. This thesis contributes to understanding the intricacies and impact of this claim.

1.2 Purpose and research questions

The aim of the thesis is to investigate the possible international responsibility of European states for enforced disappearances of migrants in the

[9] Banu, B. (2014). Sovereignty as Erasure: Rethinking Enforced Disappearances. *Qui Parle*, 23(1), 35–75, p. 40.

[10] WGEID. (2017, July 28). Enforced disappearances in the context of migration. (A/HRC/36/39/Add.2). Para. 14. However, also acknowledging that enforced disappearances of migrants could occur for many reasons.

[11] Ibid., para. 50

Mediterranean Sea. This will be done through assessing responsibility under the European Convention on Human Rights (ECHR). To fulfill this objective the following questions have been posed and sought to be answered:

- **Can state responsibility of European states for enforced disappearances be established in the context of missing migrants in the Mediterranean?**
    - What is the content and scope of the notion of enforced disappearances in international law?
    - How does the legal framework of enforced disappearances apply to the situation of missing migrants in the Mediterranean under the European Convention on Human Rights?

1.3 Methodology and limitations

The questions this research poses and intends to answer belong to the area of international law, implying that the methodology adopted has indeed also been one of international law. This means that the traditional sources, as defined in Article 38 of the Statute of the International Court of Justice – international conventions, international customary law and general principles of international law – has been used to establish the current law, together with the auxiliary means of interpretation: judicial decisions and legal doctrine. The approach has been to study, analyze and describe international law on enforced disappearances, and then by considering the situation of migrants in the Mediterranean Sea, determine how their circumstances fit into the concept of enforced disappearances. As a second step, the thesis explores whether states can be held responsible for such a human rights violation. From this, three topics of scrutiny has been identified. One that relates to the situations of migrants in the Mediterranean and the different legal regimes that may (or may not) apply to them: EU law, international maritime law, international refugee law, etcetera. The second, confined to international human rights law on enforced disappearances, and the third, connecting the previous two and incorporating international law on state responsibility.

In this sense, the methodology used is one relating to the law as it exists, or *lex lata*. But it should be made explicit that in the formulation of the question posed there is a normative assumption that states should be held responsible. In posing the question it is assumed that states are *de facto* responsible for the situation in the Mediterranean, and the inquiry seeks to consider one possible option to hold states *de jure* responsible under international law. This implies that, while aiming at describing what the law is, arguments of what law ought to be, *lex ferenda*, are also present. In this regard, it its appropriate to refer to the article by Mann, discussing maritime legal black holes and rightlessness of migrants in international law. Arguing that the very structure of international law has rendered migrants dying in the Mediterranean in a state

of rightlessness. In his views, the deaths are not a result of violations of international law but generated from the very structure of international law and the inherent conception of the prevailing sovereignty of the state. Leading to the result that migrants are rendered rightless, with no way to hold states accountable for drownings on the high sea due to the way international human rights law has been shaped and the jurisdictional limitations and lack of legal obligations on states to save lives.[12]

Clearly, this also steers us toward the timeless debate between legal positivism and natural law. This author is tended to morally side with the maxim of natural law that human rights should be universal and inherent in every human being. However, whether such a moral value serves to create legal obligation in international law is highly dubious. The limited extent to which individuals may enjoy and exercise their rights is evident from the continuous violations by states, and this reality cannot, and should not, be neglected. Especially for a research project seeking to have any relevance on a practical level. Thus, for this reason, the first step has been to consider and establish *lex lata*, often in its most restricted interpretation, as it is commonly the most widely accepted one. From there, arguments deriving from a *lex ferenda* perspective have been proposed. Seeking to also problematize the current structure and limitations. Granted that there is no universal international legislative, judicial nor executive authority, the exact content and scope of international law will always remain uncertain to some degree. While perhaps 'choosing an aspirational analysis of law that cannot be enforced',[13] in the words of Mann, international law is in fact developing through the advancement of such positions which at first appear as aspirational, but may in due time lead to change. Nonetheless, these two positions – what law is and what it should be – should not be confused, and this work seeks to properly display when the arguments advanced are not generally accepted to reflect the content and scope of current international law.

Having discussed the underlying theoretical approach to the topic investigated, a quick overview of the sources used are in place. The ICPPED has been used as the main framework to describe international law on enforced disappearances granted that it is the universal Convention on enforced disappearances and to date has been ratified by 72 states. The historical development has also been considered, and in this regard, the 1997 Inter-American Convention and the jurisprudence from the IACtHR has played an important role, by which, it has also been referred to. However, as the human rights system of Europe, the ECHR has been chosen as the framework to analyze state responsibility for the human rights violation that enforced disappearance constitutes to, and as such, the main focus has been

[12] Mann, I. (2018). Maritime Legal Black Holes: Migration and Rightlessness in International Law. *European Journal of International Law*, 29(2), 347–372.

[13] Ibid., p. 367.

dedicated to case law of the ECtHR. Furthermore, this research does not aim to propose a comparative analysis of the protection against enforced disappearances in different human rights system, but from the condense overview given some more general conclusions has been made. Although the Committee on Enforced Disappearances as the supervisory body over the ICPPED, the Human Rights Committee (HRC) of the ICCPR, or also other treaty bodies of the UN could have been used to assess responsibility for states, the already existing case law of the ECtHR on enforced disappearances, and to some extent, violations of human rights of migrants in the Mediterranean, it has been deemed as suitable to use the ECHR as the legal regime. Also the CJEU should be mentioned. While clearly relevant as well, as too a large extent EU migration policy is of main concern and the coordinated action of EU Member States, responsibility of EU Member States could have been considered, as well as the responsibility of the EU as an international organization. However, the limitation of the CJEU in not being a proper human rights court is decisive. While the EU Charter offers protection for human rights, the limited application being to when EU law is implemented, makes it less adequate for the purpose of this inquiry.

Concerning the situation of migrants in the Mediterranean, EU law and policy is described to cast a light on the legal reality of migrants trying to reach the EU. More so, international maritime law on particularly search and rescue operations are of importance due to the lack of legal pathways for migration forces migrants to take to the sea, crossing the Mediterranean in life-threatening journeys, to possibly reach Europe. The Mediterranean is usually understood by the EU in terms of three migratory routes: the Eastern one from Turkey to Greece, Cyprus and Bulgaria; the Central route from Algeria, Egypt, Libya and Tunisia to Italy and Malta; and the Western route from Algeria and Morocco to Spain. Out of these countries, this study centers on Greece and Turkey; Italy and Libya; and Morocco and Spain. These states have been chosen for two reasons. Firstly, given their geopolitical location they are main countries of origin, transit and destination.[14] Secondly, the rather advanced cooperation, bilateral and at an EU level, developed between them gives rise to questions of what this cooperation implies for responsibility under international law. However, this thesis is mainly interested in responsibility of states at a conceptual level. This means that, while responsibility of Greece, Italy and Spain as EU Member States under ECHR is considered, and separately responsibility of Turkey as a state party to the ECHR, the purpose has not been to evaluate the *actual* responsibility of these states. Rather, they serve as examples to demonstrate the larger issues at stake and to consider whether in light of the conduct of European states, the

[14] As of 18th December 2023, out of 273 640 arrivals to Europe, 91,7% migrants arrived in these three countries. (Greece 44 846 arrivals, Italy 153 620 arrivals and Spain 52 549 arrivals) See International Organization for Migration. Migration Flow to Europe. Arrivals. https://dtm.iom.int/europe/migrants-presence (accessed December 18, 2023).

situation in the Mediterranean fits into the concept of enforced disappearances. More importantly, as will be shown, they serve as example to illustrate the possibilities in holding states responsible for the deaths of migrants. The crime of enforced disappearances also gives rise to individual criminal responsibility for perpetrators, and while the accountability of coast and border guards, migrant smugglers and other actors, should certainly also be subject to scrutiny, this question lies outside the scope of this thesis.

At last, it is proper to point out that there is no internationally agreed upon definition of migrant. Used in this thesis, the OHCHR has provided the following definition: 'any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence'.[15] Accordingly, for the purpose of this study, migrants are considered to encompass asylum seekers and refugees, as well as persons who migrate for economic, labor, climatic or other reasons. In general, while the EU is consistent with distinguishing between what they label as "irregular migrants" and refugees, it should be noted that for the main purpose of this paper, whether the victim in question is in need of international protection or not, is not determinant for the question of responsibility for an enforced disappearance. The only exception being the prohibition of *refoulement* in international refugee law which only applies to refugees, but the scope of the principle under international human rights law is broader and covers not only refugees. This distinction and its implications will be addressed when due. Indeed, for questions of rescue operations at sea and possible duties owed to saving lives of people in the Mediterranean, the legal status of the persons in distress is irrelevant.

1.4 Literature review

Whereas the concept of enforced disappearances has been greatly discussed by legal scholars, its application to migrants who disappear during their migratory journeys, even more specifically, in the context of the Mediterranean, has rarely been addressed. On another note, the lack of accountability of migrant deaths in the Mediterranean has been subject for scholarly attention. For this reason, this thesis seeks to contribute to the current debate by providing an analysis on how the lack of accountability possibly could be addressed by considering migrants in the Mediterranean as victims of enforced disappearances. To this end, the work by Scovazzi and

[15] Office of the UN High Commissioner for Human Rights. (2014). *Recommended Principles and Guidelines on Human Rights at International Borders*. https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf. Para. 10; see also UNCHR. (2000, January 6). Report of the Special Rapporteur Ms. Gabriela Rodríguez Pizarro on Human Rights of Migrants, (E/CN.4/2000/82), para. 36.

Citroni,[16] Vermeulen,[17] and Baranowska,[18] has been relied upon to discuss the content and scope of the prohibition of enforced disappearance in international law. More so, for the specific setting of enforced disappearances in the context of migration, apart from the reports by the WGEID, the work by Duhaime and Thibault[19] addressing the issue of enforced disappearances of migrants during their migratory journey, has been used as a starting point. In relation to enforced disappearances in Europe, the work by Czepek [20] providing a case law study on enforced disappearances by the European Court of Human Rights (ECtHR) has served to give an outline of the jurisprudence of the Court.

1.5 Structure

This thesis is divided into three main parts. Following this introductory Chapter, Chapter 2 deals with migration to Europe, more exactly, migration across the Mediterranean destined to reach EU Member States. Given this, the relevant developments of EU policy and law on migration will be discussed, focusing on action and measures taken after 2015. As a pretext for understanding the response by the EU, the responsibilities of coastal states regarding search and rescue operations are explored, shedding light on the obligations these states face in the context of migration. The discussion then turns to consider EU migration and border practices, emphasizing securitization and externalization strategies employed by the EU to manage migration dynamics. This includes an examination of anti-smuggling measures, border control efforts in the Mediterranean during rescue operations and collaboration by the EU with third states. Noteworthy examples of such cooperation are detailed, with specific insights into partnerships with Libya, Morocco, and Turkey.

Transitioning into Chapter 3, the focus shifts to the international legal framework on enforced disappearances. The background of the practice is explored and the consequent codification process of the prohibition in international law. Then, the definition of the crime as found in different instruments is discussed, followed by an in-depth analysis of the definitional elements of enforced disappearances: deprivation of liberty, involvement of

[16] Scovazzi, T., & Citroni, G. (2007). *The struggle against enforced disappearance and the 2007 United Nations convention*. Martinus Nijhoff Publishers.

[17] Vermeulen, M. L. (2012). *Enforced disappearance: determining state responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance.* Intersentia.

[18] Baranowska, G. (2021). *Rights of Families of Disappeared Persons: How International Bodies Address the Needs of Families of Disappeared Persons in Europe*. Intersentia.

[19] Duhaime, B., & Thibault, A. (2017). Protection of migrants from enforced disappearance: A human rights perspective. *International Review of the Red Cross*, 99(2), 569–587, p. 585.

[20] Czepek, J. (2013). European Court of Human Rights on Enforced Disappearances Case-Law Study. *Internal Security*, 5(1), 7–16.

state agents, and the refusal to acknowledge. The Chapter then addresses the victim status of relatives to disappeared persons by considering case law of the Inter-American Court on Human Rights (IACtHR) and ECtHR. The rights of relatives, including the right to locate and return remains and the right to the truth, are scrutinized.

Moving forward, Chapter 4 investigates the international responsibility of European States for enforced disappearances of migrants in the Mediterranean Sea. More precisely, it seeks to answer whether European states can be held responsible for this crime, under the ECHR, by acting in contravention of the rights and freedoms in the specific context. The case law of the ECtHR is examined, providing insights into how enforced disappearances have been addressed within the European context. The Chapter scrutinizes whether the situation of migrants fits into the definition of enforced disappearances and whether they find themselves under the jurisdiction of European States within the meaning of the ECHR. To finalize, the potential breaches by European States of their duty to prevent, investigate, and respect the rights of missing migrants in the Mediterranean under the ECHR is delved into.

Lastly, the thesis concludes by summarizing key findings and implications drawn from the preceding sections. In essence highlighting the complex legal landscape surrounding the responsibility of European States for enforced disappearance of missing migrants in the Mediterranean, emphasizing the need for nuanced approaches that seek to overcome the lack of accountability for missing migrants while balancing state sovereignty concerns and human rights protection.

2 The EU and migration: recent developments in and about the Mediterranean

The year 2015 has been engraved in the memory of European societies as the year of *the refugee crisis*.[21] In 2015, Europe experienced an unprecedented increase of arrivals; a total of 1 255 600 first time asylum seekers applied for international protection in the Member States of the EU, more than double the amount of people seeking protection the year before.[22] Following the steady increase of arrivals since 2014, the EU and its Member States initiated the adoption of an array of measures with the purpose of managing the crisis. The European Council held a meeting in April 2015 after the tragic shipwreck off the coast of Libya where over 800 persons are estimated to have died,[23] in which it committed to 'alleviate migratory pressures in the Mediterranean'.[24] This meeting was followed by the European Commission presenting a *European Agenda on Migration* which set out four pillars to 'manage migration better in all its aspects'.[25] In the following years, discussions within the EU would much center around migration and shortcomings of the European system. In September 2020, the European Commission proposed a New Pact on Migration and Asylum,[26] which included five proposals by the Commission on regulations and further recommendations and guidance related to migration and asylum.[27]

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[21] See Spindler, W. (2015, December 8). The year of Europe's refugee crisis. *UNHCR* https://www.unhcr.org/news/stories/2015-year-europes-refugee-crisis Also sometimes labelled as the *migration crisis*. However, as have been pointed out by others, perhaps it is more suiting talking about *a humanitarian crisis*, considering the precarious situation experienced by people on the move. See Panebianco, S. (2022). The EU and migration in the Mediterranean: EU borders' control by proxy. *Journal of Ethnic & Migration Studies*, 48(6), 1398–1416, p. 1400.

[22] See Eurostat database on migration and asylum for 2015 and 2014.

[23] Bonomolo, A., & Kirchgaessner, S. (2015, April 20). Italy PM Matteo Renzi compares migrant shipwreck crisis to Srebrenica massacre. *The Guardian*. https://www.theguardian.com/world/2015/apr/20/italy-pm-matteo-renzi-migrant-shipwreck-crisis-srebrenica-massacre (accessed December 30, 2023).

[24] See European Council. (2015, April 23). Special meeting of the European Council, , 23 April 2015 - statement. https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/ (accessed December 30, 2023).

[25] European Commission. (2015, May 13). A European Agenda on Migration (COM(2015) 240 final). Brussels. The four pillars set out were: 1) reducing the incentives for irregular migration; 2) a focus on border management by strengthening the role and capacity of Frontex and the capacity of third countries to manage their borders; 3) implementing the Common European Asylum System; and 4) the creation of a new policy on legal migration.

[26] European Commission. (2020, September 23). Communication from the Commission on a New Pact on Migration and Asylum (COM(2020) 609 final). Brussels.

[27] For overview of the Migration and Asylum Package see European Commission. (2020). Migration and Asylum Package: New Pact on Migration and Asylum – Documents adopted on 23 September 2020. https://commission.europa.eu/publications/migration-and-

As will be demonstrated in this Chapter, the main aim of the migration policy of the EU has been to reduce and stop arrivals of migrants to Europe.[28] More importantly, the main strategy to achieve this has been through reinforced borders and through cooperation with third states.[29] Granted that measures on migration in Europe to a large extent are adopted within the framework of the EU, the EU's border and migration policy will be considered as such. Nonetheless, it should not be forgotten that these policy decisions, while taken at an EU level, are implemented by the Member States themselves. As such, for the purpose of state responsibility, this thesis is concerned with how these policies are expressed through the acts or omissions of the Member States. However, before considering the conjoint response of the EU, which later will serve to illustrate how the practice and policies adopted may serve to hold European States responsible for these deaths, it is appropriate to consider what prompted states to react the why they did. To do this, the nature of the Mediterranean area as a sea and the southern EU Member States as coastal states needs to be taken into account. Because the reaction by European states to migration influxes arriving by sea can be understood and explained in light of obligations of coastal states.

2.1 Responsibilities of coastal states: search and rescue

Under international maritime law, all states and shipmasters have a duty to assist people in distress at sea. This obligation finds itself codified in various international instruments. Notably, the UN Convention on the Law of the Sea (UNCLOS), the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention on Maritime Search and Rescue (SAR).[30] Importantly, UNCLOS obliges coastal states to cooperate with neighboring states to establish, operate and maintain an adequate and effective search and rescue service on the sea.[31] This is further elaborated upon in SAR, by which there is a general obligation on states to 'participate in the development of search and rescue services to ensure that assistance is

asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en (accessed December 30, 2023).

[28] The approach of the EU's migration policy to reduce migratory pressure has also been pointed out by scholars. See for example Gatta. (2018). Legal Avenues to Access International Protection in the European Union: Past Actions and Future Perspectives. *Journal européen des droits de l'homme / European Journal of Human Rights*, 3, 163-201, p 164.

[29] See Frelick, B., Kysel, I. M., & Podkul, J. (2016). The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants. *Journal on Migration and Human Security*, 4(4), 190–220; and Cantor et. al. (2022). Externalisation, Access to Territorial Asylum, and International Law. *International Journal of Refugee Law*, 34(1), 120–156.

[30] UNCLOS has been ratified by all EU Member States; SOLAS has been ratified by all Member States except Austria, the Czech Republic and Hungary; and SAR has been ratified all Member States except Austria, the Czech Republic and Slovakia. Turkey has ratified SOLAS and SAR but not UNCLOS.

[31] Article 98 UNCLOS.

rendered to any person in distress at sea'.[32] In order to effectively fulfill this duty, state parties are obliged to establish 'search and rescue regions' within each sea area.[33] In this established area, the state 'having accepted responsibility to provide search and rescue services' shall 'provide assistance to a person who is, or appears to be, in distress at sea'.[34] Regionally, within the EU, the Maritime Surveillance Regulation[35] (MSR) also obliges Member States to assist persons in distress at sea, by Article 9(1):

> Member States shall observe their obligation to render assistance to any vessel or person in distress at sea and, during a sea operation, they shall ensure that their participating units comply with that obligation, in accordance with international law and respect for fundamental rights. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.

In this sense, the coastal states of the EU have an obligation to not only aid people in distress at the Mediterranean Sea, but they are also responsible for search and rescue regions, in which they must offer search and rescue services. "Search" is defined as an operation 'to locate persons in distress'.[36] "Rescue" as 'an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety'.[37] For this purpose, European coastal states have created Rescue Coordination Centers (RCC) to coordinate operation within their regions,[38] as well as launched maritime missions dedicated to saving lives, such as the Spanish Maritime Safety and Rescue Society[39] (SASEMAR) and the Italian Mare Nostrum Operation.[40]

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[32] Article 2.1.1 SAR.

[33] Article 2.1.3 SAR.

[34] Article 2.19 SAR. "Distress" is considered 'a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance' see Article 1.2.13 SAR .

[35] Regulation 656/2014. *Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.*

[36] Article 1.3.1 SAR.

[37] Article 1.3.2 SAR.

[38] See Article 2(13) Regulation 656/2014.

[39] SASEMAR distinguishes itself from most other search and rescue services of military character offered by the EU Member States, as it is a civil entity whose main task is search and rescue without any border control competences. See Bellido Lora, M. (2023). Inmigración y cooperación hispano-marroquí en búsqueda y salvamento marítimo: perspectivas de una cooperación SAR en la región del Estrecho de Gibraltar. *Revista de Estudios Jurídicos y Criminológicos*, N.º 7, 87–124, p. 96.

[40] Mare Nostrum was 'aimed at tackling the humanitarian emergency in the Strait of Sicily, due to the dramatic increase in migration flows'. See Italian Navy. (n.d.). Mare Nostrum Operation. https://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx (accessed December 30, 2023).

However, the international legal regime of search and rescue was not created with the notion of mass migration at sea in mind.[41] This has led to controversies between international maritime law and domestic migration laws, and thus, by extension, with international human rights law. Coastal states, as any other state, are sovereign and retain the right to regulate the admission of non-citizens into their territory. This state of affairs has resulted in a reluctance and refusal of states to allow migrants rescued at sea to disembark on their territory.[42] While states are obliged to render assistance to people in distress at sea, participate in search and rescue operations and deliver survivors to a place of safety, there is no corresponding obligation on states to accept survivors to disembark on their territory. A "place of safety" has not been defined in international maritime law, and while the International Maritime Organization has held that it is 'a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met' taking 'into account the particular circumstances of the case',[43] this is a non-legally binding definition. More importantly, this does not imply that the "place of safety" has to be the territory of the state executing the rescue operation.

The issue of disembarkation is only foreseen by SOLAS to the extent that the state responsible for the search and rescue region in which the rescue was executed, has primary responsibility for ensuring cooperation and coordination so that survivors are disembarked and delivered to a place of safety as soon as reasonably practicable.[44] Within the EU, MSR provides that the operational plan of a search and rescue operation, must contain at least three modalities for disembarkation of the survivors depending on the circumstances of the rescue.[45] A general provision is enshrined therein, according to which disembarkation shall be done at the place designated by the Rescue Coordination Centre. In addition, depending on where the vessel is intercepted: if in the jurisdictional waters of the coastal Member State

[41] See statement by Secretary-General of IMO Mr. Koji Sekimizu: 'There is a clear recognition among IMO Member States that using the SAR system to respond to mass mixed migration was neither foreseen nor intended […]' International Maritime Organization. (2015, October 14). *IMO Secretary-General welcomes UN Security Council resolution on migrant smuggling.* https://www.imo.org/en/MediaCentre/PressBriefings/Pages/45-UNSC-resolution-.aspx (accessed December 30, 2023).

[42] Velasco, A. C. (2022). Vulnerability and marginalisation at sea: maritime search and rescue, and the meaning of "place of safety." *International Journal of Law in Context*, 18(1), 85–99, p. 85; One example being in June 2018, 629 migrants were refused to disembark on Italian territory after having been rescued by a German NGO. See Fink, M., Gombeer, K., & Rijpma, J. (2018, July 9). *In Search of a Safe Harbour for the Aquarius: The Troubled Waters of International and EU Law*. EU Migration Law Blog. https://eumigrationlawblog.eu/in-search-of-a-safe-harbour-for-the-aquarius-the-troubled-waters-of-international-and-eu-law/ (accessed December 30, 2023).

[43] International Maritime Organization. (2004, May 20) Gui*delines on the Treatment of Persons Rescued at Sea*. (MSC 78/26/Add.2). paras. 6.12 and 6.15.

[44] Chapter V, Regulation 33, paragraph 1.1, SAR.

[45] See Article 10(1) Regulation 656/2014.

hosting the operation, disembarkation shall take place on the territory of that state; or if intercepted on the high sea, on the territory of the third country 'from which the vessel is assumed to have departed'. On the high sea, the state hosting the operation is only required to disembark the survivors, if this is not possible in any third state.[46] In 2018, the European Commission presented an outline for "regional disembarkation arrangements", in which a clear preference towards disembarkation on non-EU territory is present.[47]

In sum, coastal states have obligations to offer effective rescue services in their search and rescue regions and to assist people in distress. This duty applies regardless of the legal status of the person in distress and thereby it extends to migrants trying to cross the Mediterranean in hope of reaching Europe. Nonetheless, the clash with the sovereignty of states is apparent and granted that states are free to decide who to let into their territory, the obligation of maritime law creates complications. The perilous journeys of migrants crossing the Mediterranean obliges states to rescue them, and once the situation is under control, the question is; where to take the survivors? Once migrants find themselves on board of a rescue vessel by a state, other obligations arise for the state in favor of these individuals: obligations imposed by other legal regimes than international maritime law; notably international refugee and human rights law.[48] This means that a rescue operation is not only assisting people in distress at sea, but it also becomes a question of respecting human rights law, when migrants and refugees are involved. In effect, the sovereignty of the state is restricted as the freedom of action is limited. As a result, it is possible to understand that, as mentioned in the beginning, the measures on migration adopted by the EU and its Member States seek to avoid these other obligations from arising. This aim has materialized itself through the securitization of the EU's external border and the externalization of border controls to third states,[49] which will be discussed in the next section.

[46] As well as if disembarkation cannot be arranged 'as soon as reasonably practicable, taking into account the safety of the rescued persons and that of the participating unit itself'.

[47] European Commission. (2018, July 24). *Managing migration: Commission expands on disembarkation and controlled centre concepts*. https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4629 (accessed December 30, 2023). It appears that the initiative was not taken much further, but the two-page factsheet presented by the Commission was dedicated to demonstrating the legality of disembarkation in third countries.

[48] International refugee and human rights law lays out the principle of *non-refoulement* which prohibits returns of individuals to a country where there are substantial grounds for believing that the person would be in danger of being subjected to human rights violations For further discussion see Section 2.3.2.3.

[49] However, EU border policies cannot be understood solely from a perspective of securitization and externalization, as the discourse also integrates humanitarian arguments. See Loukinas, P. (2022). Drones for Border Surveillance: Multipurpose Use, Uncertainty and Challenges at EU Borders. *GEOPOLITICS*, 27(1), 89–112, p. 92.

2.2 EU migration and border policy: securitization and externalization

Looking at the development of the migration policy of the EU in the context of the Mediterranean Sea during the past decade, Moreno-Lax notes that migrants have been objectified by the EU both as "*a* risk" and "*at* risk"; as threats to the internal security of European states and as victims of smuggling.[50] The narrative around the deaths on the Mediterranean has been framed by the EU as being the sole fault of migrant smugglers,[51] by defining smugglers as the "enemy" posing a threat to not only migrants, but also toward the EU migration and border management system.[52] This is an example of the securitization process of EU's external border by which the security of borders is favored over the security of people.[53] The security logics is inherent in the migration policy of the EU but through framing the conflict as being between the smuggler and the migrant, the Coast Guard of EU Member States appears to step away from its functions as border control, and instead takes on the role as a rescue operation. However, the rescue function is only secondary to the primary function of protecting the border. In the situation then of border control, two seemingly non-compatible interests exist: that of protecting the border, and that of protecting the migrant. To this end, a number of scholars have noted the securitization trend within the EU; rather than focusing on the protection needs of migrants at sea, the focus is on protection of the external border.[54]

Additional and in parallel with the securitization of EU's external border, the EU has also been externalizing border controls for at least three decades.[55]

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[50] Moreno-Lax, V. (2018) The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' *Paradigm. JCMS: Journal of Common Market Studie*s, 56: 119–140, p. 120.

[51] See for example, 'It is estimated that the activities of ruthless migrant smugglers, especially at sea, resulted in a staggering death toll of over 28 000 people since 2014.' European Commission. (2023, November 28). Proposal for a Regulation of the European Parliament and of the Council on enhancing police cooperation in relation to the prevention, detection, and investigation of migrant smuggling and trafficking in human beings, and on enhancing Europol's support to preventing and combating such crimes and amending Regulation (EU) 2016/794. (COM(2023) 754 final). Brussels. p. 1f.

[52] Stepka, M. (2023). The new pact on migration and asylum: another step in the EU migration-security continuum or preservation of the status quo?. *Bialostockie Studia Prawnicze*, 28(1), 23-37, p. 31; see also Moreno-Lax (2018), p. 119.

[53] Securitization has been defined as 'the discursive process through which an intersubjective understanding is constructed within a political community to treat something as an existential threat to a valued referent object, and to enable a call for urgent and exceptional measures to deal with the threat'. See Buzan, B., & Wæver, O. (2003). *Regions and Powers: The Structure of International Security*. Cambridge University Press, p. 491.

[54] See for example, Stępka, M. (2022). *Identifying Security Logics in the EU Policy Discourse*: *The "Migration Crisis" and the EU* (1st ed. 2022.). Springer International Publishing; Moreno-Lax (2018) and Gatta (2018).

[55] See Jones, C., Lanneau, R., & Maccanico, Y. (2022, December). Access denied: Secrecy and the externalisation of EU migration control. Heinrich-Böll-Stiftung European

Externalization can be described as extraterritorial state action that prevents persons, regardless of legal status, from entering the territory or jurisdiction of a state, without any individual consideration of if they might have a substantiated protection claim.[56] Externalization practices are controversial because they may cause infringements of human rights; some of them being the right to seek asylum,[57] the right to leave any country,[58] the special rights of vulnerable people (such as refugees, asylum seekers, stateless people, children and victims of trafficking),[59] the principle of *non-refoulement*,[60] and the right to effective remedies.[61] Additionally, externalization is often paired with the attempt to move responsibility away from the state, as the practice tend to exploit the grey areas in international law on extraterritorial jurisdiction and application of human rights duties beyond the territory of the state.[62] Lavenex has identified how externalization of refugee policy has developed in four stages: First, as unilateral policies of non-admission; second, as collaborative policies of non-arrival; third, as delegated policies of non-arrival, and; four, as outsourced policies of non-departure.[63] The first stage being the imposition of visa requirements and carrier sanctions as to prevent asylum seekers from lawfully and practically entering a state to apply for asylum.[64] The second stage implies to cooperation with mainly countries of transit to minimize arrivals of asylum seekers to the territory of the state. In practice, achieved by safe third country rules and readmission agreements

Union & Statewatch. https://eu.boell.org/sites/default/files/2023-03/secrecy_externalisation_migration_web.pdf, p. 13.

[56] Frelick, Kysel & Podkul. (2016), p. 193. Other scholars have pointed out that externalization does not only occur in relation to migration and asylum, but 'it refers to the process of shifting functions which are normally undertaken by a State within its own territory so that they take place, in part or in whole, outside its territory.' See Cantor et. al. (2022), p. 122.

[57] The Universal Declaration of Human Rights (UDHR), Article 14.

[58] UDHR, Article 13; the 1951 Refugee Convention, Article 31(1).

[59] See the 1951 Refugee Convention; Convention on the Rights of the Child; and Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.

[60] 1951 Refugee Convention, Article 33; International Covenant on Civil and Political Rights, Article 7; and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3.

[61] For overview of rights of migrants which may be violated by externalization practices see Frelick, B., Kysel, I. M., & Podkul, J., p. 196-199.

[62] Cantor et. al. (2022). p. 123f. However, the attempt to shift responsibility is not a necessary feature of externalization. The issues arising from the EU's externalization practice will be discussed in section 4.4 Issues of Jurisdiction.

[63] Lavenex, S. (2022). *The cat and mouse game of refugee externalisation policies: Between law and politics*. Taylor and Francis, p. 30; Measures of externalization adopted by states include visa requirements, sanctions for carriers bringing in unauthorized persons, interception at the high seas to "safe third country" procedures. See Liguori, A. (2019). *Migration law and the externalization of border controls: European state responsibility*. Routledge, Taylor & Francis Group, p. 1.

[64] Lavenex. (2022). p. 31 As well as "safe third country procedures", this practice was implemented within the EU with the 1990 Dublin Convention which allow member states to apply the safe third country rule to non-EU countries according to national legislation.

allowing for rapid returns.[65] The third stage then seeks to minimize arrivals but by indirect techniques of financial, logistical, legal and technical assistance and training of authorities in third states.[66] Lastly, the fourth stage takes the shape of measures adopted to dissuade and hinder asylum seekers to depart from one country to reach another, mainly by focusing on promoting hosting capacities in countries and areas close to the place of origin.[67]

Thus, in the context of the Mediterranean, the EU's response to migration is an expression of securitization logics and externalization practices, which as a result has allowed the EU and its Member States to move borders, prevent access to Europe and circumvent international obligations.[68] The adopted policy measures have been characterized by an approach that labels migrant smugglers as the culpable and centers on anti-smuggling measures; a focus on heightened border surveillance and strong border control; and external action and cooperation with third states to outsource said border controls. These three practices of the EU will be discussed accordingly, in what way they constitute examples of securitization and externalization, and importantly, the implications they have for migrants seeking to reach Europe.

2.3 EU migration and border practices

2.3.1 EU anti-smuggling measures

The absolute majority of migrants arriving to Europe do so by crossing the Mediterranean,[69] and often they rely on smugglers to make the crossing.[70] This has resulted in an approach where migrant smugglers have been made out to be one of the main issues on the EU's agenda on migration control.[71] The head-on fight against migrant smuggling has resulted in difficulties for NGOs assisting migrants in the context of search and rescue operations at sea.[72] The criminal offence of migrant smuggling is defined in the EU's

[65] Lavenex. (2022). p. 33.

[66] Lavenex. (2022). p. 37.

[67] Lavenex. (2022). p. 39.

[68] Liguori, p. 1.

[69] As of 13 November 2023, 228,467 arrivals by sea out of 251,118 total arrivals. See International Organization for Migration. Migration Flow to Europe: Arrivals. https://dtm.iom.int/europe/arrivals (accessed November 13, 2023).

[70] Europol estimates that 90 per cent of those who cross the EU borders irregularly do so with the assistance of migrant smugglers, either for their whole journey or for parts of it.

[71] One of the key areas of concern of the 2020 new Pact on Asylum and Migration was to reinforce the fight against migrant smuggling. The European Commission also launched a new action plan against smuggling in 2015, renewing it in 2021. See European Commission. (2015, May 27). EU Action Plan against migrant smuggling (2015-2020). (COM(2015) 285 final). Brussels; and European Commission. (2021, September 29). A renewed EU action plan against migrant smuggling (2021-2025). (COM(2021) 591 final). Brussels.

[72] Rescue operations by NGOs have been compromised by both administrative and judicial measures taken by EU Member States. Rescue vessels have been seized or blocked from leaving port and criminal proceedings launched against individuals. Since 2017, NGO ships and crew members have faced 63 administrative or criminal proceedings initiated by

"Facilitators package",[73] as facilitation of unauthorized entry, transit or residence and sets out criminal sanctions to any person who intentionally assists a non-EU national into the EU.[74] This definition has been criticized for being overly broad and resulting in the prosecution of innocent people aiding migrants at sea on humanitarian grounds.[75] While humanitarian assistance mandated by law cannot be criminalized under any circumstance,[76] sanctions for assistance not required under law is left optional and for Member States to decide upon.[77] This has resulted in a lack of clarity and legal certainty on the distinction between facilitation of irregular migration and humanitarian assistance offered by NGOs and private vessels. In the end of 2023, the European Commission proposed a new directive to replace the Facilitators package,[78] seeking to solve the issues of criminalization of humanitarian assistance.[79]

To some degree, the measures adopted by EU Member States against NGO rescues stem from the argument that the presence of rescue vessels encourages more crossing attempts, and in that way, acts as a "pull factor" for migrants.[80] In this way, the labeling of such aid as smuggling can be viewed

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Germany, Italy, Malta, the Netherlands, and Spain. See European Union Agency for Fundamental Rights. (2023, October 11). Legal proceedings against civil society actors involved in SAR operations, *June 2023 update - Search and rescue operations in the Mediterranean and fundamental rights*. Available at: https://fra.europa.eu/en/publication/2023/2023-update-ngo-ships-sar-activities?page=2#read-online (accessed December 30, 2023).

[73] Consisting of Council Directive 2002/90/EC. Defining the facilitation of unauthorised entry, transit and residence; and Council Framework Decision 2002/946/JHA. On the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.

[74] See Article 1 in Council Directive 2002/90/EC.

[75] See critique by for example OHCHR. (2019, July 18). *UN experts condemn criminalization of migrant rescues and threats in Italy*. Geneva. https://www.ohchr.org/en/press-releases/2019/07/italy-un-experts-condemn-criminalisation-migrant-rescues-and-threats?LangID=E&NewsID=24833 (accessed December 30, 2023); and Commissioner for Human Rights of the CoE. (2019, June). *Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean*. Council of Europe. https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87 (accessed December 30, 2023).

[76] See European Commission. (2021, September 29). A renewed EU action plan against migrant smuggling (2021-2025). (COM(2021) 591 final). Brussels, p. 18.

[77] See Article 1(2) in Council Directive 2002/90/EC.

[78] European Commission. (2023, November 28). Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorized entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA (COM(2023) 755 final). Brussels.

[79] By defining the criminal offence as assistance provided when there is an actual or promised financial or material benefit, or where the offence is highly likely to cause serious harm to a person, see proposal by European Commission, Article 3. Ibid.

[80] See European Commission. (2020, September 23). Commission Recommendation (EU) 2020/1365 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities: 'it is essential to avoid a situation in which migrant smuggling or human

as an expression of the security logics by which protection of the border from new arrivals is favored over offering help to migrants whose life is at risk at sea. Indeed, as remarked by Gallagher, 'the politics of migrant smuggling are also, very much, the politics of asylum'. Albeit humanitarian arguments and framing smugglers as the reason for deaths in the Mediterranean, anti-smuggling measures can much be explained as being an attempt of states to prevent refugees to reach their territory and seek asylum. More so, 'a focus on the "crime" of migrant smuggling both justifies and explains the externalization of border controls'.[81] In this regard, Casaglia and Pacciardi have argued that the externalization and securitization practice of the EU work hand-in-hand with humanitarianism, as measures adopted are often justified with a language that recalls humanitarian aims.[82] The EU-Turkey Deal will be discussed in further detail below,[83] but the related statement made by the European Commission can be given as an example: that 'the return of all new irregular migrants and asylum seekers from Greece to Turkey [was] an essential component in breaking the pattern of refugees and migrants paying smugglers and *risking their lives'*.[84] In this way, humanitarian words are used by the EU to justify measures – preventing migrants from risking their lives – but the effect of the measures is not humanitarian, it is rather the opposite. As pointed out by the UN Special Rapporteur on the human rights of migrants:

> 14. "Fighting the smugglers" will remain futile as long as persons in need of mobility, without other options, may avail themselves of the irregular mobility solutions offered by opportunistic smuggling rings. The present escalation in repressive measures does not bode well for migrants: it will push them further underground, into the hands of unscrupulous lenders, recruiters, smugglers, employers and landlords.
>
> 15. The only way to effectively reduce smuggling is to offer more accessible, regular, safe and affordable mobility solutions, with all the identity and security checks that efficient visa procedures can provide.[85]

Through disregarding the fact that smugglers are not the reason why people migrate, and more so, that reliance on smugglers is explained by the very lack

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trafficking networks […] take advantage of the rescue operations conducted by private vessels in the Mediterranean'.

[81] Gallagher, A. T. (2014). *The international law of migrant smuggling*. Cambridge University Press, p. 12.

[82] Casaglia, A., & Pacciardi, A. (2022). A close look at the EU–Turkey deal: The language of border externalisation. Environment and Planning C: *Politics and Space*, 40(8), 1659–1676, p. 1664.

[83] See Section 2.3.4.3.

[84] European Commission. (2016, March 16). *Next operational steps in EU-Turkey cooperation in the field of migration*, (COM(2016) 166 final), p. 2 (emphasis added).

[85] UNGA. (2016, August 4). Report of the Special Rapporteur on the Human Rights of Migrants. A/71/285, paras. 14 and 15.

of safe and legal pathways to Europe,[86] the EU and its Member States are distancing themselves from responsibility for the fate of migrants. The pinpointing of guilt on migrant smugglers allows the EU to exercise its border control under a shroud of humanitarianism, justifying measures adopted by referencing lifesaving purposes, while in reality, the main aim is migration control.

2.3.2 Border management in the Mediterranean Sea

2.3.2.1 The European Border and Coast Guard Agency

Management of the external border of the EU has been a priority ever since the creation of an area without internal borders.[87] More so, the 2020 New Pact reaffirmed that management of the external border was 'an essential component of a comprehensive migration policy'.[88] Before that, following the 2015 crisis, the European Border and Coast Guard Agency had been launched in October 2016.[89] Commonly referred to as Frontex,[90] the Agency was granted extended powers and competences: the right to intervene, to perform Coast Guard surveillance, a mandate to work in third countries and a strengthened role in returns. In November 2019, the powers of Frontex were

[86] See for example UNHRC. (2013, April 24). Report of the Special Rapporteur on the human rights of migrants: Regional Study: Management of the External Borders of the European Union and Its Impact on the Human Rights of Migrants. (A/HRC/23/46.); UNHCR. (2014, November 18) *Legal avenues to safety and protection through other forms of admission*; and Muižnieks, N. (2014, November 10). *Ensuring the Rights of Migrants in the EU: From Vulnerability to Empowerment*. Speech at the Fundamental Rights Conference "Fundamental Rights and Migration to the EU". Council of Europe Commissioner for Human Rights. (CommDH/Speech(2014)11) Rome.

[87] Already in 1985, with the signing of the Schengen Agreement, 'on the gradual abolition of controls at the shared borders', the steppingstones were laid down for the creation of common European rules on border control, immigration and asylum. Although the Schengen Convention establishing an area without internal border controls was separate from the European Communities (EC), and only integrated into the framework of the EU in 1999, similar steps were taken within the cooperation of the EC. The new common area established by the Single European Act in 1986, amending the Treaty of Rome and creating the European Economic Community, led to similar needs of convergence.

[88] See section 4.1 Stepping up the effectiveness of EU external borders in European Commission. (2020, September 23). *New Pact on Migration and Asylum*. (COM(2020) 609 final). Brussels.

[89] Regulation 2016/1624. *Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC*. The Agency replaced the previous European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU which had been created in 2004 for the integrated management of the external border of the EU, See Regulation 2007/2004. *Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.*

[90] See recital 11 of Regulation 2016/1624: '[…] it should be renamed the European Border and Coast Guard Agency, which will continue to be commonly referred to as Frontex.'

expanded further through an increase of staff and technical equipment, a broader mandate to support Member States in border control and returns; and increased competence to establish cooperation with non-EU states. [91]

In practical terms, the European Border and Coast Guard Agency is built from the border control authorities of the Member States and Frontex. In this sense, Frontex supports the Member States with border surveillance and border guard functions. As such, the Mediterranean Sea as an external border of the EU means that support to Coast Guards of Member States also is an integrated part of the functions of Frontex.[92] Importantly, this means that in the context of migration on the Mediterranean, the border surveillance and control function may interface with rescue operations of migrants in distress at sea. For this reason, one of the tasks of Frontex is to 'provide technical and operational assistance' in support of search and rescue operations, 'which may arise during border surveillance operations at sea'.[93] In this sense, Frontex is not endowed with a specific mandate to execute rescue operations, as pointed out by Esteve, 'Frontex does not have a proactive and humanitarian mission of search and rescue but a reactive function while implementing its other tasks'.[94]

2.3.2.2 Border surveillance and rescue operations

In the second half of 2018, Frontex announced that it would begin testing drones for border surveillance, including but not limited to the purposes of surveillance of the sea and providing support to search and rescue operations.[95] Not much later, in March 2019, the EU decided to cease with the maritime patrols of the EUNAVFOR MED Operation Sophia,[96] at the expense of search and rescue operations. Although Operation Sophia had never been a humanitarian mission, the preamble of the decision establishing the Operation, guaranteed that the vessels assigned 'would be ready and

[91] Regulation 2019/1896. *Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624*.

[92] Regulation 2019/1896, Article 7(1), Article 10(1)(t) and Article 69.

[93] Regulation 2019/1896, Article 10(1)(i).

[94] Esteve, F. (2017). The Search and Rescue Tasks Coordinated by the European Border and Coast Guard Agency (Frontex) regarding the Surveillance of External Maritime Borders. *Paix et Securite Internationales - Journal of International Law and International Relations*, 5, 93–116, p. 107.

[95] Frontex. (2018, September 27). Frontex begins testing unmanned aircraft for border surveillance. https://www.frontex.europa.eu/media-centre/news/news-release/frontex-begins-testing-unmanned-aircraft-for-border-surveillance-zSQ26A (accessed December 30, 2023).

[96] European Council. (2017, October 19). *European Council meeting (19 October 2017) – Conclusions* (EUCO 14/17). In the decision, the mandate was extended, but the naval assets were suspended and instead, the mission was to 'continue to implement its mandate, accordingly, strengthening surveillance by air assets as well as reinforcing support to the Libyan Coastguard and Navy'.

equipped to perform' the international obligations of search and rescue.[97] Contrarily, EUNAVFOR MED Operation Irini, which replaced Operation Sophia in 2020,[98] made no refence to rescue operations of migrants in distress at sea, only holding that the prolongation of the operation was dependent upon whether it 'produced a pull effect on migration'.[99] Since 2016, the allocated budget of Frontex has exponentially increased over the years, from 254 million euros in 2016, to 361 million euros in 2020, to 845 million euros in 2023. Along with this, increasing investment has been made into drones.[100] This indicates that the expansion of aerial surveillance in the EU has been undertaken in parallel with the withdrawal of EU naval missions capacitated for rescues.

Likewise, the past years show a trend of a decrease in rescue operations being carried out by vessels of EU Member States, favoring rescues by non-EU states. In the strait of Gibraltar, Spain and Morocco share responsibility for search and rescue operations in an overlapping area due to disagreements between the two states.[101] Before 2019, rescue operations were almost exclusively conducted by Spain, through SASEMAR, with little presence of the Moroccan Coast Guard executing rescues, even in Moroccan waters.[102] Of the rescue operations realized by SASEMAR in 2018, one third was in Spanish waters, another third in shared waters, and the last third in Moroccan waters.[103] However, in 2018, as Spain recorded an increase in arrivals from Morocco,[104] a centralized authority was created to coordinate the Spanish search and rescue operations.[105] As a result, the following year, 70 per cent

[97] See recital 6 in Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED).

[98] Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI). The main mandate of Operation Irini was to implement the UN arms embargo on Libya.

[99] See Article 8 in Council Decision 2020/472.

[100] The 2023 budget included a procurement plan with a 144-million euros contract for aerial maritime surveillance. See Frontex. (2023, February 13). *Management Board Decision 6/2023 of 13 February 2023 adopting the Annual Procurement Plan for 2023 for the Agency*. (Ref. Ares(2023)1027641).

[101] This is due to that maritime zones have been declared by Spain and Morocco respectively and are not accepted by the other. Similarly, the search and rescue regions are not agreed upon and therefore they share responsibility for the overlapping area. See Bellido Lora, p. 90 and 94.

[102] Bellido Lora, p. 96.

[103] Gálán Caballero, J., Martín, M., & Grasso, D. (2019, March 29). España rescata a un tercio de los migrantes en aguas de responsabilidad marroquí. *El País.* https://elpais.com/politica/2019/03/26/actualidad/1553613053_040695.html (accessed December 30, 2023).

[104] IOM reporting 50,440 arrivals by sea to Spain in 2018, compared to 22,108 in 2017. See International Organization for Migration. (2018, November 16) *Mediterranean Migrant Arrivals Reach 103,347 in 2018; Deaths Reach 2,054.* Geneva. https://www.iom.int/news/mediterranean-migrant-arrivals-reach-103347-2018-deaths-reach-2054 (accessed December 30, 2023).

[105] See Orden PCI/842/2018, de 3 de agosto, por la que se publica el Acuerdo del Consejo de Ministros de 3 de agosto de 2018, por el que se dispone la creación de la Autoridad de Coordinación de las actuaciones para hacer frente a la inmigración irregular

of the operations done by SASEMAR was in Spanish waters, noticeably decreasing the activates in the shared area and in Moroccan waters. In 2022, the per centage had increased to close to 80 per cent.[106] Similarly, the Italian rescue operation Mare Nostrum was only operative for one year before it was replaced in 2014 by the Italian led, and Frontex supported mission, Operation Triton.[107] While also tasked with search and rescue functions, it was principally perceived as a surveillance operation to control irregular migration.[108]

It is the responsibility of coastal states to offer rescue services in its search and rescue regions, however the obligation to assist persons in distress at sea falls upon any vessel which detects such a situation. The activity of the EU and its Member States in the Mediterranean has resulted in a deteriorated capability of executing effective search and rescue operations aimed at saving lives in the Mediterranean. The move from maritime operations dedicated to rescues to military operations and favoring surveillance by aerial drones, which merely surveil, detect and pass along the information clearly illustrates this.[109] There are gaps in the legal framework of search and rescue operations. While there is a clear duty of shipmasters to provide assistance to persons in distress at sea, it is not certain what obligations fall upon the operator of a drone. Information is passed along either to rescue coordination centers, or directly to the authorities and coast guards of third states. Thus, non-EU states execute the rescue and bring the migrants back to shore, without any involvement of coast guards of EU Member States. This results in effectively protecting the territory of the EU from arriving migrants, without any direct contact, or any consideration of their potential claim for international protection, and in this way, enhances the externalization of border control. During 2022, Frontex reported that its planes and drones had participated in 1 000 missions and contributed to the rescue of 21 000 people.[110] However,

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en la zona del Estrecho de Gibraltar, mar de Alborán y aguas adyacentes y se establecen normas para su actuación. *Boletín Oficial del Estado* 188, de 4 de agosto de 2018. https://www.boe.es/buscar/doc.php?id=BOE-A-2018-11138. (accessed December 30, 2023).

[106] Gálán Caballero, J., Martín, M., & Grasso, D. (2022, August 21). Salvamento Marítimo reduce drásticamente el rescate de pateras en aguas de responsabilidad marroquí. *El País*. https://elpais.com/espana/2022-08-21/salvamento-maritimo-reduce-drasticamente-el-rescate-de-pateras-en-aguas-de-responsabilidad-marroqui.html (accessed December 30, 2023).

[107] European Commission. (2014, October 7). Frontex Joint Operation 'Triton' – Concerted efforts to manage migration in the Central Mediterranean. (MEMO/14/566). Brussels. https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_566. (accessed December 30, 2023).

[108] Esteve, (2017), p. 113.

[109] Blay Puntas, I. (2022, June). The use of drones for maritime surveillance and border control. *Centre Delàs Working Papers.* https://centredelas.org/wp-content/uploads/2022/06/WP_DronesFrontex_ENG.pdf. (accessed December 30, 2023).

[110] Frontex. (2022, September 20). Frontex aircraft fly 1000 mission. https://www.frontex.europa.eu/media-centre/news/news-release/frontex-aircraft-fly-1000-mission-HRtGEK (accessed December 30, 2023).

the question remains how many of these people were rescued by the coast guard of the very state they were trying to depart from.

2.3.2.3 Pushback and pullback practices

The increased use of aerial surveillance cannot be said to be all negative. Drones are able to cover larger areas for a longer time, and by so may also enhance the detection of people in distress.[111] However, the information sharing made possible by drones, and their usage in supporting pushback and pullback practices is concerning from a human rights perspective. While there is no internationally agreed definition of pushbacks, in 2021 the UN Special Rapporteur on the Human Rights of Migrants, defined it as:

> various measures taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border.[112]

Pullbacks, sometimes labeled as pushbacks by proxy,[113] refers to the prevention of migrants from reaching European territory through the delegation of migration-related border control to third states.[114] In this regard, Frontex has been accused of being involved in both pushbacks and pullbacks. Cases have been reported where Frontex has supported pullback operations by sharing distress incidents directly to the Libyan Coast Guard,[115] as well as involvement in pushbacks operations by Member States through strategic guidance, data and operational and technical support, without sufficiently

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[111] Loukinas, (2022), p. 100.

[112] UNHRC (2021, May 12). Report of the Special Rapporteur on the human rights of migrants: Report on means to address the human rights impact of pushbacks of migrants on land and at sea. (A/HRC/47/30), para. 34.

[113] Clarke, L. (2018, June 28). In the Hands of the Libyan Coast Guard: Pushbacks by Proxy. *Open Migration*. https://openmigration.org/en/analyses/in-the-hands-of-the-libyan-coast-guard-pushbacks-by-proxy/ (accessed December 30, 2023).

[114] González Morales, F. (2021, May 12), para. 67: 'States increasingly externalize border governance measures, including by physically keeping arriving migrants, including registered asylum seekers, away from State territory. Externalization may entail delegating migration-related border governance and "entry" procedures to cooperating States, resulting in "pullbacks" [...].'

[115] See Frontex. 2020. *Frontex Consultative Forum on Fundamental Rights: Seventh Annual Report*, p. 24: 'Concerns were also raised about the potential impact of increased Frontex aerial surveillance over the Central Mediterranean and the provision of information on search and rescue incidents identified by Frontex to the Libyan Maritime Rescue Coordination Centre.'; and OHCHR report on pushback practices in the Mediterranean Sea. OHCHR. (2021, May). *Lethal Disregard: Search and rescue and the protection of migrants in the central Mediterranean Sea*, p. 21: 'Multiple migrants interviewed by OHCHR provided information indicating that their interception and return to Libya was facilitated by the deployment of European aerial assets over international waters within the Libyan and Maltese SAR zones'.

addressing the risk of violations of fundamental rights nor adopting measures to prevent its realization.[116] Pushbacks and pullbacks forms part of the externalization strategy of the EU, and is a widespread and systematic practice by the EU Member States in the Mediterranean.[117]

Pushback practices, but also pullbacks, are criticized because by informally forcefully returning migrants without evaluating their individual situation, this may violate the principle of *non-refoulement* as found in international refugee and human rights law. This principle prohibits returns of individuals to a country where there are substantial grounds for believing that the person would be in danger of being subjected to human rights violations.[118] The principle is also codified in the EU Charter of Fundamental Rights,[119] and in the context of Europe, pushbacks violating the principle of *non-refoulement*, may violate the prohibition of torture and inhumane treatment (Article 3 ECHR) as well as, depending on the circumstances, the prohibition of collective expulsion (Article 3, Protocol 4 ECHR). To this end, the ECtHR ruled in 2012, in the *Hirsi* case.[120] Italy was found to have violated both the prohibition of inhumane treatment and collective expulsion when it had transferred migrants rescued at sea back to Libya, without any examination of the individual situation of each person.[121] While a celebrated judgment due to its implications for protection of human rights,[122] the ruling has contributed to a development within the EU of finding 'ways to manage

[116] See The Frontex Scrutiny Working Group. (2021, July 14). *Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations*. LIBE Committee on Civil Liberties, Justice and Home Affairs; and Parliamentary Assembly of the Council of Europe. Resolution 2299 (2019). *Pushback policies and practice in Council of Europe member States*. Council of Europe. Strasbourg. The responsibility of Frontex for fundamental rights violations have been raised before the Court of Justice of the EU (CJEU), but so far, the Court have found these claims as inadmissible. See CJEU Order of 7 April, T-282/21, *SS and ST v Frontex*; CJEU Order of 13 December 2023, T-136/22, *Hamoudi v Frontex*; CJEU Judgment of 6 September 2023, T-600/21, *WS and Others v Frontex*; and CJEU Order of 28 November 2023, T-600/22, *ST v* Frontex.

[117] The Special Rapporteur on the human rights of migrants has reported on extensive number of cases of pushbacks by Greece, Cyprus, Italy, Malta and Spain. See UNHRC (2021, May 12), paras. 55, 59 73, 74 and 77.

[118] Under international refugee law, the prohibition only applies to refugees and asylum seekers, whereas under international human rights law, it applies to any person within the jurisdiction of the state. Article 33 the 1951 Refugee Convention lays out the principle of non-refoulement, which prohibits refugees from being expelled or returned to a country where their life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. It is also laid out in human rights conventions, and prohibits returns where there are substantial grounds for believing that the person would be in danger of being subjected to torture or to enforced disappearance. See Article 3 UNCAT and Article 16 ICPPED.

[119] Article 19(2), Charter of Fundamental Rights of the European Union.

[120] ECtHR Judgment of 23 February 2012, App. no. 27765/09 *Hirsi Jamaa and Others v. Italy.* For further discussion of *Hirsi* and the jurisdictional question see Section 4.4

[121] *Hirsi Jamaa and Others v. Italy*, paras. 110–138 and paras. 183–186.

[122] For discussion of the implications of the *Hirsi* judgment, see Heijer, M. D. (2013). Reflections on Refoulement and Collective Expulsion in the Hirsi Case. *International Journal of Refugee Law*, 25(2), 265–290.

migration at sea by avoiding any kind of physical contact with people on the move'.[123] Examples of this include the increased usage of aerial drones to monitor the Mediterranean Sea, and the consequent decrease of maritime patrols. It has also entailed strengthened cooperation with third countries to exercise a type of "contactless control",[124] as to cut the legal link with the jurisdiction of EU Member States and shift responsibility toward third states.[125] As such, following the strong focus on border control and pushbacks to stem arrivals, the step toward contactless control and pullbacks is an example of to the previous mentioned third stage of externalization: seeking to minimize arrivals through indirect techniques of financial, logistical, legal and technical assistance and training of authorities in third states. This way of controlling the external border allows the EU and the Member States to evade direct participation in the deterrence of migrants. Coastal states still have the obligation to offer rescue services in their search and rescue region, but through the increased aerial surveillance, the rescue operation of a detected vessels carrying migrants can be coordinated, passed on to the coast guard of a third state, and allow for minimum involvement of EU Member States. By doing so, they circumvent the duty to offer protection to refugees and avoid responsibility for potential human rights violations, such as infringement of the principle of *non-refoulement*, resulting from *pushback* practices. Through the cooperation with third states, the EU 'orchestrates border controls there via "assistance", "endorsement", "convening" and "coordination" that allow European policy makers to govern external borders indirectly'.[126] In this light, EU's cooperation on migration in the Mediterranean area with third states is crucial, as this allows for effectively handing over responsibility to these states. As such, we will now turn to the second characteristic of the EU's migration policy: external action and partnerships with third states.

2.3.3 EU external action and partnerships with third states

Cooperation and partnerships with third countries forms part of the external migration policy of the EU, this is evidentiated among other things by the 2020 New Pact dedicating a whole section to third country-partnerships.[127] The competence of the EU regarding questions of migration is granted upon it through its competence to act in the Area of Freedom, Security and Justice

[123] Alarm Phone, Borderline Europe, Mediterranea & Sea-Watch. (2020, June 17). *Remote control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*. https://www.eu-libya.info/, p. 5.

[124] For discussion on the contactless control deployed by the EU, see Moreno-Lax, V., & Giuffré, M. (2017, March 31). The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows. In S. Juss (Ed.), *Research Handbook on International Refugee Law* (Edward Elgar, Forthcoming).

[125] Lavenex, S. (2022). The cat and mouse game of refugee externalisation policies: Between law and politics in Dastyari, A., Nethery, A., & Hirsch, A. (Eds.). *Refugee externalisation policies*. Routledge, Taylor & Francis Group, 27–44, p. 36.

[126] Augustova et. al. (2023). Push and back: The ripple effect of EU border externalisation from Croatia to Iran. *Environment and Planning C: Politics and Space*, 41(5), 847-865, p. 851.

[127] Section 6 entitled 'Working with our international partners'.

(AFSJ).[128] In this way, the creation of the AFSJ put a new focus on external action also for migration matters.[129] However, the competence over the AFSJ is shared with the Member States,[130] and despite there being implied external powers for the EU to sign international agreements,[131] there is a general preference towards non-binding agreements when cooperating on migration matters with third countries. Altogether, the EU has developed 'an extensive network of bilateral and multilateral political, legal and financial instruments aimed at supporting the management of migration through cooperation with partner states.'[132]

External action taken by the EU on migration policy should not be equated with externalization. Cooperation and partnerships with third countries do not necessarily result in preventing access to Europe and the outsourcing of legal accountability. However, by considering the EU's approach to cooperation with third states on migration, the externalizing result is clear. One of the first manifestations of external action in the area of migration, was the 2005 Global Approach to Migration (GAM).[133] Under GAM, Mobility Partnerships (MP) were launched in 2007.[134] These partnerships essentially established that non-EU states, in exchange of preventing irregular migration, would be provided with improved opportunities for legal migration to the EU. In practice, this has resulted in the signing of readmission and visa facilitation agreements.[135] GAM was then transformed in 2011 into the Global Approach

[128] See Article 3(2) TEU.

[129] Upon the creation of the AFSJ, the need for partnership with countries of origin and transit to effectively 'manage migration flows at all their stages' was highlighted, and more so, that external relations were 'to be used in an integrated and consistent way' to build the AFSJ. See European Council (1999) Presidency Conclusions, Tampere European Council 15 and 16 October 1999, paras. 59 and 62.

[130] The EU may adopt measures on border checks, asylum and migration only when granted to do so under the Treaties, see article 4(2)(j) TFEU and Title V TFEU. For external action, the EU is only able to conclude readmission agreements, see Article 79(3) TFEU.

[131] García Andrade illustrates this implied power of the EU, See García Andrade, P. (2018). EU external competences in the field of migration: How to act externally when thinking internally. *Common Market Law Review*, 55(1), 157-200.

[132] Augustova et. al., (2023), p. 849.

[133] European Council. (2005, December 13). Global approach to migration: Priority actions focusing on Africa and the Mediterranean. (15744/05).

[134] European Commission. (2007, May 16). On circular migration and mobility partnerships between the European Union and third countries. (COM(2007) 248 final). Brussels. Between 2007 and 2015, nine Mobility Partnerships were signed with Moldova (2008), Cape Verde (2008), Georgia (2009), Armenia (2011), Morocco (2013), Azerbaijan (2013), Tunisia (2014), Jordan (2014) and Belarus (2015).

[135] See Natasja Reslow. (2015). EU "Mobility" Partnerships: An Initial Assessment of Implementation Dynamics. Politics and Governance, 3(2), 117–128. https://doi-org.ludwig.lub.lu.se/10.17645/pag.v3i2.398, p. 118; See also European Commission. (2011, November 18). The Global Approach to Migration and Mobility (COM [2011] 743). Brussels, p. 11: 'The Mobility Partnership (MP) is to be built in a balanced way around all four pillars of the GAMM, notably with commitments on mobility, visa facilitation and readmission agreements.'.

to Migration and Mobility (GAMM).[136] GAMM also incorporated the approach that cooperation with non-EU countries was to be guided by four pillars, among them 'preventing and reducing irregular migration and trafficking in human beings' and 'promoting international protection and enhancing the external dimension of asylum policy'.[137] The latter implying increased cooperation with non-EU countries to strengthen their asylum systems to 'enable these countries to offer a higher standard of international protection for asylum-seekers and displaced people who remain in the region of origin of conflicts or persecution'.[138] More so, in 2016, a new Migration Partnership Framework (MPF) with third countries was launched.[139] The three short-term objectives set out was 1) to save lives in the Mediterranean Sea; 2) To increase the rate of returns to countries of origin and transit; and 3) To enable migrants and refugees to stay close to home and to avoid taking dangerous journeys.[140] The externalization logics of these partnerships modalities is first of all shown by the overall aim of preventing irregular migration and stemming arrivals to Europe. More specifically, the focus on readmission agreements under the MPs is an example of externalization as it seek to minimize arrivals in the EU through creating rapid returns. More so, the pillar of GAMM to enhance the external dimension of asylum policy, is another example being a measure seeking to dissuade asylum seekers from departing through improving local hosting capacities. As to the MPFs, considering the five progress reports published during the first year of implementation,[141] it becomes clear that the overall objective was to prevent people from leaving the partnership countries and send back those who had

[136] European Commission. (2011, November 18). The Global Approach to Migration and Mobility (COM [2011] 743). Brussels.

[137] The other two pillars were: Organizing and facilitating legal migration and mobility; and Maximizing the development impact of migration and mobility.

[138] European Commission. (2011, November 18). The Global Approach to Migration and Mobility (COM [2011] 743). Brussels, p. 17.

[139] European Commission. (2016, June 7). Communication from the Commission on establishing a new Partnership Framework with third countries under the European Agenda on Migration. (COM(2016) 385 final). Strasbourg.

[140] Ibid., see p. 5f.

[141] See European Commission. (2016, October 18). *First Progress Report on the Partnership Framework with third countries under the European Agenda on Migration*. (COM(2016) 700 final). Brussels; European Commission. (2016, December 14). *Second Progress Report: First Deliverables on the Partnership Framework with third countries under the European Agenda on Migration*. (COM(2016) 960 final). Brussels; European Commission. (2017, March 2). *Third Progress Report on the Partnership Framework with third countries under the European Agenda on Migration* (COM(2017) 205 fina). Brussels; European Commission. (2017, June 13). *Fourth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration*. (COM(2017) 350 final). Strasbourg; and European Commission. (2017, September 6). *Fifth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration*. (COM(2017) 471 final). Brussels. The European Commission has not published any more MPF progress reports since the fifth one in 2017.

managed to,[142] which again illustrates the effect of preventing access to Europe and placing responsibility on third states.

More so, partnerships with third states as a key element in the EU's migration governance and management is also evident from the steadily increase in the EU budget on migration dedicated to funding towards non-EU states and cooperation. In November 2015, the EU hosted a summit on migration in Valletta, which brought together European and African Heads of State and Governments in an effort to strengthen their cooperation.[143] The summit resulted in, among other things,[144] the establishment of the EU Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa (EUTF).[145] As such, we recall the fact that externalization may materialize itself through seeking to minimize arrivals by cooperation with third states through indirect techniques, notably financial support, material aid and training of border and coast guards. For this reason, to exemplify how this externalization practice has expressed itself, the EU's cooperation with Libya, Morocco and Turkey will be discussed in the following Section.

2.3.4 Examples of cooperation with third countries

2.3.4.1 Libya

In 2017, cooperation with Libya was reaffirmed as a key element to ensure effective control of the EU's external border and stem illegal flows by the Malta Declaration of the European Council. The Declaration included the priority of the EU in providing training, equipment and support to the Libyan Coast Guard as 'capacity building [was] key for the authorities to acquire control over the land and sea borders and to combat transit and smuggling activities'.[146] Through the EUTF, Libya had received a total of 59 million

[142] This fact has also been pointed out by scholars, underlining that the interests of third countries under MPF has been dismissed in practice, whereas the interest of the EU, on readmission and returns, has become the main objective. See Castillejo C. (2017). The EU Migration Partnership Framework: time for a rethink?. Discussion Paper, No. 28/2017 *German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE)*, p. 6*;* and Bisong, A. (2020). Migration Partnership Framework and the Externalization of European Union's (EU) Migration Policy in West Africa: The Case of Mali and Niger in Rayp, G., Ruyssen, I., Marchand, K. (eds) *Regional Integration and Migration Governance in the Global South*. United Nations University Series on Regionalism, vol 20. Springer, Cham. 217–237, p. 225f.

[143] Council of the European Union. Valletta summit on Migration 11-12 November 2015. Malta.

[144] The summit also resulted in the creation of a political declaration and action plan.

[145] European Commission (2015, November 12). A European Union Emergency Trust Fund for Africa. (MEMO/15/6056) https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_6056 (accessed December 30, 2023).

[146] European Council. (2017, February 3). *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route,* para. 6.

euros as of February 2022. The funding has aimed at 'integrated border management' and focused on 'strengthening the capacity of the Libyan authorities through training on search and rescue, including human rights, and through the provision of equipment'.[147] Already in 2013, the EU was training and mentoring the Libyan authorities in developing capacity for enhancing the security of the land, sea and air borders, through the EU Border Assistance Mission (EUBAM) in Libya.[148] Likewise, in 2016, the mandate of the EU maritime mission Operation Sophia was extended to include capacity building and training of the Libyan Coast Guard and Navy.[149]

However, the support of the EU and its Member States in training and funding the Libyan Coast Guard is clearly problematic from the point of view of targeting migrants at sea trying to reach safety. Not only for its implications as an externalization method, but because of the systematic and widespread pattern of human right abuses and precarious situation of migrants in Libya.[150] In this regard, Italy and Malta have been criticized for not ensuring that their cooperation with Libya complies with international law and respect for human rights.[151] At the moment of writing, a case is pending before the

[147] European Commission. (2022, February). EU Support on Migration in Libya: EU Emergency Trust Fund for Africa North of Africa window. European Commission. Fact Sheet. https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-03/EUTF_libya_en.pdf (accessed December, 30, 2023).

[148] Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya). The mandate has since then been renewed multiple times, most recently in June 2023, expending the objective of the mission to "enhancing the capacity of the relevant Libyan authorities and agencies to manage Libya's borders, to fight cross-border crime, including human trafficking and migrant smuggling, and to counter terrorism". See Council Decision (CFSP) 2023/1305 of 26 June 2023 amending Decision 2013/233/CFSP on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya. For discussion on the support of the EU to Libya, see Pacciardi, A., & Berndtsson, J. (2022). EU border externalisation and security outsourcing: exploring the migration industry in Libya. *Journal of Ethnic and Migration Studies*, 48(17), 4010–4028, p. 4016.

[149] Council Decision (CFSP) 2016/993 of 20 June 2016 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA).

[150] The final report from the UN Fact-Finding Mission on Libya reported on in the context of deprivation of liberty where, migrants, often arbitrarily detained and then held at either official sites led by the Directorate for Combating Illegal Migration or unofficial locations, had been subject to acts of murder, enforced disappearances, torture, enslavement, sexual violence, rape and other inhuman acts. See UN Independent Fact-Finding Mission on Libya. (2023, March 3). Report of the Independent Fact-Finding Mission on Libya. UN Human Rights Council (UNHRC). (A/HRC/52/83), paras. 40-47; see also report on human rights situation in Libya by Amnesty and Human Rights Watch: Amnesty International. (n.d.) Libya 2022. https://www.amnesty.org/en/location/middle-east-and-north-africa/libya/report-libya/ (accessed December 30, 2023) and Human Rights Watch. (2019, January 21). No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya. https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya (accessed December 30, 2023).

[151] In 2022, the UN Fact-Finding Mission on Libya held that 'little has been done […] by [Libyan authorities'] international partners, including Italy and Malta who have cooperation agreements with Libya in the field of migration control.'. See UN Independent

ECtHR for alleged human right violations committed against migrants who were in distress at sea and the responsibility of Italy for its assistance to the Libyan Coast Guard in intercepting and returning the migrants to Libya.[152]

Additionally, it has been found that Libyan state officials, notably the Coast Guard, has colluded with traffickers and smugglers in the context of interception and deprivation of liberty of migrants.[153] More so, that the monetary and technical support and equipment provided by the EU and its Member States, had contributed to such interception and detention.[154] Notwithstanding this finding, the EU has not stopped providing support. As late as in October 2023, an annex to a letter sent by the President of the European Commission to the European Council, reported in a positive light how five search and rescue vessels had been delivered to the Libyan Coast Guard during 2023 and that 10 900 individuals had been rescued or intercepted by Libya and then disembarked.[155] The fates of these persons upon their return to Libya remain unknown. Altogether, the financial support given to Libya is a clear case of externalization as it aims at increasing the capacity of the Libyan Coast Guard in intercepting migrants and returning them to Libya, seeking to prevent arrivals to Europe without much concern about the human rights situation in Libya nor corruption of state officials.

2.3.4.2 Morocco

As Spain noted a migration influx in 2018, the EU responded with allocating funding to Morocco from the EUTF. Between 2015 and 2021, Morocco had received 234 million euros in total from the EUTF,[156] mainly with the aim of

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Fact-Finding Mission on Libya. (2022, June 27). Report of the Independent Fact-Finding Mission on Libya. UNHRC. (A/HRC/50/63), para. 70.

[152] See ECtHR Communicated Case of 26 June 2019. App. No. 21660/18. *S.S. and Others v. Italy*. About 150 people were on board an inflatable boat in November 2017, making the crossing from Libya, they had signaled the Italian Coast Guard to be rescued, which notified the Libyan Coast Guard. Upon the rescue operation multiple persons drowned and others who survived, were taken to detention centers in Libya and alleging to have been subject to inhuman treatment.

[153] UN Independent Fact-Finding Mission on Libya. (2023, March 3). Report of the Independent Fact-Finding Mission on Libya. UNHRC. (A/HRC/52/83), para. 44.

[154] UN Independent Fact-Finding Mission on Libya. (2023, March 3). Report of the Independent Fact-Finding Mission on Libya. UNHRC. (A/HRC/52/83), para. 46.

[155] The letter and annex were revealed and published by the non-profit organization Statewatch. See Statewatch. (2023, November 16). EU planning new anti-migration deals with Egypt and Tunisia, unrepentant in support for Libya. https://www.statewatch.org/news/2023/november/eu-planning-new-anti-migration-deals-with-egypt-and-tunisia-unrepentant-in-support-for-libya/ (accessed December 30, 2023).

[156] European Commission. (2023, Febraury). EU migration support in Morocco. European Commission Fact Sheet. https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-03/EU_support_migration_morocco.pdf (accessed December, 30). Scholars have noted that majority funding have been provided since 2018 and onwards. See Gazzotti et. al. (2023). A "European" Externalisation Strategy? A Transnational Perspective on Aid, Border Regimes, and the EU Trust Fund for Africa in Morocco. In Finotelli, C., Ponzo, I. (eds) *Migration Control Logics and Strategies in Europe*. IMISCOE Research Series. Springer, Cham. 69–89, p. 78.

helping 'step up the fight against migrant smuggling and trafficking of human beings, including through reinforced integrated border management'.[157] A further 152 million euros cooperation program was announced in March 2023 to 'strengthen Morocco's border management actions in the fight against smuggling networks, the National Strategy of Morocco on Immigration and Asylum, as well as the voluntary return and the reintegration of migrants to their countries of origin'.[158]

The financial support by the EU to strengthen Morocco's border management, has led to an increased presence of the Moroccan Coast Guard in the strait of Gibraltar and surrounding waters.[159] While *prima facie* this may come across as something positive due to increasing rescue operations, it has been observed that as a result, migrants are travelling further distances in order to reach Spanish waters, thus, waiting longer before calling for help, ultimately making journeys far more dangerous and resulting in a larger loss of life.[160] More so, the transfer of rescue operations to Morocco by Spain, without consideration to the protection need of migrants, especially in light of the quality and methods used by the Moroccan authorities, has been criticized.[161] In this regard, Statewatch has called attention to the human right violations committed by Moroccan security forces against migrants, and the indirect role of the EU in facilitating such practice through the strengthening of Moroccan border security and surveillance.[162] Especially, the dispersal

[157] See European Commission. (2018, December 14). Western Mediterranean Route: EU reinforces support to Morocco. Press Release. https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6705 (accessed December 30, 2023).

[158] See European Commission. (2023, March 2). EU launches new cooperation programmes with Morocco worth €624 million green transition, migration and reforms. Press release. https://ec.europa.eu/commission/presscorner/detail/en/ip_23_423 (accessed December 30, 2023) The support was launched under the Neighbourhood, Development and International Cooperation Instrument – Global Europe. See Regulation 2021/947. Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU of the European Parliament and of the Council and repealing Regulation (EU) 2017/1601 of the European Parliament and of the Council and Council Regulation (EC, Euratom) No 480/2009.

[159] Bellido Lora (2023), p. 104.

[160] Bellido Lora (2023) p. 114; see also ACAPS. (n.d.) Country analysis: Spain. https://www.acaps.org/en/countries/spain (accessed December 30, 2023): 'Since late 2020, there have been heightened security and intensified patrols across the Western Mediterranean route. As a result, arrivals to the Spanish mainland have decreased, and people have been pushed to take longer and more dangerous routes'.

[161] Bellido Lora (2023), p. 120, Prior to 2021 all migrants rescued by Spain had been taken to Spanish ports. However, following an agreement between the two states, SASEMAR commenced disembarking survivors in Morocco for interception in Moroccan waters. See Martín, M. & Abellán, L. (2019, February 21). Spain and Morocco reach deal to curb irregular migration flows. *El País*. https://english.elpais.com/elpais/2019/02/21/inenglish/1550736538_089908.html (accessed December 30, 2023).

[162] Statewatch. (2019, November 24). Aid, border security and EU-Morocco cooperation on migration control. https://www.statewatch.org/analyses/2019/aid-border-

tactic of Morocco has been heavily criticized. A practice where Moroccan police forces have targeted Black individuals, racially profiled as "irregular sub-Saharan migrants", and arbitrarily arrested them in Northern cities of Morocco close to the border area, without legal basis. Then, brought them to police stations before transporting them several hours south and leaving them without any reception infrastructure nor support to travel back.[163] While the official reason for the dispersals given by Morocco is to dismantle human trafficking networks,[164] scholars argue that the strategy of dispersal has the main aim of removing migrants from the border zone so as to prevent crossings.[165] In this way, the funding of the EU is seemingly achieving the effect of externalization; through financial support the Moroccan authorities are strengthened and departures toward the EU is prevented. All the same, rather than focusing on the protection need of migrants or increasing the capacity of saving lives, the main aim of border security and migrant control is apparent: the financial support being granted without conditioning its use for rescue operations, but rather for reinforced border control.[166] Ultimately, favoring reducing arrivals to the EU, externalizing border controls, without consideration to the vulnerable situation of migrants in Morocco and their need of protection.

2.3.4.3 Turkey

As for cooperation with Turkey, the agreement signed in March 2016, that came to be known as the EU-Turkey Deal, is of main importance. By the Deal, the EU Member States and Turkey decided 'to end the irregular migration from Turkey to the EU'.[167] Interestingly, the CJEU held in a much-questioned ruling that, rather than being an agreement reached between Turkey and the European Council, it had been concluded between Turkey and

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security-and-eu-morocco-cooperation-on-migration-control/ (accessed December 30, 2023).

[163] Gazzotti, L., & Hagan, M. (2021). Dispersal and dispossession as bordering: Exploring migration governance through mobility in Post-2013 Morocco. *The Journal of North African Studies*, 26(5), 912–931, p. 917f. Between July and September 2018, a Moroccan NGO estimated that 6 500 people were arbitrarily arrested and displaced during these operations. Groupe Antiraciste de Défense et d'accompagnement des Etrangers et Migrants (GADEM). (2018, September) *Coûts et blessures: Rapport sur les opérations des forces de l'ordre menées dans le nord du Maroc entre juillet et septembre 2018 Éléments factuels et analyse*. https://loujna-tounkaranke.org/wp-content/uploads/2018/12/20180927_GADEM_Couts_et_blessures.pdf (accessed December 30, 2023).

[164] Ahdani J. (2018, September 7). Mustapha El Khalfi: "Le Maroc refuse d'être le gendarme de l'immigration clandestine". *Telquel*. https://telquel.ma/2018/09/07/mustapha-el-khalfi-le-maroc-refuse-detre-le-gendarme-de-limmigration-clandestine_1609841 (accessed December 30, 2023).

[165] See Gazzotti & Hagan (2021), p. 915; and Tazzioli, M. (2020). Governing migrant mobility through mobility: Containment and dispersal at the internal frontiers of Europe. Environment and Planning C: Politics and Space, 38(1), 3-19.

[166] Bellido Lora (2023), p. 113.

[167] European Council. (2016, March 18 March) EU-Turkey statement. Press release. https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ (accessed December 30, 2023).

the twenty-eight Member States of the EU.[168] The finding of the CJEU is interesting from the perspective that acts or decisions that appear to be made by the EU as an international organization, may actually be attributable to the states themselves. While the conclusion of the CJEU can be questioned,[169] it demonstrates that migration policies seemingly developed within the framework of the EU, may actually be attributable to the Member States themselves. As such, it serves the purpose of this thesis in supporting the claim that if these policies violate human rights, European states – which are also Member States of the EU – could be held responsible.

To achieve the goal of ending irregular migration, the EU-Turkey Deal formulated nine action points. One being that the EU agreed to mobilize and disburse a total of six billion euros to Turkey under the Facility for Refugees in Turkey project.[170] Additionally, considering the immense impact for migrants and refugees trying to reach the EU from Turkey, the following three action points of the Deal are examples of externalization:

1. All irregular migrants crossing from Turkey to the Greek islands were to be returned to Turkey.
2. For every Syrian returned to Turkey from the Greek islands, another Syrian were to be resettled from Turkey to the EU
3. Turkey was to take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU.[171]

The EU-Turkey Deal has been criticized due to its externalizing effect. More concretely, the EU has been criticized for 'outsourcing the management of migration flows to Turkey, and not assuming its fair share of responsibility

[168] The validity of the Deal was brought before the CJEU in three separate cases to annul it based on the argument that the European Council had concluded an agreement without following the procedure laid out by EU law. While it was disputed that the Deal amounted to an international agreement – instead it was described as a political commitment– the finding of the Court, that it was attributable to the Member States, meant that it lacked jurisdiction to rule on its annulment. See CJEU Order of 28 February, T-192/16, *NF v European Council;* CJEU Order of 28 February, T-193/16; *NG v European Council;* and CJEU Order of 28 February, T-257/16; *NM v European Council.*

[169] For discussion on the decision by the CJEU see Carrera, S., den Hertog, L., & Stefan, M. (2017, April 15). It Wasn't Me! The Luxembourg Court Orders on the EU–Turkey Refugee Deal. *CEPS Policy Insights, 2017(15).* Centre for European Policy Studies; and Spijkerboer, T. (2018). Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice. *Journal of Refugee Studies*, 31(2), 216–239.

[170] The EU agreed to speed up the disbursement of three billion euros that had been allocated to Turkey for the Facility for Refugees in Turkey project, as well as that an additional three billion euros funding would be mobilized, see point 6 of the EU-Turkey Statement. In June 2018, the additional three billion euros were agreed to be provided to Turkey.

[171] The other five points were to 4) activate a Voluntary Humanitarian Admission Scheme once crossings had been reduced, 5) accelerate the fulfilment of the visa liberalisation roadmap, 7) work on the Customs Union, 8) re-energizing the accession process; and 9) work together to improve humanitarian conditions inside Syria.

for refugee protection'[172] In this light, the UN High Commissioner for Human Rights has criticized the Deal for its serious implications from a human rights perspective.[173] The aim of returning refugees and migrants,[174] raises issues related to the risk of collective expulsions, without individual assessment and right to appeal.[175] Especially in view of that Turkey has been reported to deploy a practice of forcible mass returns of refugees to Afghanistan, Iraq and Syria, violating the principle of *non-refoulement* by putting them at risk of serious human rights violations.[176] This makes the return of Syrian refugees from the EU to Turkey concerning as well. Additionally, on the European side, the default detention of all new arrivals on the Greek islands, as a means of safeguarding return to Turkey in accordance with the EU-Turkey Deal, has been criticized as it does not comply with the principle that detention should be a measure of last resort.[177] Particular concern has been raised about cases

[172] Kerwin et al. (2023). Between Humanitarian Assistance and Externalizing of EU Borders: The EU-Turkey Deal and Refugee Related Organizations in Turkey. *Journal on Migration and Human Security*, 11(1), 57–74, p. 59.

[173] United Nations High Commissioner for Human Rights. (2016, March). *UN rights chief expresses serious concerns over EU-Turkey agreement*. OHCHR Press Release. https://www.ohchr.org/en/press-releases/2016/03/un-rights-chief-expresses-serious-concerns-over-eu-turkey-agreement (accessed December 30, 2023).

[174] The lawfulness of returns of asylum-seekers to Turkey under the Deal is based on the EU Asylum Procedures Directive, by which a person's asylum application may be found inadmissible if a third state is considered either a "first country of asylum" or a "safe third country", and the labelling of Turkey as a safe third country where asylum-seekers are able to access "effective protection". See Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), Article 33(2)(b)-(c), 35 and 38.

[175] The High Commissioner noting that, although on paper declaring that it will comply with international law standards, this in practice requires a well-functioning infrastructure and properly trained state officials, for it to effectively allow each individual claim to be assessed. For critic of the limited access to effective protection for refugees in Turkey, See Amnesty International. (2016). No Safe Refuge: Asylum-Seekers and Refugees Denied Effective Protection in Turkey. AI index EUR 44/3825/2016. https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR4438252016ENGLISH.pdf (accessed December 30, 2023).

[176] Amnesty International. (2015, December 16). Europe's Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey. AI Index EUR 44/3022/2015 https://www.amnesty.org/en/documents/eur44/3022/2015/en/ (accessed December 30, 2023); Amnesty International, (2016, March 23. Turkey 'Safe Country' Sham Revealed as Dozens of Afghans Forcibly Returned Hours after EU Refugee Deal. https://www.amnesty.org/en/latest/news/2016/03/turkey-safe-country-sham-revealed-dozens-of-afghans-returned/ (accessed December 30, 2023); and Amnesty International. (2016, April 1). Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU-Turkey Deal. https://www.amnesty.org/en/press-releases/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/ (accessed December 30, 2023).

[177] Papastergiou, V. (2021, November 16). *Detention as the Default: How Greece, with the support of the EU, is generalizing administrative detention of migrants*. Joint Agency Briefing Paper. Oxfam International and Greek Council for Refugees.

of migrants who have been detained upon arrival without being identified, nor formally registered, before being pushed back to Turkey.[178]

In sum, having discussed the cooperation between the EU with Libya, Morocco and Turkey, each partnership and cooperation expresses itself and is realized in different ways, yet the end result is the same; the external action of the EU through cooperation with non-EU states has resulted in the immaterial border of the EU being moved increasingly further south, as border control functions are exercised by these third states. This is achieved through the funding of third states focused on border management and strengthening the capacity of border and coast guards, so as to prevent migrants from departing and bringing them back during rescue operations at sea, as the case in Libya and Morocco. But also in the context of the EU-Turkey Deal where even refugees who reach the territory of the EU, are sent back to Turkey. However, one particularity of the EU-Turkey Deal, which will bear relevance for later discussions of responsibility of EU Member States resulting from the financial support given to third states, should be noted. In comparison to the financial support given to Libya and Morocco – aiming at strengthening the capacity of the coast guard to rescue and intercept migrants to return them – the funding under the EU-Turkey Deal is dedicated to refugee projects that contributes to improving the standard of living, health, and education.[179] From this sole perspective, financial support to Turkey may not be as concerning. Nonetheless, human rights of migrants are still very much at risk as a result from the Deal. In any case, all of the above makes the cooperation the EU has with Libya, Morocco and Turkey, key examples of the externalization of border control done by the EU: seeking to reduce arrivals to Europe, limiting contact with migrants and ultimately, shifting responsibility away from the EU and its Member States. This shift of responsibility has resulted in a situation where human rights of migrants are violated without anyone, or any state, being held responsible. Importantly, the thousands of migrants who have disappeared and died in the Mediterranean as a result of the EU's focus on protecting the external border rather than persons, are unaccounted for.

[178] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). (2019, February 19). Report to the Greek Government on the visit to Greece carried out by the CPT from 10 to 19 April 2018. (CPT/Inf (2019) 4). Strasbourg, para. 136-145. Including an investigation by The New York Times which reported that Greece had detained migrants and held them incommunicado at a secret extrajudicial location in 2020 before expelling them to Turkey without due process. See The New York Times. (2020, March 10). *At Secret Site in Greece, Suspected Migrants Are Warehoused.* https://www.nytimes.com/2020/03/10/world/europe/greece-migrants-secret-site.html (accessed December 30, 2023).

[179] For comparison how the EU's financial support to Libya and Turkey complies with the obligations on Member States by virtue of the International Covenant on Economic, Social and Cultural Rights, see Pijnenburg, A. (2023). Migration Deals Seen through the Lens of the ICESCR. *International Journal of Refugee Law*, 35(2), 151–170.

2.4 Lack of accountability for missing migrants

This Chapter begun by addressing the fact that in order to understand the reaction by the EU to migration influxes over the Mediterranean, it was necessary to consider the obligation of coastal states under international maritime law to provide search and rescue services. As was argued, this obligation has resulted in the EU adopting measures on migration that seek to allow EU coastal states to comply with their obligation to assist people in distress at sea while simultaneously upholding the migration policy of the EU. In essence, the measures on migration and border control have been characterized by a strong focus on anti-smuggling measures, a security logic which favors protection of the external border, rather than protection of the lives of migrants, and externalization of border controls to third states. By pinpointing the guilt migrant smugglers, the EU has effectively distanced itself from its role in these deaths. More so, while aerial surveillance has resulted in an increased capacity of detecting migrants in distress at sea, it has come accompanied with the withdrawal of maritime operations by the EU and the Member States, and a widespread use of pushbacks and pullbacks. Ultimately, the EU's Member States have increasingly moved toward a contactless control of migration as to avoid responsibility. Cooperation with third states has shifted border control functions from the hands of the EU; either through financial support to strengthen the capacity of the border and coast guard, as the case for Libya and Morocco, or through the direct agreement of sending back migrants and refugees to third states, as under the EU-Turkey Deal. In the end, the common factor between the different policies and measures adopted, have been the main aim of reducing and stopping arrivals of migrants to Europe.

Looking at statistics of arrivals to Europe from the last years, it seems like the measures adopted by the EU and the Member States, seeking to stem migration, have been successful. The number of arrivals was steadily decreasing between 2016 and 2020, from 373 652 in 2016; to 95 774 arrivals in 2020. This downward trend has slightly changed the last three years, with 2022 recording 159 410 arrivals, and 2023, 260 726 arrivals.[180] However, nothing compared to the numbers in 2015, and also, as often the case, explained by other factors such as the Covid-19 pandemic temporarily and partly halting migration movements in 2020. From this, one would assume that given that the numbers of arrivals to Europe have decreased in the last eight years, the number of migrants going missing and dying in the Mediterranean should also have decreased. The contrary is true. In 2015,

[180] Data as collected by UNHCR. See UNHCR. Mediterranean situation. https://data.unhcr.org/en/situations/mediterranean (accessed December 31, 2023) The increase from 2022 and forward can also be explained by that the statistics collected from 31 December 2021 include data from all European countries, and before limited to Italy, Cyprus, Malta, Greece and Spain (including the Canary Islands). It should be pointed out to that for geographical reasons, the absolute majority of arrivals to Europe is through these countries.

3 771 persons were estimated to have died or gone missing. In 2022, 2 439 persons were estimated to have disappeared or died in the Mediterranean.[181] This means that from one in 3 600 arrivals going missing or dying in 2015, the same proportion has changed to one for every 150 arrival in 2022.[182] European coastal states are obliged to provide search and rescue services and assist migrants, regardless of legal status, in distress at sea. Yet, the numbers on deaths and missing people in the Mediterranean seem to testify to that, while the EU and its Member States have adopted measures to elevate border surveillance, the likelihood for perishing at sea has increased. To understand why this is one could call attention to the fact that naval vessels have been successively replaced by aerial drones, meaning that while maritime surveillance remains present, the detection of people in distress at sea does not guarantee immediate rescue. Instead, it requires locating and coordinating rescue operations. More so, perhaps the very increase of surveillance, facilitating pullbacks by the state that migrants depart from, forcing smugglers to choose new routes to avoid detection – often times more dangerous ones – is leading to higher disappearances and deaths. In this light, the securitization of borders and externalization of border control is key, as the policies and measures on migration adopted by the EU and the Member States are seemingly, if not causing, at least contributing to the larger loss of life.

With much focus being placed on how to halt arrivals by European state, less attention is given to those who vanish at sea, and with this, an indifference toward families searching for their loved ones. Of the 28 427 migrants who have gone missing in the Mediterranean, the extent to which these individuals have been identified is low.[183] The lack of investigation and identification leaves the relatives of each one of the disappeared persons in a permanent state of uncertainty. However, the need to investigate and identify the missing is just one side of the coin, the other side is accounting for these migrants and establishing responsibility for these deaths. A complex task due to the often overlapping and interacting legal regimes – human rights law, refugee law,

[181] Data as collected by UNHCR. See UNHCR. Mediterranean situation. https://data.unhcr.org/en/situations/mediterranean (accessed December 31, 2023).

[182] It should be emphasized that these statistics are estimations, and that there is a high probability that the actual number of missing and dead individuals is even higher. The IOM has in its collection of data on missing migrants pointed out that collecting data on migrant deaths in the Mediterranean is especially difficult, and that the documented numbers are likely an undercount, due to the nature of any overseas crossing and the high likelihood that migrants disappear without a trace in cases where people are lost at sea or shipwrecks occur with no survivors. See International Organization for Migration, Missing Migrants Project – Mediterranean https://missingmigrants.iom.int/region/mediterranean (accessed December, 30 2023).

[183] According to a study made by the International Committee of the Red Cross (ICRC) Paris Delegation Forensic Department, between 2014-2019, the remains of deceased migrants in Greece, Italy and Spain, represent around 13 per cent of the over 20,000 missing or deceased migrants reported by the IOM during the same period. See International Committee of the Red Cross (ICRC). (2022, November). *Counting the Dead*. ICRC Paris Delegation Forensic Department. Online Report. 1956/002.

maritime law, EU law – and the multiplicity of actors involved ranging from different states and non-state actors. Be that as it may, the reality is that thousands of migrants are dying trying to reach Europe, and few states have been held accountable for this, if at all.[184] The similarities and widespread character of these deaths seem to testify to the existence of a systematic issue, extending beyond the fault of migrant smugglers. For this reason, the responsibility of European states for the humanitarian crisis in the Mediterranean should be evaluated, because without accountability, the current state of affairs which fosters a situation that allows for disappearances and deaths to happen, will remain.

[184] In proceedings before the ECtHR, Italy has been held responsible for violating the principle of non-refoulement by a pushback operation of migrants in *Hirsi Jamaa and Others v. Italy*; and Greece was found responsible for the death of migrants in the Mediterranean uring an alleged pushback operation, causing a shipwreck. See ECtHR Judgment of 7 July 2022, App. no. 5418/15 *Safi and Others v. Greece*.

3 International Law on Enforced Disappearances

Considering the devastating numbers of disappearances and deaths in the Mediterranean Sea in recent years, and the fact that these numbers have not dropped in conjunction with the decrease of arrivals to Europe, it appears essential to examine if these deaths are a result of violations of international human rights law. More importantly, to assess the responsibility of states. Granted that states are the main addressee of human rights obligations under international human rights law, it is natural that their responsibility should be evaluated for the humanitarian crisis and massive loss of life in the Mediterranean. In this context, there are various different legal regimes under which one could assess the responsibility of states,[185] but the international regime on disappeared persons in the context of enforced disappearances appears useful for the following reasons: first, the result from disappearances is most often death; second, disappearances leave the relatives in a state of despair not knowing what has happened to their loved ones; and third, the lack of any investigations into the fate of the disappeared. Seemingly, there are similarities between victims of enforced disappearances and the situation migrants and their relatives experience in the Mediterranean. More so, taking into account the vulnerable situation of migrants, there is an obvious need to consider what options there are to hold states responsible and remedy the current state of impunity.

3.1 Background

Europe is not usually the first continent to come to mind when enforced disappearances are brought up. Although there certainly are European states which have been found to deploy such practices, it is mainly dictatorships in Latin-American states which have been associated with this crime.[186] Nevertheless, the first instance of enforced disappearances has historically been attributed to the practice of the German *Third Reich* during the Second World War of secret transfers of prisoners from occupied territories to Germany.[187] More precisely, the Night and Fog decree (*Nacht und Nebel*

[185] For example, violations of the International Covenant on Civil and Political Rights, the obligations of the ECHR as such, EU Member States for violations of the EU Charter on Fundamental Rights, the Convention on the Rights of the Child for violations of the rights of children who have been forced to migrate etc.

[186] Enforced disappearance are however committed worldwide, on the African and Asian continent as well. See for example Heath, J., & Zahedi, A. (2023). *Book of the Disappeared*. University of Michigan Press; Nudd, E., & Vicente, A. (2021). Addressing a forgotten struggle: Victims of enforced disappearance in Africa. *Torture Journal*, 31(2), 68–82; and Ashraf, S., Badshah, I., & Khan, U. (2023). The role of women's political activism against enforced disappearances in Balochistan: a study of the Baluch missing persons. *Inter-Asia Cultural Studies*, 24(6), 979–993.

[187] Although there had existed examples of enforced disappearances before Nazi Germany, one example being the secret arrest and imprisonment in the Soviet Union under the leadership of Stalin, the decree represents its first usage as an explicit state policy. See

Erlass) issued on 7th of December 1941 is often marked as the precedent.[188] Labeled as a "fundamental innovation" in the Nuremberg Trials, it was explained that the complete absence of any information to the whereabouts or fate of the disappeared person would have a deterrent effect, particularly through the intimidation and anxiety caused by the uncertainty experienced by the family of the disappeared person.[189] In this way, the idea that 'effective and lasting intimidation of a civilian population could only be achieved either by capital punishment or by measures which keep the victim's relatives and the population in general uncertainty as to his fate' was effectively introduced into the collective consciousness.[190]

This practice was then further developed during the military dictatorships in Latin America during the 1960s to the 1980s. As a response to the social rights movements that had gained momentum after the end of the Second World War, regimes were established in various countries by the conservative right-wing elite that pushed back against ideas of the political left, and the opponents of these regimes were targeted.[191] The first country in Latin America in which enforced disappearances were practiced on a systematic scale was Guatemala. The *coup d'état* in 1963 brought about a period of oppression where enforced disappearances were deployed. Similarly, enforced disappearances formed part of the strategy of the military regimes in Brazil in 1969, in Uruguay and Chile in 1973, Argentina in 1976 to El Salvador and Honduras in 1980.[192] More importantly, the practice of enforced disappearances in South and Central America reached a new level of severity through the cooperation that existed between the various dictatorships. This cooperation was established by the US-backed Operation Condor, by which the involved states were exchanging intelligence information.[193] More critically, the military regimes were cooperating in facilitating returns of political refugees and exiles to their country of origin. Members of the intelligence services were allowed to operate and arrest persons within the other states, and security forces of the state a person had fled to would also abduct and hand them over to the authorities of the other state.[194] By this

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Finucane, B. (2009, June 28). Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War. *Yale Journal of International Law*, 35(1), 171–198, p, 175.

[188] The decree ordered for prisoners in the occupied territories, who had committed an offence against the *Reich* or its armed forces and were either not punished with the death penalty or sentenced within eight days from arrest, be secretly transferred to Germany. See Scovazzi & Citroni (2007) p. 4.

[189] Finucane (2009) p. 176.

[190] Scovazzi & Citroni (2007) p. 5.

[191] Vermeulen, M. L. (2012). *Enforced disappearance: determining state responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance. Intersentia*, p. 5f.

[192] See Vermeulen (2012) pp. 8-14 for an overview of the historical practice of enforced disappearance in Latin-American states.

[193] Involved states were initially Argentina, Chile, Uruguay, Paraguay, Brazil and Bolivia, later joined by Peru and Ecuador.

[194] See Vermeulen (2012) pp. 6-8 and Scovazzi & Citroni (2007) p. 181.

advanced cooperation established under operation Condor, the practice of enforced disappearance reached a new interstate level.

However, enforced disappearances are not limited to Central and South America, but examples of this practice can also be found in the rest of the world. In Europe, cases include, but are not limited to Spain during the Spanish Civil War and the Franco regime; the war of Yugoslavia with persons disappearing in Bosnia Herzegovina, Croatia, Serbia and Kosovo; following Turkey's invasion of Cyprus and through the oppression of the Kurdish population; and the Soviet Union and Russia, notably the Katyń and Caucasus massacres, but also the conflicts in Belarus and Ukraine.[195]

The similarities between the contexts in which enforced disappearances have occurred can be noted; dictatorships, internal conflict and targeted individuals being opposed politically to the ruling government. Nonetheless, the similarity of circumstances where enforced disappearances have been deployed should not be exaggerated as this is not the defining feature of the crime. Rather, the focal point should be the common characteristics of the practice as it has been realized in various countries: deprivation of liberty and the refusal to acknowledge such deprivation. Most importantly, the denial to provide any information is central to the crime. As it is only the state through the acts of its officials which *de facto* possess the knowledge of the whereabouts or fate of the disappeared person, the refusal implies in many cases the impossibility to locate the person. More so, as the detention is often not documented anywhere, the lack of evidence in combination with the refusal of cooperation on behalf of the state also means that perpetrators are never held accountable.[196] The seriousness of the crime and the widespread and extensive practice was denounced by the international community, and eventually led to the codification of the prohibition of enforced disappearances in international law.

3.2 Codification developments

At the international level, the first legal reaction against enforced disappearances came from the Inter-American Commission on Human Rights (IACHR) in 1974.[197] In its regulars reports to the General Assembly of the

[195] Baranowska, G. (2021). *Rights of Families of Disappeared Persons: How International Bodies Address the Needs of Families of Disappeared Persons in Europe*. Intersentia, p. 15. In an even more contemporary context, cases of possible enforced disappearances are being reported to have been committed by Russia in the occupied territories of Ukraine. The OHCHR documented 864 individual cases (763 men, 94 women and 7 boys) of arbitrary detention perpetrated by Russia between 24 February 2022 and 23 May 2023, many of which also amounted to enforced disappearances. See OHCHR. (2023, June 27). *Detention of Civilians in the Context of the Armed Attack by the Russian Federation against Ukraine*.

[196] Vermeulen (2012) p. 23f.

[197] Tayler suggests that these responses came 'probably as the result of the work carried out by Latin American exiles in Europe and North America who had escaped during that

Organization of American States (OAS), the practice of disappearances was starting to be denounced. Both in more general terms, but also more direct by calling on states to clarify circumstances on specific cases of disappeared persons.[198] In 1977, the IACHR called for taking all necessary measures to put an end to the so-called "cases of disappearances", by which persons were arrested and detained by security forces or other authorities without informing the relatives nor the competent authorities.[199] Later, it made the following description of the human rights violation caused by the disappearances*:*

> This procedure is cruel and inhuman. As experience shows, a "disappearance" not only constitutes an arbitrary deprivation of freedom but also a serious danger to the personal integrity and safety and to even the very life of the victim. It leaves the victim totally defenseless, violating the rights to a fair trial, to protection against arbitrary arrest, and to due process. It is, moreover, a true form of torture for the victim's family and friends, because of the uncertainty they experience as to the fate of the victim and because they feel powerless to provide legal, moral and material assistance.[200]

Following the regional development in Latin-America, the UN General Assembly (UNGA) addressed the issue in a Resolutions in 1978 entitled "Disappeared Persons". The Resolution expressly used the label of "enforced or involuntarily disappearances" and expressed concern of 'the persistent refusal of such authorities or organizations to acknowledge that they hold such persons in their custody or otherwise to account for them'.[201] More so, the UNGA in the Resolution connected the practice of enforced disappearances with the right to life, liberty and security of person, freedom from torture, freedom from arbitrary arrest and detention, and the right to a fair and public trial.[202] This has led to scholarly discussion as to whether

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period from the military dictatorships in the region. The protests voiced by the associations of the family members of victims in their struggle to establish the whereabouts of their loved ones were eventually to have repercussions far beyond Latin America.' See Tayler, W. (2001, September). Background to the Elaboration of the Draft International Convention on the Protection of All Persons from Forced Disappearance. *ICJ Review: Impunity, Crimes Against Humanity and Forced Disappearance*, no. 62-63, 63–72, p. 63

[198] For example, in the annual report of 1974, in the consideration of communications received, IACHR requested the Government of Chile to provide information about the specific cases of persons 'allegedly disappeared executed, tortured or detained'. See Inter-American Commission on Human Rights (IACHR) (1974, December 30). *Annual Report of the Inter-American Commission on Human Rights 1974.* OEA/Ser.L/V/II.34, Doc. 31 Rev.1.

[199] IACHR. (1977, March 10). *Annual Report of the Inter-American Commission on Human Rights 1976.* OEA/Ser.L/VII.40 Doc. 5 corr.1.

[200] See IACHR. (1978, April 20). Annual Report of the Inter-American Commission on Human Rights 1977. OEA/Ser.L/V/II.43 Doc. 21 corr. 1, 20 April 1978 [translation to English from Spanish as by Tayler (2001) pp. 63-64].

[201] UNGA. (1978, December 20). Resolution 33/173. *Disappeared Persons.*

[202] Stating in the preamble: '*Recalling* the provisions of the Universal Declaration of Human Rights, in particular articles 3, 5, 9, 10 and 11 concerning, inter alia, the right to life, liberty and security of person, freedom from torture, freedom from arbitrary arrest and

enforced disappearances were forbidden before the eventual codification of the prohibition. Baranowska suggests that, as the rights recalled by the UNGA in its Resolution already found themselves codified in various international conventions, the practice of enforced disappearance was unlawful as well, as it violated these protected rights.[203] However, Cassese has claimed that enforced disappearances was not criminal under customary international law, and only became so upon the adoption of the Rome Statute of the International Criminal Court (ICC).[204] Contrarily though, Finucane has argued that it already was a crime under international humanitarian law (IHL). The source in IHL is important to the extent that historically it has limited the definition of the crime to armed conflicts, and this implies that the contribution of human rights instruments has been to criminalize the practice in the context outside of armed conflicts. In this sense, contrasting the purpose of IHL to provide minimum damage rule during war, human rights law has a much broader purpose and 'protects the bodily integrity and dignity of the governed from their governments and is intended to protect the individual in all circumstances.'[205] For this reason, the development of the prohibition of enforced disappearances in human rights law, has extended its scope of application and provided more extensive protection.

Additionally, in the 1978 Resolution, the UNGA requested the UN Commission on Human Rights (UNCHR) to consider the question of disappeared persons with a view to making appropriate recommendations.[206] One year later a report was submitted to the UNGA, in which, among other things, the appointed expert recommended that 'careful consideration should be given to establishing particular measures at the United Nations level to respond rapidly and effectively to reports of large-scale disappearances of persons'.[207] In the following year, 1980, the UNCHR established the Working Group on Enforced or Involuntary Disappearances (WGEID).[208] The WGEID was the first thematic mechanism established, as the previous ones had been

detention, and the right to a fair and public trial, and the provisions of articles 6, 7, 9 and 10 of the International Covenant on Civil and Political Rights, which define and establish safe-guards for certain of these rights'.

[203] Baranowska (2021) p. 27.

[204] See Cassese, A. (2003). *International criminal law*. Oxford University Press.

[205] Finucane (2009) p. 172-173.

[206] Also in 1979 the then Subcommission on the Prevention of Discrimination and Protection of Minorities suggested that a group of experts be established to obtain information concerning specific cases of "disappearance" and to maintain contact with family members and governments. see Tayler (2001) p. 64.

[207] UN Commission on Human Rights (UNCHR). (1979, November 21). Report of the Expert on the Question of the Fate of Missing and Disappeared Persons in Chile. A/34/583/Add.1, para 196.

[208] UNCHR. (1980, February 29). Resolution 20 (XXXVI). *Question of missing and disappeared persons.* Since then, the mandate has been renewed and extended to cover a wide range of activities. The most recent resolution renewing the mandate of the WGEID, see UNHRC (2020, October 6) Resolution 45/3. Enforced or involuntary disappearances. A/HRC/RES/45/3.

established relating to specific situations in specific countries.[209] It was initially established for a period of one year, consisting of five experts, and with the original mandate to examine questions relevant to enforced or involuntary disappearances of persons. In practice, it mainly assisted families in determining the fate and whereabouts of their disappeared relatives. The following eight years, apart from the UNGA labeling enforced disappearances as a "matter or priority", there was not much other development within the UN to take other steps to deal with the occurrence of enforced disappearances.[210]

Rather, 'the first international effort to promote an international convention' was taken by the Human Rights Institute of the Paris Bar Association. In 1981, it hosted an international colloquium from which a definition of the crime was provided.[211] Then, regional non-governmental organizations in Latin America led the way and adopted draft conventions for the prohibition of the crime. In 1987 the General Assembly of the OAS requested the IACHR to elaborate a text for a convention which was finally presented in 1988. About the same time, a debate was commenced within the UN on a declaration. The draft passed through various seminars and sessions,[212] and eventually this text would become the Declaration on the Protection of all Persons from Enforced Disappearance (the 1992 Declaration) adopted by the UNGA in 1992.[213] The 1992 Declaration provided for the first internationally agreed upon definition of enforced disappearances.[214] While a declaration is not strictly legally binding and creates no legal obligations, the 1992 Declaration was adopted by the UNGA unanimously. This fact has been argued to attest to the existence of the subjective element, *opinio juris*, of an international custom. Which then together with following state practice, the objective element, has resulted in the prohibition reaching the status of an international customary norm.[215]

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[209] UNCHR. (2002, January 8). *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances.* E/CN.4/2002/71, para 15.

[210] Scovazzi & Citroni (2007) p. 247.

[211] The definition read as follow: 'The expression forced or involuntary disappearance applies to any action or deed capable of undermining the physical, psychological or moral integrity or security of any person' See the text of the draft convention prepared by the Institut des droits de l'homme du Barreau de Paris, in Le refus de l'oubli: La politique de disparition forcée, Colloque janvier/février 1981 [as cited in Tayler (2001) p. 65.].

[212] See Tayler (2001) pp. 65-67. Giving an overview of drafting history of an international convention on enforced disappearances.

[213] UNCHR. (1992, February 28) Declaration on the Protection of All Persons from Enforced Disappearance. E/CN.4/RES/1992/29. Since 2003, the mandate of the WGEID was also extended to report on the implementation of the 1992 Declaration.

[214] Scovazzi & Citroni (2007) p. 249.

[215] See Pérez Solla, M. A. (2006) *Enforced Disappearance in International Human Rights.* McFarland & Company, p. 10 and p. 20f.

The adoption of the 1992 Declaration in the UN, brought about some momentum which allowed also Latin-American states and the OAS to move forward. Finally in 1994 the Inter-American Convention on Forced Disappearance of Persons (the 1994 Inter-American Convention) was adopted: the first legally binding text on enforced disappearances.[216] The 1994 Inter-American Convention labels the systematic practice of enforced disappearances as a crime against humanity. This characteristics as a crime against humanity 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack' was further reinforced upon the adoption of the Rome Statute of the ICC in 1998.[217]

From the first initiatives on drafting a Convention in the beginning of the 1980s, it would take another almost 30 years until a universal convention on enforced disappearances was adopted. The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) entered into force in December 2010. The history of the text of the ICPPED begun with the first draft convention submitted to the UNCHR in 1998.[218] In 2001, an independent expert was appointed by the UNCHR, [219] and an intersessional open-ended working group was established to further prepare a draft convention, which was endorsed by the ECOSOC.[220] The intersessional open-ended working group met for the first time in 2003 and held two sessions a year. The initial debates were frustrated with resistance from some states as to whether a new convention was necessary or if there already were sufficient legal protection.[221] At its final session in September 2005, the working group agreed by consensus that 'the instrument should take the form of a convention'.[222] The final Convention was then adopted on the 23rd of September 2005 by the working group. The Human Rights Council

[216] Inter-American Convention on Forced Disappearance of Persons, adopted in 1994, 9 June, entered into force 1996, March 28. However, the Convention offered rather weak protection. Some of the issues that have been called into attentions relate to the lack of provisions on the obligation of prevention, judicial guarantees of victims, measures to prevent ill-treatment in the investigation and allowing for reservations. See Scovazzi & Citroni (2007), p. 254.

[217] Article 7(2)(I) Rome Statute of the ICC.

[218] Elaborated by the Working Group on the Administration of Justice, submitted by the Sub-commission for the Promotion and Protection of Human Rights. See UNCHR. (1998, September 30). *1998/25. Draft international convention on the protection of all persons from enforced disappearance* in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 50th session, Geneva, 3-28 August 1998. E/CN.4/1999/4.

[219] See Scovazzi & Citroni (2007) p. 257.

[220] UN Economic and Social Council (ECOSOC). (2001, June 4). Decision 2001/221 *Question of enforced or involuntary disappearances*.

[221] States did not agree if there already were sufficient legal protection with the 1992 Declaration and other human rights conventions, or also if an optional protocol to the ICCPR was a better way forward. See Scovazzi & Citroni (2007) p. 258.

[222] ECOSOC. (2006, February 2). *Report of the Intersessional Open-ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearances*. E/CN.4/2006/57, para. 83.

(UNHRC) (replacing the UNCHR) adopted the Convention on June 29th of 2006.[223] And the UNGA adopted it on 20th of December 2006.[224] To date, the Convention has been ratified by 72 states. Most European states have ratified the ICPPED, of the ones boarding the Mediterranean: Spain, France, Italy, Slovenia, Croatia, Montenegro, Albania, Greece, and Malta; all except Turkey and Monaco.

The text of the Convention is largely based on the 1992 Declaration but has also found inspiration from the Inter-American Convention, the UN Torture Convention and the practice of the WGEID.[225] In 2001, before the Convention had been adopted, Tayler argued that the complex nature of enforced disappearances, 'conceived precisely to evade the legal framework of human rights protection', was the explanatory factor of the conceptual and political difficulties for states to agree on the concept.[226] Therefore, the definition of the crime and its different elements are of essence, which we now turn to in the next section.

3.3 Definition of Enforced Disappearances

The definitions of enforced disappearance in human rights instruments are widely similar. ICPPED defines enforced disappearance in Article 2 as:

> the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

The 1994 Inter-American Convention have defined enforced disappearance in Article II as:

> the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

The 1992 Declaration does not provide a free-standing definition of enforced disappearance, but the preamble states that:

[223] UNHRC. 2006, June 29) Resolution 1/1.

[224] UNGA. (2006, December 20). Resolution 61/177. International Convention for the Protection of All Persons from Enforced Disappearance. A/RES/61/177.

[225] Andreu-Guzmán (2001) p. 81.

[226] Tayler (2001) p. 65.

> persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law

While the Council of Europe (CoE) through its Parliamentary Assembly have adopted resolutions condemning enforced disappearances,[227] there exists no regional human rights instrument on enforced disappearances in Europe. The CoE has defined the crime as 'a deprivation of liberty, refusal to acknowledge the deprivation of liberty or concealment of the fate and the whereabouts of the disappeared person and the placing of the person outside the protection of the law'.[228] However, the European Convention on Human Rights (ECHR) as the legal regime guaranteeing the human rights in the region, may however serve to protect the rights of victims of enforced disappearance. The European Court of Human Rights (ECtHR or the Court) has ruled on violations of the rights and freedoms of the Convention caused by an enforced disappearance. How the Court defines an enforced disappearance is not completely settled. Baranowska argues on her part, that the ECtHR, has never provided a definition of "enforced disappearance" in its jurisprudence, although the term has been repeatedly used.[229] The first time a definition was mentioned by the Court was in 2009 in the *Varnava* Case, where the definition of the, by then, not yet entered into force, ICPPED, was referred to.[230] However, Schabas on his side, gives the example of the 2012 *El-Masri* case,[231] in which the Court made explicit reference to the ICPPED and held that the acts 'amounted to "enforced disappearance" as defined in international law".[232] Thus, while the ECtHR may not have provided its own definition, it would seem that the Court by now embraces the definition found in the ICPPED.

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[227] See for example Parliamentary Assembly of the CoE. (1984, September 26) Resolution 828 (1984). Enforced disappearances; and Parliamentary Assembly of the CoE. (2005, October 3) Resolution 1463 (2005) Enforced disappearances.

[228] See Parliamentary Assembly of the CoE. (2005, October 3) Resolution 1463 (2005) Enforced disappearances.

[229] Baranowska (2021) p. 39.

[230] ECtHR Judgment of 18 September 2009, App. nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 *Varnava and Other. v. Turkey*, paras. 89 and 91. In the first case in 1998 of an "enforced disappearance" (it was not labelled as such by the Court) the 1992 Declaration was mentioned, but not the definition *per se*. See ECtHR Judgment of 25 May 1998, App. no. 24276/94 *Kurt v. Turkey*, para. 64.

[231] Schabas, W. A. (2015). *The European Convention on Human Rights: A Commentary* (1st ed.). Oxford University Press, p. 137.

[232] ECtHR Judgment of 13 December 2012, App. no. 39630/09 *El-Masri v. The Former Yugoslav Republic of Macedonia*, para. 240.

While the definitions differ slightly in exact wording, there are three main elements which are reoccurring and which amount to the core elements of the crime: deprivation of liberty, involvement of state agents in that deprivation and a subsequent refusal to acknowledge the fate of the disappeared person. Whether the placement of the disappeared person outside the protection of the law is a fourth autonomous element, or simply a consequence of the crime, is contested.[233] While the ICPPED references the placement outside the protection of the law, it does not explicitly refer to the impossibility of exercising legal recourses and guarantees. Neither does the 1992 Declaration. In comparison, the 1994 Inter-American Convention holds that the refusal to acknowledge impedes the victims from 'recourse to the applicable legal remedies and procedural guarantees'.[234] Andreu Guzmán has argued that the omission of this element in the ICPPED is because of the legal defenselessness that the disappeared person experiences is 'an inherent consequence of the criminal action than an element of the action itself'.[235] However, in the drafting, it was not possible to reach an agreement on its status as a consequence or element due to differing views, and the chairman suggested leaving it as a "constructive ambiguity".[236] This approach facilitated negotiations by leaving it open for states to make interpretative declarations upon ratification as to their preferred reading.[237] To date, no such interpretative declarations have been made, resulting in the lasting uncertainty of its status as either an element or merely a consequence. For the purpose of this thesis, given that within the European system of Human Rights, the ECtHR have not dedicated its attention to the question of placement outside the protection of the law in its case law as part of the definition, we will not consider it further, but instead focus on the three main elements of the definition as being: 1) Deprivation of liberty; 2) Involvement of agents of the

[233] See Vermeulen (2012) p. 56f.

[234] The Rome Statute of the ICC also includes the element of placement outside the protection of the law. However, it does so by making it into a subjective element of the crime. Thus, the intent of the perpetrator to place the victim outside the protection of the law is necessary to find an individual criminally responsible for an enforced disappearance. See Article 7(2)(i): 'with the intention of removing them from the protection of the law for a prolonged period of time.' Scovazzi and Citroni have argued that enforced disappearances as defined by the Rome Statue does not seem to extend into international human rights law but should be limited to be applied in cases before the ICC. See Scovazzi & Citroni (2007) p. 276.

[235] Andreu-Guzmán (2001) p. 83.

[236] UNCHR. (2005, March 10). Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance. E/CN.4/2005/66, para. 23.

[237] UNCHR. (2006, February 2). Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance. E/CN.4/2006/57, para. 93. Upon the approval of the draft Convention in the Third Committee of the UNGA, the United Kingdom and Japan expressed their view that it constituted a fourth element. See UNGA (2006, November 13) Third Committee Approves Draft Resolution Concerning Convention on Enforced Disappearances. GA/SHC/3872.

State; and 3) Refusal to acknowledge. The content and scope of these elements will be discussed accordingly.

3.4 Elements of Enforced Disappearances

3.4.1 Deprivation of liberty

The definition in the ICPPED refers to 'the arrest, detention, abduction or any other form of deprivation of liberty'. This indicates a broad understanding of the element of the crime. Scovazzi and Citroni have pointed out that for the purposes of the definition, it is not important to specify how the deprivation of liberty was achieved – through arrest, detention, abduction, or any other form – nor whether the deprivation was legal, illegal, or arbitrary.[238] Likewise, whether the disappeared person was killed immediately, was held in secret detention, or was transferred abroad after the deprivation, is irrelevant for establishing a violation of the prohibition of enforced disappearance.[239] Of essence though, according to the authors, is that the deprivation of liberty takes place against the will of the person. A person who voluntarily disappears cannot be considered a victim of enforced disappearance.[240] More so, typically, state agents must be involved in the deprivation of liberty.

3.4.2 Involvement of agents of the State

Common to human rights violations, the crime being committed by state agents separates enforced disappearances from crimes under national criminal law.[241] The definition in the ICPPED holds that the deprivation of liberty is 'by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State'. Thus, the involvement of state agents can be direct or indirect. Importantly though, the indirect involvement is strictly limited to when non-state actors are acting with the authorization, support or acquiescence of the state. However, there have been and still exist discussions within the international community about the extent to which other instances of when non-state actors may be considered as perpetrators of enforced disappearances. Already in 1996 when the draft for ICPPED was developed, some participants in the working group had expressed their view that the definition should include disappearances also perpetrated by 'certain private entities or organized groups acting altogether independently', while other participants were hesitant to such an approach.[242] In the continuous drafting of the ICPPED, the inclusion or non-

[238] See Scovazzi & Citroni, (2007) pp. 272 and 282.

[239] Although the fate of the victim is quite clearly important for the finding of other human rights violations.

[240] Scovazzi & Citroni, (2007) p. 271.

[241] Abduction or kidnapping would typically be the corresponding crime to enforced disappearance in a domestic legal context.

[242] See UNCHR, Sub-Commission on Prevention of Discrimination and Protection of Minorities. (1996, August 13) Report of the sessional working group on the administration

inclusion of non-state actors was one, if not the most, debated issue. Some were advancing the traditional understanding of enforced disappearances as a state practice,[243] with others noting that contemporary disappearances were committed at a large extent by paramilitary groups, rebel groups or criminal organizations.[244]

In this light, Scovazzi and Citroni has noted that making a distinction between the type of perpetrator does seem to fail to consider the experience of the victim. The suffering of the disappeared person is not dependent on the perpetrators being state agents.[245] Nonetheless, a majority of states were skeptical to the inclusion of non-state actors in the ICPPED, recalling the nature of the instrument as a human rights treaty and thus, addressing obligations of states.[246] In this sense, when an individual violates the human rights of another individual, this is generally to be punished under domestic criminal law, but not as a human rights violation under international law.[247] For this reason, if the crime is committed by a non-state actor, the state is under an obligation to prevent, investigate and sanction it, but may not be held responsible for the act of enforced disappearance in itself.[248] Ultimately, non-state actors were not included as possible perpetrators in the definition of the ICPPED, unless acting with the authorization, support or acquiescence of the state, but it was agreed that states had an extensive obligation in relation to such acts, with Article 3 stating that:

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of justice and the question of compensation. E/CN.4/Sub,2/1996/16, par. 46: 'Other participants said that, while they understood the gravity of these situations, they had reservations in principle (Mr. Alfonso Martínez), particularly since such a course might weaken the State's mandate to ensure security of person.'

[243] Scovazzi & Citroni (2007) p. 279.

[244] The Representative of the Philippines remarked during the drafting that a significant portion of such disappearances were committed by non-State groups, see UNGA Third Committee. (2006, December 13). Third Committee Approves Draft Resolution Concerning Convention on Enforced Disappearances; Hears Introduction of 17 Texts on Human Rights Issues. GA/SHC/3872. Also in 2004, the WGEID had noted in its annual report that 'in the context of internal armed conflict, opposition forces have reportedly perpetrated enforced disappearances.' WGEID (2004, December 23) Annual Report for 2004. E/CN.4/2005/65, para. 11.

[245] Scovazzi & Citroni, p. 278.

[246] Some Delegations pointed out that 'the obligations contained in the future instrument were addressed solely to States, and that such an insertion would alter the traditional framework of responsibility in relation to human rights', See UNCHR. (2004, February 24). Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance. E/CN.4/2004/59, para. 31.

[247] Third part effect of fundamental rights, known as *Drittwirkung*, whereby human rights are considered to be enforceable by individuals against other private persons as well as by public authorities may also exist, albeit being ambiguous and doctrinally contested. See Engle, E. (2009, October 1). Third Party Effect of Fundamental Rights (Drittwirkung). *Hanse Law Review*, 5(2), 165-173.

[248] Scovazzi & Citroni (2007) p. 279.

> Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.

This article imposes an obligation on states to investigate, prosecute and sanction acts amounting to enforced disappearances committed by non-state actors. Thus, a state may be held responsible for failing to fulfill this duty.

3.4.3 Refusal to acknowledge

As previously mentioned, the refusal to acknowledge has been considered as the element which essentially seizes 'the nature of enforced disappearance'.[249] The definition in the ICPPED describes this element as either the refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person. The content and scope of this element was never thoroughly discussed during the drafting of the ICPPED. While proposed that "concealment" should be considered in more detail during one of the sessions,[250] this initiative was never elaborated upon.[251] In general, it is understood that the denial may take different forms, ranging from a flat denial of the existence of the disappeared person to making claims that they have joined guerilla forces or disappeared voluntarily.[252] On the one hand, the meaning of refusal to acknowledge a deprivation of liberty is rather clear. In this sense, often enforced disappearance entails unacknowledged detention, but every unacknowledged detention is not a case of enforced disappearance. Vermeulen argues that 'unacknowledged detention turns into an enforced disappearance when considerable time has passed or when it is clear that the person has been detained outside the protection of the law.'[253] On the other hand, what the concealment of the fate or whereabouts entails is more dubious, especially what is meant by the terms "fate or whereabouts". They have not been defined by neither the HRC, IACtHR nor ECtHR. As such, Vermeulen has proposed that, from the perspective that the violation only ends when this information is revealed, it should at 'at the very least include information on whether the person has been detained, the place of detention and whether he or she is dead or alive. In the case of death, "fate" should mean the location of the mortal remains, their identification and, if possible, their delivery to the relatives.'[254] In this sense, as long as this information is not brought to light, the state can be said to conceal the fate or whereabouts of the disappeared person.

[249] Scovazzi & Citroni (2007) p. 272.

[250] UNCHR. (2003, February 12). Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance. E/CN.4/2003/71, para. 41.

[251] Vermeulen (2012) p. 56.

[252] Scovazzi & Citroni (2007) p. 272.

[253] See Vermeulen (2012) p. 178.

[254] See Vermeulen (2012) pp. 170, 440 and 485.

In sum, the three elements of deprivation of liberty, involvement of state agents and refusal to acknowledge make out the core elements of the definition. Whereas the first and second elements relate to the situation the disappeared person is made subject to, the third is also related to the suffering experienced by the relatives and family of the disappeared person. While the refusal to acknowledge certainly also affects the disappeared person as well – often arbitrarily and informally detained, held incommunicado without means to communicate with their loved ones and fearing for their life – the uncertainty experienced by the relatives is continuous and a direct result from the refusal to disclose the fate or whereabouts. As such, the crime of enforced disappearance is committed against persons beyond the disappeared person itself, and as mentioned in the beginning of this Chapter, the very employment of enforced disappearances by Germany during the Second World War, was because of its effect on the civilian population as inflicting fear through the uncertainty of the fate of the disappeared persons. Having this in mind, we will now turn to who is considered a victim of enforced disappearances under different international human rights law instruments.

3.5 Victims of Enforced Disappearances

3.5.1 Relatives of the disappeared person

One of the characteristics of the crime of enforced disappearances is that it does not only affect the disappeared person, but also violate the rights of a larger group of people. Notably the relatives of the disappeared person, but even society at large in certain ways. While any human rights violation committed against an individual surely will also affect the relatives of the victim, enforced disappearance differs just because the rationale of the crime. The historical practice of enforced disappearance shows that it has been chosen as a means of violence precisely because of its impact that extends beyond the individual victim. This is the case when it is deployed as part of state policy or committed by state agents, but it can also be argued to apply for the more inclusive definition where non-state actors, such as rebel groups or criminal organizations, are considered perpetrators. The permanent uncertainty felt by the family as to the fate of their beloved one is an inherent part of the crime; the anguish of not knowing whether they are alive and may return in many cases prevents the relatives from acknowledging the death and start the process of mourning.[255]

The different legal instruments on enforced disappearances have recognized that victims of enforced disappearance include other persons apart from the disappeared person. The ICPPED defines victim as ‘the disappeared person and any individual who has suffered harm as the direct result of an enforced

[255] Sometimes labeled as *ambiguous loss*, See Boss, P. (2000). *Ambiguous Loss: Learning to Live with Unresolved Grief*. Harvard University Press: Cambridge.

disappearance'.[256] This extensive definition of victim as not only including relatives, but any person who as suffered harm, does most likely not reflect customary international law, as the scope of victimhood is narrower in other frameworks.[257] Already the annual report for 1977 of the IACHR to the General Assembly of the OAS stated that a "disappearance" was 'a true form of torture for the victim's family and friends, because of the uncertainty they experience as to the fate of the victim and because they feel powerless to provide legal, moral and material assistance'.[258] In a similar spirit, the HRC, assessing a violation of the International Covenant on Civil and Political Rights (ICCPR), declared in 1983 that the anguish and stress suffered by relatives of the disappeared person from not knowing the fate of their loved ones, made them too into independent victims of the violations suffered by the disappeared person, particularly the phycological situation amounting to a form of inhuman and degrading treatment.[259] The 1992 Declaration also grants the family of the disappeared person status as victim, but it is limited in the sense of granting them the right to obtain redress and compensation.[260]

On a regional level, the Parliamentary Assembly of the CoE has recognized family members as independent victims,[261] whereas the Inter-American Convention does not address victimhood. However, both the IACtHR and the ECtHR have clarified the concept of victims of enforced disappearance in their case law. In 1998, the IACtHR ruled for the first time, in *Blake v. Guatemala* case, that the relatives of a disappeared persons are autonomous victims whose right not to be subjected to inhuman and degrading treatment is violated by the 'suffering and anguish, in addition to a sense of insecurity, frustration and impotence in the face of the public authorities' failure to investigate.'[262] The ECtHR came to the same conclusion the same year in the case *Kurt v. Turkey,* noting that the mother of the disappeared person had experienced anguish for a prolonged period of time as a result of the detention of her son with a complete absence of official information as to his fate.

[256] Article 24(1) ICPPED.

[257] For example, the 1992 Declaration only mentioning the family of the victim: 'the victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation'; and as is discussed in the following, victim within the 1997 Inter-American Convention and ECHR is mainly confined to relatives of the disappeared perrons (a part from the disappeared person itself), as well as with the difference that the IACtHR presumes the suffering of the relatives, whereas the ECtHR imposes a burden of proof of the suffering.

[258] See Conclusions, Part II in IACHR (1978, April 20) *Annual Report of the Inter-American Commission on Human Rights 1977*. OEA/Ser. L/V/II.43, Doc. 21 corr. 1.

[259] UN Human Rights Committee Decision of 21 July 1983 Communication No. 107:1981 *Almeida de Quinteros v. Uruguay*, para. 14.

[260] See Article 19 1992 Declaration.

[261] See Parliamentary Assembly of the CoE Resolution 1463 (2005), para 10.2: 'family members of the disappeared persons should be recognised as independent victims of the enforced disappearance and be granted a "right to the truth", that is, a right to be informed of the fate of their disappeared relatives'.

[262] See Inter-American Court of Human Rights (IACtHR) Judgment of January 24 1998 (Merits) *Blake v. Guatemala*, paras. 114-116.

Therefore, she was 'herself the victim of the authorities' complacency in the face of her anguish and distress' and she had been subjected to treatment contrary to Article 3 ECHR.[263] In this regard, Scovazzi and Citroni have noted a difference between the approaches of the IACtHR and ECtHR on evidentiary matters.[264] The IACtHR has held that there exists a presumption that the immediate family of the disappeared person suffer serious effects on their psychological and emotional integrity as a consequence of the disappearance.[265] The ECtHR on its side, places the burden of proof of the suffering on the relatives. In the Case *Çakici v. Turkey*, the Court found no degrading treatment of the brother of the disappeared person as no evidence had been provided of "special features" to 'justify finding an additional violation' in relation to the brother. The relevant factors used by the Court are the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and if the response of the authorities involved any aggravating features.[266] To this end, Scovazzi and Citroni have noted that the Court generally has considered that mothers and fathers have been subjected to inhuman and degrading treatment, whereas the case law for brothers and sisters is contradictory.[267] From this, the notion of victimhood under the ECHR for enforced disappearance is narrower than under the ICPPED and as interpreted by the IACtHR. While relatives of disappeared persons may be considered as victims of enforced disappearances, this is not an inherent part of the crime as interpreted by the ECtHR, but requires demonstrating proof as to their individual suffering. Victim status of relatives to disappeared persons can be important to the extent that this finding will grant them the enjoyment of some specific rights, question to which we now turn.

3.5.2 Rights of victims

By labeling a disappearance as an enforced disappearance, obligations on states are reinforced through the prohibition under international human rights law. In this sense, victims of enforced disappearances, notably relatives of disappeared persons, are also endowed with rights. These rights include 1) the right to the truth; 2) the right to have the remains located and/or returned;

[263] *Kurt v. Turkey*, paras. 133-134.

[264] Scovazzi & Citroni (2007) p. 344.

[265] See IACtHR Judgment of September 15 2005 (Merits, Reparations, and Costs) "Mapiripán Massacre" v. Colombia, para. 146. Immediate family members being defined as direct descendants or ascendants of the alleged victim, mothers, fathers, daughters and sons, as well as sisters or brothers, spouses or permanent partners, or anyone else as determined by the Court. See IACtHR Judgment of July 1, 2006 (Preliminary Objections, Merits, Reparations and Costs) *Ituango Massacres v. Colombia*, para. 264.

[266] ECtHR Judgment of 8 July 1999, App. no. 23657/94 *Çakici v. Turkey*, para. 99. See also *Varnava and Others v. Turkey*, para. 200; and ECtHR Judgment of 21 October 2013, App. nos. 55508/07 and 29520/09 *Janowiec and Others v. Russia*, para. 178.

[267] Scovazzi & Citroni (2007) p. 221.

and 3) the right to compensation.[268] By establishing these rights, corresponding obligations on the state arise to fulfill them in favor of the relatives. Due to the relevance this holds for the discussion in the next chapter on the significance of labeling the situation of missing migrants in the Mediterranean as enforced disappearances, locating and returning the remains and the right to the truth will be discussed. Although our main framework of interest is the ECHR, the ICPPED and rulings of the IACtHR will be mentioned due to their important contributions to the content and scope of these rights, as well as for the purpose of giving a comparative overview.

First, the right to compensation will be touched upon. The right to compensation is important for victims due to the fact that enforced disappearances often cause severe economic hardship to the family members. This right is recognized by the ICPPED, namely that 'victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.'[269] In many cases, the disappeared person is a man, commonly the main breadwinner of the family, and often the victims belong to already disadvantaged communities, where financial issues are already present. In addition, the search for the disappeared person frequently results in the family incurring further expenses which worsen their financial situation.[270] This is particularly the case of migrants who are already considered as belonging to a vulnerable group.[271] However, while monetary compensation is important, it needs to be accompanied by other measures to fully address the suffering experienced by relatives.[272] These other measures specifically relate to the obligation on states to conduct investigations so as to reveal the fate and whereabouts of the disappeared person, and locate and return the remains, where relevant and possible.

3.5.2.1 Locating and returning the remains

The ICPPED explicitly places an obligation on states to search for, locate and either release the disappeared person, or in the event of death, return their

[268] These rights widely correspond to the four basic needs of families of disappeared persons as identified by Baranwoska for the most common cases where an adult disappeared many years ago and family members assume that they are dead as no information of their fate has been revealed. The fourth one not mentioned here is the acceptance of responsibility by states. I do not mention it as the issue of state responsibility is the overarching question of the thesis. See Baranwoska (2021) p. 7f.

[269] Article 24(4) ICPPED.

[270] Baranowska (2021) p. 12f.

[271] WGEID. (2017, July 28). Enforced disappearances in the context of migration, para. 46: 'These include situations which increase the vulnerability of migrants, such as the contexts of conflict and violence to which they are often exposed; the multiple forms of discrimination and socioeconomic difficulties that they suffer; the lack of remedies; the prevailing impunity; the impact of inappropriate migratory, security and counter-terrorism policies; and the lack of available data and statistics thereon'.

[272] See Scovazzi & Citroni (2007) p. 369: 'Pecuniary redress would be insufficient and would leave unaddressed several needs related to the phenomenon, including guarantees of non-repetition.'

remains.[273] In this way, the right to have the remains returned is an autonomous right under the ICPPED. Within the Inter-American human rights system, the return of the remains is instead considered as a form of reparation. In the 1996 reparations judgment in *Neira Alegría and others v. Peru*, the IACtHR found for the first time that, 'as a form of moral reparation, [Peru] has the obligation to do all in its power to locate and identify the remains of the victims and deliver them to their next of kin.'[274] Following this precedent, this obligation upon the state has been reaffirmed in all judgments on enforced disappearance by the IACtHR.[275] If returning the remains is not possible, the relatives have a right to know the whereabouts of the remains. This, in addition to the right to the truth of what happened to the disappeared person – which has also been confirmed as a form of reparation in the Inter-American system – is an obligation the states owe not only to the family of the disappeared person, but also to society as a whole.[276]

The returning of the remains was addressed much later by the ECtHR, and its role within the European system is less clear. The importance of returning the remains was recognized for the first time in 2012, in *Aslakhanova and others v. Russia.*[277] Before that, it had not been addressed in substance as such, but only in relation to the Court holding that the finding of the remains did not constitute an end to the procedural obligation on states to investigate the circumstances surrounding the disappearance and death.[278] In this regard, upon finding the remains of a disappeared person, the following conduct of the state is of crucial importance, as it is only though an effective investigation that the remains can be returned and the truth revealed.[279] Nonetheless, although the ECtHR has pointed out the importance of locating the remains, there exists no autonomous right to have the remains returned under the ECHR. From this, the general difference between the Inter-American and

[273] Article 24(3) ICPPED.

[274] IACtHR Judgment of 19 September 1996 (Reparations and Costs) *Neira Alegría and others v. Peru*, para. 69.

[275] Scovazzi & Citroni (2007) p. 365.

[276] IACtHR Judgment of 22 February 2002 (Reparations and Costs) Bámaca Velásquez v. Guatemala, para. 76.

[277] ECtHR Judgment of 18 November 2012, App. nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10 *Aslakhanova and Others v. Russia*, para. 226 'Another pressing need is the allocation of specific and adequate resources required to carry out large-scale forensic and scientific work on the ground, including the location and exhumation of presumed burial sites; the collection, storage and identification of remains and, where necessary, systematic matching through up-to-date genetic databanks.'

[278] *Varnava and Others. v. Turkey*, para. 145: 'the procedural obligation to investigate can hardly come to an end on discovery of the body or the presumption of death; this merely casts light on one aspect of the fate of the missing person. An obligation to account for the disappearance and death, and to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain'.

[279] See Baranowska (2021) p. 36f.

European system can be noted.[280] On the one hand, the IACtHR has a rich case law with reparations ordered from the states including a wide array of measures ranging from pecuniary compensation, restitution, satisfaction to guarantees for non-repetition.[281] On the other hand, the ECtHR is much more restrictive in the determination of measures of reparation and is limited to "just satisfaction", interpreted as compensation for pecuniary and non-pecuniary damages.[282] Instead, for the ECHR, it is in the execution of judgments, supervised by the Committee of Ministers (CoM),[283] that particular issues to what measures should be adopted so as to comply with the judgment can be addressed. From this, Baranowska has noted that it is only following the *Aslakhanova* judgment, that the CoM started to demand from states, so far limited to Russia, to undertake steps to exhume and identify the remains of disappeared persons. In previous executions of judgments, notably against Turkey, the CoM had not demanded from the state to return the remains.[284] Thus, at a *de jure* level, it appears that the right of relatives to have the remains returned are better protected under the Inter-American system.[285] Whereas state parties to the ECHR are obliged to abide by the judgment of the ECtHR,[286] they are generally free to choose the means they adopt to comply with it. Thus, arguably the explicit order to investigate, locate and return the remains as pronounced by the ECtHR would have put more pressure on states than the same demand coming from the CoM.

3.5.2.2 The right to the truth

Continuing with the right to the truth, it also finds itself codified in the ICPPED:

> Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the

[280] For a discussion of this difference, see Schneider, J. (2015). *Reparation and enforcement of judgments: a comparative analysis of the European and InterAmerican human rights systems*. Berlin: epubli GmbH.

[281] See Rescia, V. M. R. (1999). Reparations in the Inter-American System for the Protection of Human Rights. *ILSA Journal of International & Comparative Law*, 5(3), 583–602; and Pasqualucci, J. M. (1996). Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure. *Michigan Journal of International Law*, 18(1).

[282] See Commissioner for Human Rights of the CoE (2016, March) Missing persons and victims of enforced disappearance in Europe. Issue paper prepared by Gabriella Citroni, p. 41.

[283] Article 46(2) ECHR.

[284] Baranowska (2021) p. 108. To date, the ECtHR has not rendered any new judgments on enforced disappearances, so it remains to be seen whether other states will be demanded to search for and return the remains in future cases.

[285] The limited extent to which states actually comply with judgments by international tribunals is widespread, and the *de facto* implications of this in whether remains are actually returned falls outside the scope of this paper. For discussion on compliance, see for example Huneeus, A. V. (2013, January 6). Compliance with International Court Judgments and Decisions. In K. J. Alter, C. Romano, & Y. Shany (Eds.), *Oxford Handbook of International Adjudication* (Univ. of Wisconsin Legal Studies Research Paper No. 1219).

[286] Article 46(1) ICPPED.

> investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.[287]

Having previously mentioned the roots of the prohibition of enforced disappearance in IHL, the right to the truth of the relatives of missing persons can also be derived from the laws of war. First formulated as 'the right of families to know the fate of their relative',[288] it has been characterized as a customary rule for armed conflicts.[289] This right, as found in IHL, has since then been expanded in human rights law: beyond armed conflict, beyond the direct family and beyond the sole fate of the disappeared person, but to also includes the circumstances of the disappearances and the progress and results of official investigations. The right to the truth is widely recognized in international law.[290] However, it does not seem to have reached the status of a general principle of international law, nor customary international law.[291]

However, the right to the truth as such has not been recognized and guaranteed from the outset of the prohibition of enforced disappearances in international law.[292] Beginning from 1974, in its resolutions regarding disappeared persons the UNGA would refer to 'the desire to know' as a 'basic human need', avoiding the usage of "truth" and 'right'.[293] The HRC would however, in 1981, recognize the right to truth for the family of the disappeared person.[294] Similarly, the right was recognized by the WGEID in its very first report from 1981.[295] However, neither the 1992 Declaration, nor the 1994 Interamerican Convention refers to the right to the truth. The IACtHR had held in 1997 that it did not exist within the ACHR, 'although it may

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[287] Article 24(2) ICPPED.

[288] See Article 32 of the Additional Protocol I of 1977 to the Geneva Conventions 'In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives.'

[289] See International Committee of the Red Cross (ICRC). (2005). Customary International Humanitarian Law: Rules, Vol. I. Cambridge. Rule 117, p. 421.

[290] See WGEID (2010, July 20).*General Comment on the Right to the Truth in Relation to Enforced Disappearances*, p. 1: 'The right to the truth – sometimes called the right to know the truth – in relation to human rights violations is now widely recognized in international law'.

[291] Panepinto, A. (2017). The right to the truth in international law: The significance of Strasbourg's contributions. *Legal Studies*, 37(4), 739–764, p. 764.

[292] Scovazzi & Citroni (2007) p. 347.

[293] Scovazzi & Citroni (2007) p. 348.

[294] See *Almeida de Quinteros v. Uruguay*, para. 14: 'The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and where abouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7'.

[295] UNCHR. (1981, January 22) Report of the Working Group on enforced or involuntary disappearances. E/CN.4/1435, para. 187: 'this right of relatives to be informed of the whereabouts and fate of missing or disappeared family members has been reflected in resolutions of United Nations bodies.'

correspond to a concept that is being developed in doctrine and case law'.[296] Three years later, the right to the truth was fully recognized in the Inter-American system. The IACtHR found that the protection of such a right by the ACHR derived from the right to a fair trial (Article 8) and the right to judicial protection (Article 25) in the sense that the failure of a state to execute an effective and impartial investigation and prosecution, violated the victims right to the truth.[297] Since 2000, violation of the right to truth has constantly been alleged by representatives of victims in cases of enforced disappearances before the IACtHR.[298]

In the European system of human rights, the ECHR, like the ACHR, lacks an explicit provision on the right to the truth. The ECtHR was more stagnant in recognizing such a right compared to the IACtHR. The first judgment in which the right to truth was explicitly formulated was rendered by the Court in 2011. In *Association "21 December 1989" and Others V. Romania*, the ECtHR found a violation of the procedural protection of the right to life in Article 2 due to the inadequate investigation, through stating:

> the importance of *the right of victims and their families and heirs to know the truth* about the circumstances surrounding events involving a massive violation of rights as fundamental as that of the right to life, which implies the right to an effective judicial investigation and a possible right to compensation.[299]

Through this ruling, the importance of the right to the truth was recognized. Importantly though, the case did not deal with a disappearance, but anti-government demonstrations where people were injured and killed. The right to the truth is broader than just inherent to enforced disappearance, and also arises from other human rights violation. From this, the landmark cases of the ECtHR dealing with the right to the truth have not engaged circumstances of enforced disappearances, but instead to a large extent dealt with cases of 'the role of European states in "extraordinary renditions", secret detention centres and torture by the CIA in the context of counterterrorism'.[300] In such a case, *El-Masri v. the Former Yugoslav Republic of Macedonia*,[301] the ECtHR held

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[296] IACtHR Judgment of 3 November 1997 (Merits) *Case of Castillo-Páez v. Peru*, para. 86.

[297] IACtHR Judgment of 25 November 2000 (Merits) *Bámaca Velásquez v. Guatemala*, para. 201.

[298] Scovazzi & Citroni (2007) p. 350.

[299] ECtHR Judgment of 24 May 2011, App. No. 33810/07 *Association "21 December 1989" and Others v. Romania*, para. 144 [emphasis added].

[300] van Noorloos, M. (2021). A Critical Reflection on the Right to the Truth about Gross Human Rights Violations. *Human Rights Law Review*, 21(4), 874–898. p. 881. For relevant case law see ECtHR Judgment of May 31 2018, App. No. 46454/11 *Abu Zubaydah v Lithuania*; and ECtHR Judgment of May 31 2018, App. No. 33234/12, *Al Nashiri v Romania*.

[301] ECtHR Judgment of 13 December 2012, App. no. 39630/09 *El-Masri v. The Former Yugoslav Republic of Macedonia.* A German national had been arrested in Skopje,

that the inadequate character of the investigation realized had impacted the right to the truth, and more so, it highlighted 'the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened.'[302]

When the Court has dealt with applications of enforced disappearances, the right to the truth has not been as expressly uphold by the ECtHR. In two cases of enforced disappearances against Russia, the ECtHR indirectly touched upon it. In *Nizomkhon Dzhurayev v. Russia,* Russia was found to have failed to cooperate with the Court. The 'evasive answers to specific factual questions and coupled with the severe investigative shortcomings at the domestic level, highlighted the authorities' unwillingness to *uncover the truth* regarding the circumstances of the case'.[303] Similarly, in *Savriddin Dzhurayev v. Russia,* the Court attached 'great weight to the way in which the official inquiries were conducted, as the authorities did not appear to want to *uncover the truth* regarding the circumstances of the case', and Russia was found to have violated the procedural aspect of article 3.[304] Thus, rather than referring to a *right* to the truth in cases of enforced disappearances, the phrasing of "uncover the truth" has been favored.

Here, two observations can be made about the right to the truth in the ECHR. First of all, similar to IACtHR, the right to the truth does not take on status as an autonomous right but is interlinked with procedural obligations of states.[305] Secondly, while part of the European system, its application for cases of enforced disappearances is not certain. From the first of these observations, we see that an effective investigation and the search for the truth is necessary for the protection of the human rights as guaranteed by the ECHR, and investigative shortcomings and uncooperativeness of states may give rise to a violation of the right to the truth. However, the intrinsic value of establishing the historical truth is not sufficient for the state to comply with its procedural obligations of Article 2 and 3 which requires investigations that aim at identifying and punishing those responsible.[306] Thus, the content and scope of the right to the truth, as found within the procedural obligations of Article

Macedonia, and held incommunicado for three weeks before he was handed over to, what he identified as, CIA agents at the airport which tortured him, and he was then transferred to Afghanistan where he was held in secret detention for more than four months before being sent back to Europe. See paras. 16-36.

[302] *El-Masri*, para. 191.

[303] ECtHR Judgment of 3 October 2013, App. No. 31890/11, *Nizomkhon Dzhurayev v. Russia*. para. 164 [emphasis added].

[304] See ECtHR Judgment of 25 April 2013, App. No. 71386/10, Savridin Dzhurayev v. Russia, para. 200 [emphasis added].

[305] Procedural obligations within the ECHR are discussed further in Section 4.5 and 4.5.2.

[306] See Davis, H., & Klinkner, M. (2022). Investigating across borders: the right to the truth in a European context. *The International Journal of Human Rights*, 26(4), 683-700. p. 685; and Von Noorloos (2021) p. 884.

2 and 3 of the ECHR is different from the right to the truth as defined in the ICPPED. The latter transcends the mere investigation into responsibility of the perpetrators but includes a right to know the truth regarding the very circumstances of the disappearance. That is not to say that the ECHR completely excludes the right to truth in the more fact-establishing sense, as it will inherently form part of any investigation into responsibility. However, by the nature of the Convention, the focus will be placed on investigations aiming at identifying those responsible. As to the second observation, in cases of enforced disappearances, the Court has not independently referred to the right to the truth, but rather addressed a need to "uncover the truth". More so, looking at the two concurring opinions of the *El-Masri* case, the place of the right to the truth within the ECHR and the jurisprudence of the ECtHR is perhaps controversial.[307] One group of judges wished to underline and even further the importance of the right of the truth.[308] The other group stated its redundance in the sense that the ECHR already obliges states to investigate violations of the right to life and the prohibition of torture, and thus, to also establish the truth. In particular, the second group of judges questioned the adequacy of referring to the right of the general public to know the truth, holding that procedural obligations only create a right for the victim to an effective investigation.[309] Notwithstanding, this collective aspect of the right to the truth was confirmed again by the Court in 2014, where it noted:

> Furthermore, where allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened.[310]

The collective right to the truth has been subject to some scholarly discussions. Panepinto has noted that, under the case law of the ECtHR, the collective nature does not result in a claimable right for society at large, but rather it 'strengthens the right to know held by specific individuals and groups'.[311] Similarly, Von Noorloos has called attention to the relationship between truth-seeking and official acknowledgment of the truth, arguing that only the first one has a place within the realm of the right to the truth. More so, that victims have a right to know the truth, but that this should not be

[307] Von Noorloos (2021) p. 882.

[308] *El-Masri*, Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, paras. 1–2.

[309] *El-Masri*, Joint concurring opinion of Judges Casadevall and López Guerra.

[310] ECtHR Judgment of 24 July 2014, App. No. 28761/11, *Al Nashiri v. Poland*, para. 489.

[311] See Panepinto (2017) p. 753.

turned into a general right of society that creates a reciprocal obligation to a public acknowledgement of the truth.[312]

To conclude this Chapter on enforced disappearances in international law, a short summary of the topics discussed is due. The practice of enforced disappearances has undergone significant transformations in recent times. From its historical precedent as secret transfers of prisoners during the Second World War, it has evolved beyond armed conflicts, and was deployed as a state policy by dictatorships in Latin American states during the 1960s to the 1980s. During this period, it also reached an interstate level through the cooperation between states in the abduction of political refugees. In the contemporary world, there is a growing argument that enforced disappearances are also committed by private actors such as criminal organizations and rebel groups. While the inclusion of acts by non-state actors in the prohibition may be contested, the ICPPED obliges states to investigate such acts regardless of the perpetrator. As to the definition of the crime, the core elements are deprivation of liberty, involvement of state agents, and refusal to acknowledge. Debate persists over whether the placement outside the protection of the law is an autonomous fourth element or merely a consequence. Notably, the suffering experienced by the relatives of disappeared persons is a distinctive aspect of enforced disappearances. The psychological anguish caused by the permanent uncertainty about the fate of their loved ones makes them into independent victims of the crime. Consequently, relatives have a right to know the truth of the very circumstances of the disappearance, which may also extend to being a right of the general public. All things considered, it is clear that international law on enforced disappearances is not uniform, and its content and scope will depend on the legal instrument applied. More so, and perhaps most importantly, it has developed extensively in parallel to how the practice of disappearances has evolved around the world. The legal framework of enforced disappearance remains, unfortunately, a highly relevant concept of international law to the contemporary setting. For that very reason, the question of responsibility of European states for enforced disappearances of migrants in the Mediterranean Sea is before us in the next Chapter.

[312] See Von Noorloos (2021) pp. 894-898.

4 International Responsibility of European States for Enforced Disappearances in the Mediterranean Sea

4.1 Enforced Disappearances in the case law of the ECtHR

In the previous Chapter, case law of the European Court of Human Rights (ECtHR or the Court) on enforced disappearances has been referred to with the purpose of identifying the scope of the prohibition in international law, as well as serving a comparative purpose. In this Chapter, the case law of the ECtHR will be used to address the responsibility of European states for enforced disappearances under the ECHR, and specifically, applying those principles to the situation of migrant disappearances in the Mediterranean.

The first judgment on an enforced disappearance was delivered by the ECtHR in 1998.[313] As of 2021, the Court has rendered over 200 decisions on individual applications concerning enforced disappearances, relating to cases in Bosnia and Herzegovina, Croatia, Cyprus, Italy, Poland, Spain, Turkey and Russia. In addition, on the same matter, the Court has dealt with one intergovernmental complaint filed by Cyprus against Turkey.[314] In this context, it should be mentioned that, in contrast to the Inter-American system of Human Rights with the 1997 Inter-American Convention on Forced Disappearance of Persons,[315] there is no equivalent legally binding instrument in Europe specifically condemning the crime of enforced disappearances. This means that, while the IACtHR has a well-developed jurisprudence on the right to not be subject to enforced disappearances as an autonomous right, the case law of the ECtHR is centered around how the different elements of enforced disappearances violate the articles of the ECHR.[316] From this, there have been scholarly discussions on whether the approach of the ECtHR has resulted in a failure to recognize the "multi-rights" violation that an enforced disappearance entails. Perez Solla argues that while a case of enforced disappearance *may* violate multiple provisions of the ECHR, it is not strictly necessary that once a case has been characterized as an enforced disappearance by the ECtHR, it should also be considered to have violated

[313] ECtHR Judgment of 25 May 1998, App. no. 24276/94 *Kurt v. Turkey.*

[314] Baranowska (2021) p. 37.

[315] With the IACtHR even referring to the 1997 Inter-American Convention in cases where the Respondent State had not ratified it, without complaint. See Pérez Solla (2006) p. 39; and Vermeulen (2012) p. 167.

[316] Although it should also be mentioned that the IACtHR, will rule on violations of the rights in the American Convention of Human Rights caused by an enforced disappearance. See Vermeuluen (2012) p. 158.

multiple rights of the victim or victims.[317] This contrasts with the approach of the IACtHR, where enforced disappearances are always considered to violate multiple rights of the ACHR.[318] Vermeulen agrees with Pérez Solla to some extent, holding that the ECtHR has mainly found violations of the right to liberty, and that the Court's case law on violations of the freedom of torture and inhuman treatment with regard to the disappeared person has been more reluctant than the approach of its counterparts [the IACtHR and the HRC].[319] And more so, that this unwillingness does not seem to correspond to the reality of victims, as unacknowledged detention entails 'great psychological suffering and, in the overwhelming majority of cases, [coincides] with torture.'[320] In any case, Vermeulen argues that the ECtHR has predominantly adopted a multi-rights approach,[321] but there appears to be a gap in the appreciation of a holistic approach to the crime and the connection between the different elements and the suffering it entails for the victims.

Although it is common that states will deny violations of the ECHR, cases of enforced disappearances take on an extra level of difficulty as states are also denying the very occurrence of the imputed acts. This denial, which is often paired with the lack of any investigation on behalf of the state, means that the ECtHR has to act to some extent as a court of first instance.[322] Normally the ECtHR has a secondary function to the domestic legal system, and the case before the Court is often a question which has already been the subject of litigation where evidence has been submitted and evaluated. However, in cases of enforced disappearances the Court is endowed with the task of not only determining whether certain acts violate the ECHR, but also whether these acts have even been committed. For this reason, the Court in its judgments on cases of enforced disappearances often includes a section

[317] Pérez Solla (2006) p. 38.

[318] See IACtHR Judgment of 29 July 1988 (Merits) *Velásquez-Rodríguez v. Hondura*s, para 150 and 155: 'The phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion … The forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee'. For discussion on the multiple rights approach of the IACtHR, see Pérez Solla, pp. 32-38.

[319] Vermeulen (2012) p. 168; see also Scovazzi & Citroni taking the view that the ECtHR requiring evidence of torture and ill treatment beyond reasonable doubt is questionable. 'Once the existence of a widespread or systematic practice of disappearance has been established together with a corresponding practice of torture of prisoners, and the material victim has last been seen in the custody of State agents, torture or inhuman and degrading treatment may be presumed, together with the presumption of the death of the victim.' Scovazzi & Citroni (2007) p. 221.

[320] Vermeulen (2012) p. 169.

[321] Vermeulen (2012) p. 167.

[322] The Court has warned that 'it must be cautious in taking on the role of a first-instance tribunal of fact where this was not rendered unavoidable by the circumstances of a particular case'. See ECtHR Judgment of 28 September 2015, App. No. 23380/09, *Bouyid v Belgium*, para. 85.

devoted to its own assessment of the facts.[323] In this regard, applicants have often found it difficult to reach the evidentiary standard of "beyond reasonable doubt" and prove the facts underlying an enforced disappearance. As a result, the ECtHR has developed in its jurisprudence some evidentiary reliefs, such as inference, presumptions and reversal of the burden of proof, to facilitate the obligations of victims.

The articles the ECtHR have found violated in cases of enforced disappearances have mainly been the right to life (Article 2), the prohibition of torture and inhuman treatment (Article 3), the right to liberty and security (Article 5) and the right to an effective remedy (Article 13 read in conjunction with Article 2, 3 and 5).[324] As for Article 2, the Court has mainly found violations of this Article in its procedural aspect, rather than a material breach. This is due to the difficulties for applicants in providing proof. The situation is similar for violations of Article 3, as evidence that the disappeared person was subject to torture is often not readily available; and is almost impossible if the disappeared person has not been found. Instead, the Court has more often found that the relatives of the disappeared person have been subject to degrading treatment as a result of the disappearance and absence of investigation. As to violations of Article 5, an unacknowledged arrest can in general be said to amount to a breach of the right to liberty, as it strips the person of access to any legal safeguards. Lastly, violations of Article 13 have been understood as resulting from the lack of an effective and thorough investigation into allegations of deprivation of life, torture and unacknowledged arrest and detention.

In the first case of enforced disappearances before the Court, *Kurt v. Turkey*, the applicant, alleged a violation of the right to life and prohibition of torture on behalf of her disappeared son. However, the ECtHR, concluded that there was insufficient evidence to establish beyond reasonable doubt that her son had been tortured and/or deprived of his life by the State's authorities. Instead, the Court found a violation of Article 5 as it was established that he had been detained without any official record.[325] Following the *Kurt* case, the next case of enforced disappearances before the ECtHR was *Çakıcı v. Turkey*. Unlike the first case, in *Çakıcı* there was sufficient circumstantial evidence to conclude beyond reasonable doubt that the disappeared person had died following his detention, and thus, the Court found a violation of the

[323] Keller, H., & Heri, C. (2014). Enforced disappearance and the european court of human rights: wall of silence, fact-finding difficulties and states as subversive objectors. *Journal of International Criminal Justice*, 12(4), 735-750, p. 739.

[324] As noted by legal shcolars. Although applicants have also, unsuccessfully, argued violations of the right to family life (article 8), right to an effective remedy (Article 6) and discrimination (Article 14). States have also been found to have violated article 38, by failure to cooperate with the Court. See Czepek, J. (2013). European Court of Human Rights on Enforced Disappearances Case-Law Study. *Internal Security*, 5(1), 7–16, p. 8; see also Vermeulen (2012) pp. 164-166; and Scovazzi & Citroni (2007) pp. 220-224.

[325] *Kurt v. Turkey* paras. 106-109, 116, 125 and 129.

substantive limb of the right to life.[326] In this way, when the body of the victim has not been recovered, the Court's decision as to whether there has been a violation of Article 2 has depended on the surrounding circumstances, in particular whether circumstantial evidence supports a presumption of death.

In some cases, in relation to certain time periods and particular regions, the Court has held that an unacknowledged detention with a person missing for several years has been sufficient to label the situation as "life-threatening".[327] However, this should not be confused with the approach of the IACtHR of establishing a "practice of disappearances" which automatically shifts the burden of proof on to the state.[328] While this has also been argued before the ECtHR,[329] the Court has not granted an automatic reversal of the burden of proof based on the connection between a disappearance and "the phenomena of enforced disappearance" in a region at a specific time. Instead, the ECtHR has satisfied itself with establishing that such facts, granted that the disappeared person was detained by state actors and this detention has not been acknowledged, may amount to a presumption of death.[330]

Nevertheless, the ECtHR has also moved from its reliance on circumstantial evidence, to apply a reversal of the burden of proof in cases where the applicant has been able to sufficiently support their claim. In 2000, the Court concluded in *Timurtaş v. Turkey* that if a person is detained and the state then fails to offer a plausible explanation of their whereabouts or fate, in conjunction with sufficient circumstantial evidence that leads to a presumption of death, the burden of proof is on the state to show that it did not violate Article 2.[331] From then, in 2005, the Court laid out in *Toğcu v. Turkey* that the burden of proof is reversed when the applicant has made out a *prime facie* case, and the necessary evidence in support of the applicant's

[326] *Çakıcı v. Turkey*, paras. 85-87; the Court also found a violation of the procedural limb due to the lack of effective procedural safeguards disclosed by the inadequate investigation.

[327] ECtHR Judgment of 17 February 2004, App. No. 25760/94, *İpek v. Turkey*, par. 167; see also ECtHR Judgment of 13 June 2000, App. No. 23531/94, *Timurtaş v. Turkey*, par. 85; and ECtHR Judgment of 1 March 2007, App. No. 19497/02, *Erkan Orhan v. Turkey*, par. 330.

[328] IACtHR Judgment of 25 November 2000 (Merits) *Bámaca Velásquez v. Guatemala*, par. 126: 'If it can be shown that there was an official practice of disappearances in Honduras, carried out by the Government or at least tolerated by it, and if the disappearance of [the victim] can be linked to that practice, the [IACHR] allegations will have been proven to the Court's satisfaction, so long as the evidence presented on both points meets the Standard of Proof Required in Cases such as this.'

[329] *Kurt v. Turkey*, par. 102; ECtHR Judgment of 9 May 2000, App. No. 20764/92, *Ertak v. Turkey.*, par. 125; ECtHR *D*ecision of 27 February 2020, App. no. 44837/07, *Çiçek and Others v. Turkey*, par. 152; and ECtHR Judgment of 11 June 2009, App. no. 28159/03, *Khasuyeva v. Russia*, para. 93.

[330] *Khasuyeva v. Russia*, par. 107; ECtHR Judgment of 5 April 2007, App. no. 74237/01, *Baysayeva v. Russia*, par. 119; and *Erkan Orhan v. Turkey*, par. 330.

[331] *Timurtaş v. Turkey*, paras. 82 and 86.

allegations is in the possession of the state.[332] The ECtHR may have incorporated mechanisms to facilitate it for victims to substantiate their claims, but it still remains difficult to prove the direct involvement of the state in the disappearance.

In sum, the ECtHR has adjudicated on a large number of cases on enforced disappearances. Mainly, its case law has concerned cases of four regions, as identified by Keller and Heri:

> Cyprus, in the context of the conflict that led to the declaration of independence of the Republic of Northern Cyprus; South-Eastern Turkey, in connection with the Kurdish conflict; the Russian Northern Caucasus, particularly Chechnya; and the ex-Yugoslavian states.[333]

The particular facts and circumstances of each of these regions has shaped the Court's case law on enforced disappearances. In general, scholars have identified that the ECtHR has more often focused on the procedural aspect of Article 2, finding the lack of investigation into the loss of life as a violation, also in conjunction with Article 13. Similar reasonings are present for violations of Article 3, characterized with a general absence of finding a violation in regard to the disappeared person itself, compared to more often than not finding a violation against the relatives based on the suffering they experience from the lack of investigation. In general, unacknowledged detention breaches the right enshrined in Article 5, making it easier to prove than violations of Article 2 and 3. While other rights and freedoms have been invoked by applicants, such as the right to family life, it has generally been rejected with the reason that no separate issue arises in light of the findings under Article 2 and 3 ECHR.[334] Using the case law of the ECtHR on enforced disappearances as a reference, more concretely guided by which articles the Court has found to be violated and the evidentiary standards applied, it is possible to assess whether the circumstances of the thousands of migrants who have disappeared in the Mediterranean Sea could fall within the scope of the ECHR. This analysis will ultimately lead to answering the question whether, and in which way, European states can be held responsible for enforced disappearances in the context of migration.

[332] ECtHR Judgment of 31 May 2005, App. no. 27601/95, *Toğcu v. Turkey*, para. 95 What amounts to a *prime facie* case is not conclusively established by the ECtHR's jurisprudence, but there seems to have been a development from formal and strict requirements to an approach where if a person disappears in an area within the exclusive control of the state, and there is *prima facie* evidence that the state may be involved, the burden may be shifted to the state. In this regard, the Court also considers the degree of cooperation on behalf of the state with the Court. See Baranowska (2021) pp. 74-76.

[333] Keller and Heri (2014) p. 737.

[334] See Vermeulen (2012) pp. 164-166. See also Czepek (2013) pp. 9-13.

4.2 Enforced Disappearances in the context of migration in Europe

The fact that people go missing when they migrate is well-known. The European Commission has called attention to this: 'Migrants go missing during their journeys and families risk getting separated.'[335] More so, the role played by states has been pointed out by the Human Rights Commissioner of the Council of Europe: 'Border and migration policies have a clear impact on the risk of migrants going missing. If migration policies aim at deterring arrivals, migrants will be forced to resort to dangerous and irregular journeys.'[336] Indeed, the WGEID has identified that migrants going missing could amount to enforced disappearances, especially highlighting three potential situations: 1) as a result of abduction for political reasons; 2) during detention or deportation processes and; 3) as a consequence of smuggling and/or trafficking.[337]

It is seldom, if ever, that someone has been held responsible for some of at least 28 427 missing migrants in the Mediterranean.[338] This impunity, also highlighted by the WGEID in its finding that no instances of state or non-state actor being held accountable had been documented before the Working Group, 'creates a favourable context for the perpetuation of these crimes and violations'.[339] As we saw in Section 2.4, although the number of arrivals to Europe has decreased the last eight years, the number of migrants going missing and dying in the Mediterranean has increased.[340] This appears to

[335] See European Commission. (2021, September 29). A renewed EU action plan against migrant smuggling (2021-2025). (COM(2021) 591 final). Brussels, p. 19.

[336] Commissioner for Human Rights of the Council of Europe. (2022, September 29). *For the Rights of the Living, for the Dignity of the Dead: Time to End the Plight of Missing Migrants in Europe.* https://www.coe.int/ca/web/commissioner/-/for-the-rights-of-the-living-for-the-dignity-of-the-dead-time-to-end-the-plight-of-missing-migrants-in-europe (accessed December 30, 2023).

[337] WGEID. (2017, July 28). Enforced disappearances in the context of migration, para. 14.

[338] This author is not aware of any cases. In this regard, the criminal proceedings launched against migrant smugglers, and even sometimes private individuals participating in rescue operations by NGOs, appear to focus on the crime of smuggling/trafficking, and not responsibility for the deaths or disappearances themselves. See for example Europol. (2023). 19 arrests for smuggling migrants within EU. *Europol: Media & Press*. Retrieved from https://www.europol.europa.eu/media-press/newsroom/news/19-arrests-for-smuggling-migrants-within-eu (accessed December 30, 2023); *Al Jazeera*. (2023, July 11). Libya jails 38 over deaths in Mediterranean Sea smuggling case. https://www.aljazeera.com/news/2023/7/11/libya-jails-38-over-deaths-in-mediterranean-sea-smuggling-case (accessed December 30, 2023); and *France 24*. (2023, June 15). Nine arrested for people smuggling after Greece migrant ship disaster. Retrieved from https://www.france24.com/en/europe/20230615-nine-arrested-for-people-smuggling-after-greece-migrant-ship-disaster (accessed December 30, 2023).

[339] WGEID. (2017, July 28). Enforced disappearances in the context of migration, para. 50.

[340] Recalling the mentioned numbers from Section 2.4, while 3 771 persons were recorded as dead or missing in 2015, with 1 032 408 arrivals, in 2022, 2 439 persons were estimated to have gone missing or dying in relation to the total of 159 410 arrivals. This

testify to the conclusion that, while surveillance has increased, the likelihood for perishing at sea has increased.

Therefore, the large number of people going missing in the Mediterranean trying to reach Europe and the suffering experienced by families and relatives from not knowing the fate of their loved ones, conveys that the lack of investigation into these most likely deaths is concerning. More so, it leads to the question if European States, particularly the Member States of the EU through the coordinated response to migration, can be held responsible for these deaths. As discussed in Chapter 2, the main aim of the migration policy of the EU has been to reduce and stop arrivals of migrants to Europe by reinforcing the EU's external border and externalizing border controls to third states. Is it possible that this approach, executed by the Member States at an individual level, amounts to a failure to fulfill their international obligations toward migrants and refugees, and by so, violates international human rights law? Given the area for scrutiny, the Mediterranean Sea, the ECHR and the jurisprudence of the ECtHR, as the regional system for the protection of human rights in Europe are of most direct relevance. For this reason, also Turkey, as a Contracting Party to the ECHR, is of interest as a state that could potentially be held responsible for enforced disappearances of migrants in the Mediterranean. The case of Turkey creates an interesting dynamic because it is at the same time not an EU Member State and as such is a site where externalization of border control takes place.

As the prohibition of enforced disappearances in international law developed as a response to the mass atrocities committed during dictatorships in Latin-American countries in the latter half of the 20th century, one could question the relevance of those contextual factors for the current humanitarian crisis of migrants losing their lives in the Mediterranean. However, one should understand that law, especially human rights law, is ever developing, and as often pointed out by the ECtHR, the ECHR is a living instrument which must be interpreted in the light of present-day conditions,[341] so the concept of enforced disappearances should not be understood as a constant. Therefore, I claim that despite being very different circumstances, the dictatorships in Latin America in the 1980s and the situation of migrants losing their lives in the Mediterranean, there are similarities between the two. I refer, namely, to the result: relatives of the missing person being left in the unknown about the fate of their loved ones, and the denial of any involvement of the state and lack of responsibility. Clearly the involvement of the state is more obvious in the former case, state agents kidnapping or detaining political opponents, but also in the latter, the migration policy of states and practice in the direct

means that from one in 3 600 arrivals in 2015, the same number was one for every 150 arrivals in 2022.

[341] See ECtHR Judgment of 25 April 1978, App. no. 5856/72, *Tyrer v. the United Kingdom*, para. 31.

involvement with migrants trying to approach and cross the border may still amount to the involvement of states.

Taking into consideration the three circumstances pointed out by the WGEID, the following analysis will focus on enforced disappearances as a consequence of migrant smuggling in the Mediterranean Sea.[342] This area of inquiry has been chosen because it appears that this situation corresponds to the highest extent to the situation of migrants going missing in the Mediterranean. The WGEID has underlined the fact that migration policies adopted by states of securitization of borders have led to an expansion in migrants smuggling, and more so, that the language used to associate irregular migrants as security threats increases their vulnerability and exposes them further to human rights violations, including enforced disappearances.[343] This is particularly the case in Europe, as we have seen, and therefore the role played by European States in supporting – directly or indirectly – migrant smugglers will be assessed. Enforced disappearance occurring during detention or deportation will be analyzed in the context of detention upon arrival by sea and pushback practices at sea.[344] The WGIED has highlighted that mass returns by Turkey of Syrian refugees could violate the principle of *non-refoulement*,[345] which relates to the obligation on states to prevent enforced disappearances, and also brings up the question of pushbacks toward Turkey in the Aegean Sea and the responsibility of Greece. Enforced disappearance from abduction for political reasons have been left out from the inquiry as *prima facie* it appears unlikely to attribute such acts to European states in the context of migration in the Mediterranean area.

Here, given that we are looking at the European System of Human Rights, some particular issues arise under this framework for finding a state responsible for enforced disappearances of migrants in the Mediterranean under the ECHR. The first step is to consider whether the situation of missing migrants fits into the concept of enforced disappearances. Secondly, the question is if these individuals find themselves under the jurisdiction of a

[342] For disappearances at the Mediterranean Sea, the WGEID has documented possible cases of enforced disappearances of migrants: ten migrants travelling by boat from Tunisia toward Italy in 2007, see WGEID. (2017, July 25). *Communications, cases examined, observations and other activities conducted.* A/HRC/WGEID/112/1, para. 93; and the case of an Algerian citizen who disappeared in 2016 while on board a boat in Tunisian territorial Waters, see WGEID. (2019, July 30). *Communications, cases examined, observations and other activities conducted*. A/HRC/WGEID/118/1, paras. 121–122.

[343] WGEID. (2017, July 28). *Enforced disappearances in the context of migration*, para. 36.

[344] In this regard it should be mentioned that the practice of hot returns at the land border between the Spanish enclaves of Melilla and Ceuta with Morocco also could amount to detention and deportation, and as such raise issues in the context of enforced disappearances. This topic will not be discussed as it lies outside the scope of this thesis focusing on the Mediterranean Sea as a border zone.

[345] WGEID. (2017, July 28), *Enforced disappearances in the context of migration*, para. 33; and WGEID. (2016, July 27). *Report of the WGEID on its mission to Turkey*. A/HRC/33/51/Add.1, paras. 55-56.

European state within the meaning of article 1 ECHR, and as such, the state owes to protect their rights and freedoms under the Convention. Once this is established, the responsibility of the state will be assessed by considering whether the state has breached any of the obligations endowed upon it by the ECHR, and violated the rights and freedoms set forth by the Convention. These three steps will be discussed accordingly, starting with the definitional scope.

4.3 Issues of definition

The definition of the crime of enforced disappearance consists of three cumulative elements, whose scope and content has been discussed in Section 3.5: 1) deprivation of liberty; 2) involvement of agents of the state; and 3) refusal to acknowledge.[346] This is the definition as found in the ICPPED, and largely in other international instruments as well, but when looking at responsibility of European states in the legal framework of the ECHR, it should be noted that the ECtHR is not bound by the definition in the ICPPED. However, as the prohibition of enforced disappearances *per se* is not foreseen in the ECHR, and to the extent that the definition in the ICPEED reflects customary international law, the Court has referred to it as the definition in international law.[347] In any case, given the absence of an European instrument, the Court will not rule on the responsibility of a state for an enforced disappearance as such, but will do so in light of the individual rights and freedoms protected by the ECHR that an act of enforced disappearance violates.

In this regard, one could ask what is the purpose then of labeling a disappearance as an *enforced disappearance* in the context of the ECHR? Whether the elements of the definition are met will not materially change the Court's examination of whether, for example, the right to life, prohibition of torture and right to freedom has been violated. Nonetheless, looking at these crimes in a bigger picture, it is clear that the finding of an enforced disappearance bears importance. It testifies to the gravity of the crime committed, it recognizes the suffering experienced by the victims and provides redress, it amounts to a reinforced obligation on the state to investigate the events to clarify the fate of the disappeared person, and it may also have implications for similar cases and at an international level for findings of violations of other legal instruments beyond the ECHR. Additionally, as pointed out by Keller and Heri:

[346] The question of placement of the disappeared person outside the protection of the law will not be discussed as this has not been addressed by the ECtHR in its case law. From which it could be assumed that the ECtHR does not consider it as a fourth element, but merely a consequence.

[347] See *El-Masri*, para. 240; see also discussion in Section 3.3 on the definition of enforced disappearance within the ECtHR.

> The importance of the disappearance cases before the ECtHR lies not only in the individual interest in obtaining a remedy for the illegal acts perpetrated by the state, but also in the creation of a record of these events and, thus, in enabling a nation to remember and learn from its own history.[348]

The right to the truth, having been recognized as a right belonging to the general public, reinforces its inherent value. More so, it concerns the very circumstances of the disappearance and is accompanied by the importance of locating and returning the remains. In contrast, the procedural obligation under Article 2 and 3 ECHR is generally fulfilled through investigations that aim at identifying and punishing perpetrators. By so, labeling missing migrants as enforced disappearances reinforces the need for investigations beyond individual responsibility, but could also entail revealing the historical truth about more general circumstances leading to and causing these deaths. Importantly, the role played by the State. In this sense, we note that the ECtHR may not interpret the right to know the truth as just described, preferring to refer to "a need to uncover" the truth, rather than a "right". Nonetheless, a finding of an enforced disappearance by the ECtHR may have broader implications at an international level, beyond the Court's own reasoning on the content and scope of the right to the truth. In this way, the labeling of missing migrants in the Mediterranean as an enforced disappearance would contradict the prevailing narrative as put forward by the EU; labeled as a refugee crisis external to Europe whose culpable actor are the migrant smugglers. By shifting the focus toward the role played by the EU in creating and sustaining this humanitarian crisis, the responsibility of European states, notably EU Member States, would improve accountability. Ultimately, it could lead to new approaches of thinking how to reconcile regulation of migration with sovereignty concerns and full adequate protection of human rights.

More so, recalling the report of the WGEID on enforced disappearances in the context of migration, it is particularly important to consider the possibility of migrants as victims of enforced disappearances due to their vulnerable situation, and the lack of accountability for crimes committed against them. Nonetheless, in the context of the Mediterranean, as will now be addressed, the situations in which missing migrants could be said to fulfill the three definitional elements, as they currently stand in international law, are limited, so as to label their disappearance as an enforced disappearance.

4.3.1 Deprivation of liberty

The first element of an enforced disappearances entails that the victim have been deprived of their liberty in one way or another. The ICPPED does not provide what is exactly meant by deprivation of liberty, but the wording

[348] Keller and Heri (2014) p. 737.

'arrest, detention, abduction or any other form of deprivation of liberty' implies that it should be understood broadly. To clarify the concept, one could consider the ECHR and the right protected by Article 5 that no one shall be deprived of their liberty except when lawful and authorized. Lawful refers to that the deprivation must be done in accordance with a procedure prescribed by law, and as to authorized, the provision lists seven cases where deprivation is granted by the Convention.[349] However, although the State may detain asylum seekers and migrants, 'such detention must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no-one should be dispossessed of his or her liberty in an arbitrary fashion'.[350] When dealing with mass arrivals at the border, the ECtHR has held that the prohibition of arbitrariness is:

> generally satisfied by a domestic legal regime that provides, for example, for no more than the name of the authority competent to order deprivation of liberty in a transit zone, the form of the order, its possible grounds and limits, the maximum duration of the confinement and, as required by Article 5 § 4, the applicable avenue of judicial appeal.[351]

Consequently, a state may detain migrants upon their intent of border crossing, which leads us to the conclusion that such detention may amount to deprivation of liberty within the scope of Article 5 ECHR. However, a distinction needs to be made between deprivation of liberty and a restriction on the liberty of movement.[352] In the case of confinement of migrants with the purpose of identification and registration, the ECtHR has expressed that in distinguishing between these two, the factors the Court consider are:

i) the applicants' individual situation and their choices,

ii) the applicable legal regime of the respective country and its purpose,

iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and

iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants.[353]

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[349] Deprivation of liberty of a person with the purpose of preventing them from entering the country in an unauthorized manner as well as with the purpose of extradition or deportation is expressly permitted by the ECHR See Article 5(1)(f) ECHR.

[350] ECtHR Judgment of 29 January 2008, App. no. 13229/03, *Saadi v. The United Kingdom*, paras. 64-66.

[351] ECtHR Judgment of 21 November 2019, App. nos. 61411/15, 61420/15, 61427/15, and 3028/16, *Z.A. and Others v. Russia*, para. 162.

[352] The right to freedom of movement is guaranteed by Article 2, Additional Protocol 4 of the ECHR.

[353] See *Z.A. and Others v. Russia*, para. 138; ECtHR Judgment of 21 November 2019, App. no. 47287/15, *Ilias and Ahmed v. Hungary*, para. 217 and ECtHR Judgment of 2 March 2021, App. no. 36037/17, *R.R. and Others v. Hungary*, para. 74.

The *Khlaifia and Others v. Italy* case concerned holding migrants rescued at sea in reception facilities and on ships.[354] The applicants in the case had been intercepted at sea by the Italian Coast Guard and disembarked on Italian territory where they were held at an official site under police surveillance. They were later transferred to a ship where they were continued to be held under surveillance, before finally being transported to the airport to be returned to their country of origin. In total, the detention lasted for a period of about nine and twelve days for the different applicants.[355] The ECtHR found that they had been deprived of their liberty within the meaning of the ECHR, considering the restriction imposed on them; they were under surveillance and prohibited from leaving for a not "insignificant" period of time.[356] The conclusion of the Court in this case centering the restrictions imposed by the authorities, supports the fact that, if a migrant is surveilled and restricted to move freely for a significant period of time, this situation may be considered as a deprivation of liberty within the meaning of the ECHR, and thus, in extension, also within the meaning of the definitional element of an enforced disappearances.

In the case that a migrant is detained by the state's police, border guard or security forces, a clear case of deprivation exists. In this regard, the systematic practice of detention of migrants arriving to Greece before being pushed back to Turkey following the EU-Turkey Deal can be recalled. Reports have shown that 'persons [were] arbitrarily arrested without being formally registered and then *de facto* detained in police stations close to the borders', before being transported back to Turkey.[357] At an earlier stage, interception at sea by another vessel may amount to a deprivation of liberty within the meaning of the ICPPED if the migrants are apprehended. In *Medvedyev and Others v. France*, a merchant ship was intercepted by French authorities on the high sea due to suspicions of drug trafficking. The ship was boarded by France and the crew were confined on board under military guard. It was not disputed that the crew had been deprived of their liberty, nor that the purpose was to bring them 'before the competent legal authority'.[358] While this case concerned

[354] ECtHR Judgment of 15 December 2016, App. no. 16483/12, *Khlaifia and Others v. Italy*.

[355] *Khlaifia and Others v. Italy*, paras. 11-17.

[356] *Khlaifia and Others v. Italy*, paras. 65-73.

[357] *The New York Times*. (2020, March 10). At Secret Site in Greece, Suspected Migrants Are Warehoused. https://www.nytimes.com/2020/03/10/world/europe/greece-migrants-secret-site.html (accessed December 30, 2023). For reported documentation on this practice, see also The Asylum Information Database (AIDA). (2020, December 31). *Country Report: Greece*. The Greek Council for Refugees, pp. 209–210; and European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). (2019, February 19). Report to the Greek Government on the visit to Greece carried out by the CPT from 10 to 19 April 2018. (CPT/Inf (2019) 4). Strasbourg, para. 136-145.

[358] ECtHR Judgment of 29 March 2010, App. no. 3394/03, *Medvedyev and Others v. France*, para. 82. Only the lawfulness of the deprivation of liberty was disputes. The Court found that it was not, and by se France had violated Article 5(1). See para 102.

drug trafficking, migrants apprehended following a rescue operations, would make a arguable claim for that the apprehension with the purpose of bringing them to the competent legal authority, could amount to deprivation of their liberty within the meaning of the ICPPED.

Lastly, in the context of crossings made at sea where migrants have not been apprehended by a coast guard, whether this element of enforced disappearance is fulfilled is questionable. When the migrant voluntarily places themselves in the hand of smugglers to cross, although clearly the conditions migrants experience during smuggling journey are far from humane – transported in overcrowded boats without proper lifesaving equipment – it appears difficult to claim that migrants have been deprived of their liberty. The exact content and scope of what is considered as voluntarily and valid consent will not be further scrutinized, but the vulnerable situation and lack of other options could be a ground for labeling the situation as not voluntarily. In the same vein, consent of a victim of trafficking is irrelevant due to abuse of power or of a position of vulnerability.[359] Indeed, the OCHCR has pointed out that 'the distinction between trafficking and migrant smuggling is a legal one and may be difficult to establish or maintain in practice.'[360] Cases have also been reported where migrants are taken hostage by smugglers, blackmailing their families to pay for the journey.[361] From this, considering the disparity of power – smugglers taking advantage of migrants vulnerable situation – this could render any consent given as irrelevant and qualify to label the situation as a deprivation of liberty.

In sum, as to the element of deprivation of liberty, it will be fulfilled if a migrant has been detained upon arrival to the shore and arguably as well intercepted at sea or apprehension after a rescue operation. As to the situation where there has been no direct contact with agents of a state, it could also be possible to argue that crossings at sea in the context of smuggling, depending on the circumstances, amounts to a deprivation of liberty due to the power

[359] Or due to the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, or of the giving or receiving of payments or benefits. See UNGA (2000, November 15). Resolution 55/25, *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, Article 3(b).

[360] OHCHR. (2010). Recommended Principles and Guidelines on Human Rights and Human Trafficking. HR/PUB/10/2, p. 34f.

[361] See Kassab et. al. (2023, June 18). Greek migrant boat tragedy: What do we know so far? *Madamasr*. https://www.madamasr.com/en/2023/06/18/feature/politics/greek-migrant-boat-tragedy-what-do-we-know-far/ (accessed December 30, 2023): 'The sum of money is like a "ransom," said Mohamed, the brother of Ayman Abdel Aziz, one of those still missing, saying that after speaking to other families he realized that they had to make the payment even if their relatives changed their minds about crossing the Mediterranean. "If they don't, then it becomes a hostage situation," said Mohamed. "He won't necessarily be killed, but he won't come back unless the money is paid.'

imbalance between smugglers taking advantage of the vulnerability of migrants.

4.3.2 Involvement of agents of the State

The second element of the definition also presents challenges. While discussion exists within the international community whether acts committed by non-state agents can amount to enforced disappearances, the definition of the ICPPED clearly excludes them. However, as mentioned, the ECtHR is not bound by the ICPPED, thus, allowing for some margin in considering acts of other actors. For this purpose, the draft articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) by the International Law Commission (ILC),[362] commonly recognized to reflect customary international law,[363] are of relevance. The Draft Articles provide that state responsibility is based on two elements: attribution and breach. For a state to be held responsible for a breach of its international obligation, the conduct must be attributable to the state.[364] Primarily, acts and omissions are attributed to the state if it is committed by a state official or a public authority, but ARSIWA also holds that conduct by non-state actors may be attributed to a state in some specific circumstances. For the situation of migrants in the Mediterranean mainly two situations of conduct by non-state actors are or relevance: conduct committed by non-state actors if they acted on the instructions of or under the control of the state (Article 8) and any conduct which the State acknowledges and adopts as its own (Article 11).[365] In this way, under the ECHR, it could be possible to argue for state responsibility for enforced disappearances, even for acts committed by non-state actors.

Taking into account the description in Chapter 2 on the EU's response to migration and the treatment by European states of migrants in the Mediterranean Sea, the actors potentially violating the rights of migrants and potentially subjecting them to enforced disappearances, or at least participating in this, would seem to be: border and coast guards, personnel participating in pushbacks at sea and/or search and rescue operations and

[362] International Law Commission. (2001). Draft articles on Responsibility of States for Internationally Wrongful Acts. *Yearbook of the International Law Commission*, 2001, Volume II, Part Two. (ARSIWA).

[363] For arguments as to its character as customary law, see Bordin, F. L. (2014). Reflections of customary international law: the authority of codification conventions and ILC draft articles in international law. *International & Comparative Law Quarterly*, 63(3), 535–567.

[364] In this Section the focus will be on the element of attribution of acts or omissions to the state. Discussion of the element of breach is found in Section 4.5.

[365] Similarly, in the absence of official authorities, the conduct of a non-state actor which in fact is exercising elements of governmental authority, is also attributable to the State. (Article 9 ARSIWA) The same applies for conduct of an insurrectional movement which becomes the new government of the State or establishes a new state (Article 10 ARSIWA).

migrant smugglers.[366] The border and coast guard are official organs of the state. This means that any disappearance of a migrant happening as a result or following detention upon arrival to the shore, interception at sea or pushbacks, would be attributable to the state. Similarly, when the state coordinates and executes a search and rescue operation there is conduct that could be attributed to the state. Either since state officials are conducting the rescue, or because actors are acting on the instruction of or under the control of states. For the former, the case of *Hirsi* clearly illustrates the responsibility of the state when an official vessel of the state is involved. As the migrants had embarked on an Italian military ship, a *de jure* organ of the state, they were considered to be within the jurisdiction of the state,[367] and a disappearance from the point of embarkation, could then be attributed to the state. The situation is more complicated for a rescue conducted by an NGO, given that it is a private vessel and not an official one of the state. However, this corresponds to the second situation mentioned just previously: the crew's conduct could be attributed to the state if they are acting on the instructions of the state. This could be the case where an NGO is instructed by the competent authorities of the flag state to tend to a rescue and a rescued migrant then disappears. Lastly, if an executed rescue operation is later acknowledged by the state as to say that it acknowledges it as its own, any disappearance resulting from it could potentially also be attributed to it.

For migrants who disappear at sea during a crossing organized by migrant smugglers, there seemingly is an absence of state agents. However, as remarked upon by the WGEID, the involvement of state officials with migrant smugglers in Libya has been well documented.[368] There is a possibility that conduct could be attributed to Libya if the smugglers acted on the instructions of or under the control by state authorities. Thus, creating a link between disappearances and state actors. Be that as it may officials of a third state, and Libya's responsibility for obvious reasons falls outside the competence of the ECtHR. Nonetheless, ARSIWA establishes that a state, aiding and assisting another state, is responsible to the extent it did so with the knowledge of the circumstances of the internationally wrongful act and the act would have been internationally wrongful if committed by the state itself.[369] Thus, it is possible

[366] While there are other actors involved as well – police and security forces, drone operators, rescue coordination centre personnel just to mention a possible few – the analysis will focus on the three described above.

[367] Jurisdiction under international human rights law is further discussed in Section 4.4.

[368] International Organization for Migration. (2021). Migrant Smuggling on the Central Mediterranean Route. Study Report, p. 43: 'There are proven cases of the Libyan Coast Guard, whose role is to intercept or rescue migrants at sea, who are also responsible for smuggling migrants'; OHCHR & United Nations Support Mission in Libya (2016, December 13). *Detained and Dehumanised: Report on Human Rights Abuses Against Migrants in Libya,* p. 13: 'UNSMIL has received reports indicating that Libyan Coast Guard and DCIM staff members have worked with armed groups, smugglers and traffickers to exploit migrants for profit.'; and WGEID. (2017, July 28). Enforced disappearances in the context of migration, para. 39.

[369] Article 16 ARSIWA.

to argue that the cooperation and partnerships between the EU and its Member States with third countries such as Turkey, Libya and Morocco, amount to aiding and assisting these states. From this, if state officials of these third states are involved in committing enforced disappearances, European states could be seen as indirectly involved. By the material aid and financial support given they contribute to the capacity of state officials to detect and deter migrants, and in extension, possibly also to the commitment of enforced disappearances. Given the plenty reports denouncing the corruption of the Libyan Coast Guard and also the occurrence of enforced disappearances in Libya, it is hardly possible for European states to argue that they are unaware of it, and it certainly would have been wrongful if committed by a European state as well. However, being a theoretical possibility, it is questionable if the link between the support provided – funding and training the Coast Guard – is strong enough to establish responsibility of European states. Gammeltoft-Hansen and Hathaway argue that it can be, claiming that providing equipment that supports coast or border guards, sharing relevant intelligence or financially supporting the capacity for migration control, may result in assisting that state in violating its obligations, notably the principle of *non-refoulement*.[370] Nonetheless, the connection between the assistance given and the commitment of acts of enforced disappearance – seemingly by non-state actors, but with the support of third state officials – may well be too abstract and lack sufficient correlation for considering it as an enforced disappearance. Future case law will have to shed light on this matter, given the particular circumstances of the cases that may arise.

However, attribution under international law should not be equated to the element of involvement of state agents in the definition of enforced disappearance. While the former may serve to establish the latter, it is not necessarily the case that attribution under ARSIWA is required to say that there is involvement of state agents within the meaning of the ICPPED. Importantly, here we should remember the obligation on states to investigate acts of enforced disappearances committed by non-state actors by virtue of Article 3 ICPPED. For this obligation to be activated, a certain level of state participation is still required, as the complete lack thereof renders the situation outside the scope of an enforced disappearance. In this way, state actors must incur some level of direct or indirect involvement. Hence, perhaps the link between European financial support and corrupt Libyan state officials is not solid enough for responsibility of a European state under ARSIWA, but it

[370] Gammeltoft-Hansen, T., & Hathaway, J. C. (2015). Non-Refoulement in a World of Cooperative Deterrence. *Columbia Journal of Transnational Law*, 53(2), 235–284. They however also point out that aid and assistance will be sufficient for attribution to the state and responsibility under international law, but not will most times be sufficient to establish jurisdiction under international human rights law. We will return to this question under the discussion of jurisdictional issues in Section 4.4.

could suffice for the finding of involvement of state agents for the purpose of the definition.

The WGEID has pointed out that involvement of state agents of enforced disappearances of migrants could take the form of collusion and corruption, with state officials allowing smugglers to operate without risk, and that states are implicitly or explicitly involved, because 'disappearances of migrants, although carried out by non-State actors, occur with the implicit or explicit authorization, support or acquiescence of individuals operating in the capacity of State officials.'[371] More so, this obligation under the ICPPED, is paralleled by the procedural obligation of states in relation to Article 2 and 3 ECHR. Thus, in this sense, a state may be found responsible for violating the right to life of the ECHR, in a case of an enforced disappearance, if it does not conduct an effective investigation into a suspected deprivation of life, no matter the perpetrator. The obligation to investigate is endowed directly upon the state and will on a domestic level normally be fulfilled through the different actors of the state's legal system: police, prosecutor, domestic courts, and similar. This entails that the failure of these actors to conduct a thorough and effective investigation, is directly attributable to the state. Hence, the indirect involvement of a third state, brings the situation within the ICPPED and the definitional element is fulfilled, which then could bear implications for responsibility of European states. While the obligation to investigate is endowed primarily on the state directly or indirectly involved in the practice, it is not impossible that another state could incur an obligation to investigate as well, through a finding that they also exercise jurisdiction over the acts committed. Jurisdiction of European states over migrants in the Mediterranean and acts committed will be further discussed in Section 4.4.

Related to the obligation to investigate, the WGEID in its 2017 report remarked, concerning the drowning of migrants abandoned in the Mediterranean Sea, especially mentioning cases where they have been prevented from approaching or disembarking, that:

> While these situations are not necessarily enforced disappearances per se as defined in the [1992] Declaration, they may trigger State responsibility as they may constitute practices tantamount to disappearances or may facilitate disappearances because they render the finding or identification of missing persons very difficult.[372]

Thus, not necessarily cases of enforced disappearances according to the WGEID, but 'systematic situations of impunity regarding the abduction and detention of migrants by private actors' could be considered as a form of

[371] WGEID. (2017, July 28). Enforced disappearances in the context of migration, para. 37.

[372] WGEID. (2017, July 28). Enforced disappearances in the context of migration, para. 44.

acquiescence and, as such, constitute enforced disappearance.[373] In this light, some scholars have also argued for a "broad" interpretation of enforced disappearances, which would include responsibility of the state when it is indirectly involved through the very failure to investigate or prevent it from happening. Duihame and Thibault point out that 'the failure to conduct investigations and adopt appropriate measures to identify the remains of migrants found in common graves or at sea, for example, contributes to impunity', indirectly creating a situation in which the state supports the commitment of enforced disappearances through allowing it to happen.[374] Scovazzi and Citroni have also argued that a state that "takes advantage" of, or allows enforced disappearances to happen, could considered to acknowledge and adopt such conduct as its own, resulting in it being attributed to the state.[375] Building on the argument of Scovazzi and Citroni, while it may be too bold to claim that the EU and the Member States are "taking advantage" of disappearances in the Mediterranean, they could perhaps be said to accept them as a necessary evil. Recent trends show that arrivals to Europe have decreased in the last years and as such, the migration policy of the EU and its Member States has been effective in achieving its aim of preventing "irregular migration".[376] However, at the same time, the probability of disappearing when crossing the Mediterranean Sea has considerably increased. Although numerous resolutions, official documents and speeches condemn these deaths, the policy response to migration – reinforcing border controls while not creating safe and accessible legal pathways – disregard the very fact that these measures have the effect of increasing migrant smuggling, making the journey far more dangerous, as less safe routes are chosen to avoid the restrictive measures, and ultimately placing migrants in a situation of increased vulnerability. In this way, European states are fostering a situation where disappearances and deaths are more likely to happen, and as such, could be said to be involved in its commitment through letting it happen caused by the lack of investigation and preventive measures, also aligning with the argument by Duihame and Thibault as well.

To summarize the discussion on potential actors and attribution of acts to states, we can draw three conclusions in the context of migrants going missing in the Mediterranean and the involvement of state agents. Firstly, there are not a lot of acts being committed by European state agents. Mainly confined to interception at sea by the coast guard or rescue operations led by an official ship of the state. Secondly, there are neither plenty of possibilities to attribute

[373] WGEID. (2017, July 28). Enforced disappearances in the context of migration, para. 42.

[374] Duhaime, B., & Thibault, A. (2017). Protection of migrants from enforced disappearance: A human rights perspective. *International Review of the Red Cross*, 99(2), 569–587, p. 585.

[375] Scovazzi & Citroni (2007) p. 281.

[376] Although this decrease is most likely not exclusively explained by the migration policy of the EU but also by other happenings in the world which affects migration trends.

acts of non-state actors to European states. One exception would be rescues conducted by an NGO acting on the instruction of a state. For these two situations, the question is how many disappearances results from this in practice, or if not rather, most disappearances happen in other contexts. Thus, thirdly, to the extent that acts are committed by state agents or non-state agents attributable to a state, these are not European states. Here we are talking about disappearances at sea, by the hand of migrant smugglers, whose acts can be attributed to mainly Libya, through the cooperation between smugglers and the Libyan Coast Guard. Nevertheless, while there is a limited number of situations where European state agents are directly involved, it is possible to argue that the indirect involvement – either through the aid and assistance to third states or by the very lack of investigation allowing for impunity of these acts – by so fulfills this element of the definition and renders the disappearance of migrants in the Mediterranean within the concept of an enforced disappearance. Importantly, giving rise to an obligation of European states to investigate these disappearances.

4.3.3 Refusal to acknowledge

The third element of an enforced disappearance concerns either the refusal of the state to acknowledge the deprivation of liberty or more broadly, the concealment of the fate or whereabouts of the disappeared person. As to missing migrants in the Mediterranean, we can recall the fact that disappearances following detention by the state is not our main topic of interest, and for that reason, the possible refusal of the state to acknowledge such detention will not be greatly considered.[377] Instead, we focus on the case of migrants going missing at sea and the concealment of their fate. Here we should remark that the state does not necessarily know what has happened to the person and is point-blank refusing to reveal any information. This is also commonly the situation in more traditional cases of enforced disappearances; the state may very well not possess the knowledge.[378] However, in these circumstances, the denial can be demonstrated by the fact that the acts were committed by agents of the state, and through that, the whereabouts and fate of the disappeared person were indirectly known to the state at one point in time. In comparison, the case of migrants whose lives are lost to the Mediterranean, if the refusal to acknowledge is to be understood as the state actually having possessed the knowledge of the fate at one given moment, it

[377] A comment can be made here to the practice of hot returns which potentially can be considered as a temporary deprivation of liberty. In these cases, the state will not necessarily deny the deprivation of liberty, but more so, inherent to hot returns, the individual is not being identified, rendering it very difficult to later confirm or deny any deprivation of liberty. However, as will be further discussed in Section 4.5.1, the state is under an obligation to prevent enforced disappearances, which implies a requirement to establish safeguards around detention to avoid disappearances.

[378] Traditional in the sense of the historical cases of enforced disappearances as abduction of mainly political opponents to the ruling regime, detention followed by torture and extrajudicial killings and the body dumped in mass graves, with no official documents or records of the events.

is not certain that this corresponds to the situation for many missing migrants.[379]

However, the denial could also be demonstrated by the absence of investigation. By the refusal to investigate the state is effectively concealing the fate of the person by not trying to clarify the circumstances. Nonetheless, this obligation to investigate is limited to situations which the state knew about or ought to have known about. This concept has been developed in international law within the framework of positive human rights obligations,[380] as the determination of a breach is contingent upon the actual or putative knowledge of the state.[381] For the situation under scrutiny, we can quite clearly say that the state in a majority of cases will not possess actual knowledge of the fate of an individual who has gone missing at the Mediterranean. Therefore, we turn to consider what is required to establish that a state "ought to have known", thereby implying that an investigation should be launched. There is no common accepted standard for what putative knowledge amounts to, but Stoyanova has identified three alternative approaches to assess when a state is considered to possess such knowledge:

> First, was the harm objectively or scientifically foreseeable at the relevant point in time, so that the state authorities should have known about it? Second, would the state authorities have correctly assessed the risk of harm based on the information they would have had if they had carried out their obligations? Carrying out these obligations might imply consulting scientific studies and taking decisions accordingly. Third, should the state authorities have known of the risk, based on the information that was *actually* before them at that particular point in time?[382]

In respect of these three alternatives, she notes that the first one might be too demanding, the second one presupposes that the state already were under an obligation to acquire knowledge, and the third one results in the least likelihood for finding a breach.[383] In any case, regardless which one of these approaches we adopt, being non-cumulative nor exhaustive, it appears as that the general situation in the Mediterranean fulfills all of them respectively. For example, as shown by the numerous instances in which the migration crisis in the Mediterranean has been addressed by the EU, by the Council of Europe

[379] A possible situation where this could indirectly be the case is in Libya where bodies allegedly have been dumped and abandoned by smugglers, potentially possible to attribute those acts to corrupt state agents, but again, responsibility of Libya is not the topic of this thesis. See International Organization for Migration. (2016). Identification and Tracing of Dead and Missing Migrants. *Fatal Journeys, Volume 2*. Geneva. p. 33.

[380] For further discussion, see Section 4.5.1.

[381] Stoyanova, V. (2023). *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries*. Oxford University Press, p. 26.

[382] Ibid., p. 26-27.

[383] Ibid., 27-28.

and by the European states themselves. More specifically, this knowledge is also supported by the widely available estimations on number of migrants who have died or gone missing in the Mediterranean, 2 731 in 2023 as estimated by the UNHCR, and a total of 28 505 since 2014 as estimated by IOM. Additionally, the report of the WGEID on enforced disappearances in the context of migration, particularly addressing the situation in the Mediterranean. All of this testifies to that the risk and the harm ought to have been known to European states as to require investigations. However, here we encounter another issue that should be addressed. This knowledge of a risk refers to the more general situation. How does it apply in the case of the risk for a particular individual? Would it be possible to say that, through the knowledge of the general situation, the states by abstaining from investigating the occurrence of deaths and disappearances, are refusing to acknowledge? A refusal of European states to acknowledge their role in these deaths? Blame is placed on migrant smugglers as the sole responsible actor while disregarding the impact of the EU's restrictive migration policy leaving migrants with little to no choice but to take far more dangerous routes; more likely to lead to their disappearance and death.[384] European states have knowledge of this. Although knowledge of the risk in relation to a particular individual is likely not the case, they are aware that migrants take to the Mediterranean to try to cross, risking their lives. Knowledge of the risk at an individual level should not be considered a necessary element for us to say that European states have knowledge that every migrant at sea is *at* risk.

In sum, once the disappearance of a person becomes known to the state – for example through a body being washed up on shore, by relatives calling on the state to investigate or a shipwreck where the persons in question are within the jurisdiction of the state – the state is required to investigate, and the absence thereof, would amount to a refusal to acknowledge their fate within the meaning of the ICPPED. The awareness of the general risk for migrants in the Mediterranean Sea to go missing is sufficient to hold that the state knows of the risk for each individual. More so, this knowledge also imposes obligation on states to adopt preventative measures, discussed further in Section 4.5.1. First though, any obligation of European states owed towards a disappeared person – of investigation or prevention – is dependent upon that the person is or was within the jurisdiction of the state, as such the issue of jurisdiction over migrants in the Mediterranean needs to be addressed.

[384] See WGEID. (2017, July 28). Enforced disappearances in the context of migration, para. 36: 'Many migration policies adopted by States in recent decades, as well as the militarization of borders, have led to an expansion of trafficking and smuggling of migrants. To avoid the restrictive measures adopted by States, many migrants choose clandestine and less safe routes as well as more dangerous means of transportation which are not monitored by State authorities and are often controlled by illegal groups with the cooperation or acquiescence of State agents'.

4.4 Issues of jurisdiction

States are responsible for protecting the human rights of the individuals within their territory and jurisdiction, but to what extent this obligation extends beyond the borders of the state – the extraterritorial application of human rights – is contested. Under the ECHR, Article 1 obliges the Contracting States to 'secure to everyone within their jurisdiction the rights and freedoms' of the Convention. In this way, the exercise of jurisdiction of the state is a necessary condition for it to be held responsible for violating the human rights protected by the ECHR. Hence, the relevant question is at what point migrants in the Mediterranean are considered to be subjects to the jurisdiction of European states within the meaning of ECHR?

The ECtHR has held that a state's jurisdictional competence is primarily territorial which is presumed to be exercised normally throughout the territory of the state,[385] and that any 'other basis is exceptional and requires special justification in the particular circumstances of each case'.[386] Thus, the Court does recognize the extraterritorial concept of jurisdiction, but only in exceptional cases. The main question is whether any exceptional circumstances exist relating to 'the nature of the link between the applicants and the respondent State and to ascertain whether the latter effectively exercised authority or control over them.'[387] There are mainly two ways in which jurisdiction of a state outside its territory can be established as found by the ECtHR: on the basis of power or control actually exercised over a person (personal jurisdiction or *ratione personae*) or on the basis of control actually exercised over a foreign territory (spatial jurisdiction or *ratione loci*). In the following Sections different types of jurisdictions as found in the case law of the Court and advanced by scholars, deemed relevant for the purposes of migrants in the Mediterranean, will be discussed. Starting with cases where migrants could be considered to be within the territorial jurisdiction of European states, followed by a discussion on extraterritorial jurisdiction based on "effective control". Lastly, the more contemporary approach of "functional jurisdiction" will be assessed, with the purpose of trying to overcome the ways in which the externalization practices by EU Member States have rendered violations of the rights of migrants outside the jurisdiction of European states.

[385] ECtHR Decision of 5 May 2020, App. no. 3599/18, M.N. and Others v. Belgium. Para/ 98; ECtHR Judgment of 4 April 2017, App. no. 36925/07, *Güzelyurtlu and Others v. Cyprus and Turkey*, para. 178; and ECtHR Decision of 12 December 2001, App. no. 52207/99, *Banković and Others v. Belgium and Others*, paras. 59-61.

[386] *Banković and Others v. Belgium and Others*, para. 61; and ECtHR Judgment of 19 October 2012, App. nos. 43370/04, 8252/05, and 18454/06, *Catan and Others v. Moldova and Russia*, para. 104.

[387] *M.N. and Others v. Belgium*, para. 112-113.

4.4.1 Territorial jurisdiction

Discussing the Mediterranean as a site for enforced disappearances, international maritime law on maritime zones establishing jurisdiction are relevant. While these types of jurisdictions – maritime and human rights – does not necessarily have to overlap, the ECtHR has in its case law supported its reasoning establishing human rights jurisdiction on maritime jurisdiction. The state exercises full jurisdiction over its internal waters and the territorial sea,[388] and exercises some level of sovereignty, notably for migration control purposes, in the contiguous zone.[389] In the *Safi and Others v. Greece* case, a boat of twenty-seven migrants capsized as the Greek Coast Guard tried to tow it, resulting in the death of eleven persons. The jurisdiction of Greece over the individuals was not disputed in the case, and assumably this was due to that the events took place in the territorial waters of Greece.[390] Thus, for incidents in territorial waters, if a migrant dies or disappears in this area, or if a body is washed ashore on the coast of a European state, it is possible to argue that since these individuals find themselves in the territory of the state according to international maritime law, the state exercises jurisdiction over them. Albeit, maritime zones establishing a state's jurisdiction extend only twenty-four nautical miles from the coast, and majority of shipwrecks where migrants drown, or interception of vessels take place is on the high sea where no state exercises sovereignty.[391] When a vessel with migrants finds itself in international waters, under whose jurisdiction do they fall?

4.4.2 Extraterritorial jurisdiction based on effective control

Turning to the question of extraterritorial jurisdiction, it is commonly held by the ECtHR to be established based on the effective control the state exercises over an area or a person. For jurisdiction *ratione loci*, the case law of the ECtHR has so far only concerned effective control as a result from military occupation,[392] and its possible extension to the Mediterranean as an area of migration is uncertain. It is dubious whether a claim that European coastal states have effective control over the Mediterranean in a spatial sense would be successful. Even though the area is divided into search and rescue regions, where states are responsible for coordinating operations to rescue persons in distress at sea, these are not maritime zones where the state exercises any *de*

[388] Article 2 UNCLOS.

[389] Article 33 UNCLOS.

[390] *Safi and Others v. Greece*, paras. 10 and 27. Also because the events took place at the hand of the Greek Coast Guard, exercising full control over the individuals (see following discussion of effective control over persons in the next Section 4.4.2).

[391] Article 89 UNCLOS.

[392] 'All the cases which the Court has hitherto considered from this angle concerned the control of the territory of a Contracting State by another Contracting State in the context of an armed conflict.' See ECtHR Guide on Article 1 of the European Convention on Human Rights Obligation to respect human rights – Concepts of "jurisdiction" and imputability (Updated on 31 August 2022), para. 73; for case law see for example ECtHR Judgment of 21 January 2021, App. no. 38263/08, *Georgia v. Russia (II)*, paras. 161-175.

jure control. Rather, considering the case law of the ECtHR, it is effective control over a person that has the most potential for being the foundation for jurisdiction.

For jurisdiction *ratione personae,* the ECtHR has pointed out that jurisdiction does not arise solely from the control exercised by the state, but rather 'what is decisive in such cases is the exercise of physical power and control over the person in question.'[393] The ECtHR has found that acts on board of ships registered or flying the flag of a state, by virtue of the exercise of full and exclusive control over the ship and crew, amounts to extraterritorial exercise of personal jurisdiction.[394] In the case of search and rescue operations in international water, the flag state of the rescue vessel is considered to exercise such control, rendering survivors or bodies retrieved from the high sea as within the jurisdiction of that state. This was the situation in the *Hirsi* case.[395] The ECtHR considered that since the vessel, an Italian military ship, was flying the Italian flag it therefore was subject to the exclusive jurisdiction of Italy under international maritime law.[396] As such, the individuals on board found themselves under *de jure* control by Italy,[397] and more so, as 'the events took place entirely on board ships of the Italian armed forces', the individuals concerned also found themselves under 'continuous and exclusive *de jure* and *de facto* control' of the Italian authorities 'in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities'.[398] Thus, given the emphasis of the Court on the crew being composed exclusively of Italian military personnel, the situation for jurisdiction would seem to be different if the rescue is executed by a private vessel such as an NGO. Indeed, this was discussed in Section 4.3.2. where it was held that if the shipmaster acted on the instructions of the competent authorities of the flag state, it would become a *de facto* organ of the state by virtue of Article 8 ARSIWA.[399] This would allow for arguing that the state exercises effective control over the individuals concerned and by so create a jurisdictional link.

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[393] ECtHR Judgment of 7 July 2011, App. no. 55721/07, *Al-Skeini and Others v. The United Kingdom*, para. 136.

[394] *Medvedyev and Others v. France*, para. 67; ECtHR Judgment of 31 May 2016, App. no. 11167/12, *Bakanova v. Lithuania*, para. 63; and *Hirsi Jamaa and Others v. Italy* para. 75.

[395] Italy had raised the objection that although the events 'had taken place on board Italian military ships', the Italian authorities had not 'exercised "absolute and exclusive control" over the applicants'. See *Hirsi Jamaa and Others v. Italy*, para. 64.

[396] *Hirsi Jamaa and Others v. Italy*, para. 76-77. For relevant maritime law provision on flag state see Article 92(1) UNCLOS.

[397] *Hirsi Jamaa and Others v. Italy*, para. 77.

[398] *Hirsi Jamaa and Others v. Italy*, para. 81.

[399] See Papastavridis, E. (2017). Rescuing migrants at sea and the law of international responsibility. In T. Gammeltoft-Hansen & J. Vedsted-Hansen (Eds.), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control*. New York: Routledge, p. 167.

Apart from control over an area and persons, there is a view that effective control exercised by one state over another state would bring individuals harmed by human rights violations by the latter into the jurisdiction of the former. In international law, a state may be held responsible for aiding and assisting another state if the former provides financial support and material aid to the latter.[400] Commonly, this has been understood to not be sufficient for human rights jurisdictional purposes,[401] as the involvement is too limited to amount to *de jure* or *de facto* control.[402] Nevertheless, in the *Ilaşcu* case, the ECtHR found that, through the support by Russia to a separatist movement in Moldova, notably financial support,[403] the acts of the movement were attributable to Russia under international law.[404] More so, as the rebel group was under 'effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survive[d] by virtue of the military, economic, financial and political support given to it by the Russian Federation',[405] it meant that Russia exercised jurisdiction within the meaning of ECHR.[406] Building on this conclusion of the ECtHR,[407] Moreno-Lax and Giuffré have argued that the "decisive influence" of the EU in third state arrangements, notably the EU-Turkey deal and Libya partnership, is 'a form of indirect but nonetheless effective control that amounts to jurisdiction under Article 1 ECHR'.[408] This "decisive influence" is derived from two factors: One, the funding, training and equipment provided by the EU is conditioned on the reciprocal obligation to manage migratory flows and impede transit toward Europe, and as such, is the sole reason for Turkey and Libya to prevent departures to Europe. Two, the practical effect of these arrangements, particularly the EU-Turkey Deal, has been a witnessed reduction in arrivals to Europe, thus effectively having an influence and determining the course of events.[409] In the case of Morocco, the decisive influence of the EU would seem to be not as apparent which is

[400] See Article 16 ARSIWA.

[401] See Gammeltoft-Hansen & Hathaway (2015) p. 276f: 'For example, states are clearly not exercising jurisdiction when they provide only training or material assistance to a partner state. Even when immigration officers or other officials are posted to another country as advisers, there will be no exercise of jurisdiction unless the authorities of the territorial state can be shown to act under the direction and control of the sponsoring state'.

[402] Rijken et. al. (2018). Protecting the EU external borders and the prohibition of refoulement. *Melbourne Journal of International Law*, 19(2), 614-638, p. 635.

[403] ECtHR Judgment of 8 July 2004, App. no. 48787/99, *Ilaşcu and Others v. Moldova and Russia*, para. 390.

[404] *Ilaşcu and Others v. Moldova and Russia*, paras. 382-384.

[405] *Ilaşcu and Others v. Moldova and Russia*, para. 392.

[406] *Ilaşcu and Others v. Moldova and Russia*, paras. 384 and 394.

[407] Also repeated by the ECtHR in *Catan and Others v. Moldova and Russia*, para. 112.

[408] Moreno-Lax & Giuffré (2017) p. 24. Third-party submissions before the ECtHR to the pending case *S.S. and Others v. Italy* have highlighted the possible responsibility of a state in aiding or assisting wrongful conduct through funding, training or other material support to another state. See Written Submissions on Behalf of The Aire Centre (Advice On Individual Rights In Europe), The Dutch Refugee Council (DCR), The European Council On Refugees And Exiles (ECRE) and The International Commission Of Jurists (ICJ) (2019, November 11), *S.S. and Others v. Italy* (App. No. 21660/18).

[409] Ibid.

illustrated by that border control is exercised rather independently by Morocco,[410] making it more difficult to argue jurisdiction of European states, notably Spain, through this approach. In any case, as noted by Rijken, a distinction should be made between financial aid aimed at, on the one hand, strengthening the capacity of the coast guard, and on the other hand, improvement of reception conditions. Whereas the former could imply involvement in the commitment of human rights violations, notably the principle of *non-refoulement*, the connection between violations and the latter is not as obvious.[411] In this regard, the difference between the financial aid under the EU-Turkey Deal and the financial support given to the Libyan Coast Guard and Morocco is clearly important. The EU-Turkey Deal allocating funds for projects relating to refugees in Turkey, and the Libyan and Moroccan partnership directly aiming at strengthening the capacity of the Coast Guard.[412] Hence, it would be necessary to assess the role of the financial aid provided, not only as "decisive influence", but also in relation to the commitment of human rights violations, to ascertain whether European states could be said to exercise jurisdiction.

Having discussed these three possibilities of jurisdiction based on effective control, we are nonetheless still left with the question who guarantees the rights of the thousands of victims at the bottom of the Mediterranean? In *Hirsi*, the applicants boarded the Italian ship before being handed over to the Libyan authorities, and by so Italy were exercising control over the individuals from the moment they had boarded the boat, creating the jurisdictional link. But what about migrants at sea who are detected by an aerial drone? The response of the EU to the *Hirsi* judgment was much to shift to a "contactless" approach to migrants and externalize border controls even further; decreasing maritime operations and increasing aerial surveillance. Through a communication sent to a non-EU coast guard, migrants are directly intercepted by a third state,[413] making it difficult to argue with this

[410] Notably the diplomatic tensions between Spain and Morocco in May 2021 over the leader of Polisario Front (the main movement claiming decolonization and independence of Western Sahara) led to a temporary relaxation of border controls in Ceuta by Moroccan security forces. Around 6,000 to 8,000 people crossed the border under a period of about two days. See Varo, L. J., Peregil, F., & Martín, M. (2021, May 18). More than 6,000 people swim to Ceuta amid diplomatic row between Spain and Morocco. *El País*. https://english.elpais.com/spanish_news/2021-05-18/more-than-6000-people-swim-to-ceuta-amid-diplomatic-row-between-spain-and-morocco.html (accessed December 30, 2023). See also statement by Moroccan migration and border control chief at the Interior Ministry Khalid Zerouali in 2020: 'Morocco is not into the logic of subcontracting and insists that each country accepts its responsibility towards its nationals'. Eljechtimi, A. (2021, December 15). Morocco's foreign minister warns EU over migration. *Reuters*. https://www.reuters.com/article/morocco-eu-migration-int-idUSKBN28P252/ (accessed December 30, 2023).

[411] Rijken (2018) p. 635f.

[412] See discussion in Section 2.3.4.3.

[413] See OHCHR. (2021, May). *Lethal Disregard: Search and rescue and the protection of migrants in the central Mediterranean Sea*. Thematic report, p. 21: 'Multiple migrants interviewed by OHCHR provided information indicating that their interception and return

understanding of extraterritorial jurisdiction, that they would have been within the "effective control" of any European state, except possibly Turkey. Thus, while perhaps rescued from a certain death at sea, their lives may still be in danger upon return to the third state, and the EU and its member states are directly involved in making this possible.

4.4.3 Functional jurisdiction

Beyond the personal and spatial jurisdiction based on effective control, there also exists an approach that jurisdiction may arise from extraterritorial *effects* caused by states. Usually labeled as "functional jurisdiction", it has been put forward by legal scholars,[414] by judges of the ECtHR in concurring opinions,[415] and arguably even found implicitly in the reasonings of the Court.[416] However, what has been denominated as functional jurisdiction encompasses somewhat different concepts and strategies, but at heart lies 'the importance it attaches to the exercise of "public power" for the establishment of a jurisdictional link'.[417] In this way, it could also be said to not be a third type at all, but a subcategory of effective control, contrasting with the focus on physical control by emphasizing other factors resulting in authority.[418] The above discussed notion of "decisive influence" could thus be considered as a type of functional approach, as it does not correspond to the traditional understanding of effective control over an area or a person, but looks at the authority exercised by a state in an extraterritorial setting. In any case, how this functional approach is labeled is without relevance, instead its practical impact is what interests us. Thus, we will initiate by considering the case law of the ECtHR on jurisdiction from extraterritorial effects, which has been described as 'a number of "leading" judgments based on a need-to-decide basis, patchwork case-law at best',[419] and then turn to scholarly discussion on said case law and proposed interpretations of jurisdiction as functional.

First out, in the 2001 *Banković* case the Court had held that 'the mere fact that decisions taken at national level had an impact on the situation of persons

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to Libya was facilitated by the deployment of European aerial assets over international waters within the Libyan and Maltese SAR zones'.

[414] See for example Gammeltoft-Hansen, T. (2011). *Access to asylum. international refugee law and the globalisation of migration control*. Cambridge University Press; and Moreno-Lax, V. (2020). The Architecture of Functional Jurisdiction: Unpacking Contactless Control - On Public Powers, S.S. and Others v. Italy, and the "Operational Model." *German Law Journal*, 21(3), 385–416.

[415] *Al-Skeini and Others v. The United Kingdom*, concurring opinion of Judge Bonello; and *Hirsi Jamaa and Others v. Italy*, concurring Opinion of Judge Pinto de Albuquerque.

[416] In *Al-Skeini and Others v. The United Kingdom* and *Hirsi Jamaa and Others v. Italy* according to De Boer, see De Boer, T. (2015). Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection. *Journal of Refugee Studies*, 28(1), 118–134.

[417] Moreno-Lax (2020) p. 402.

[418] See Moreno-Lax (2020) pp. 401-403 for a summary on different legal scholarly views on functional jurisdiction.

[419] *Al-Skeini and Others v. The United Kingdom*, concurring opinion of Judge Bonello, para. 5.

resident abroad' did not establish the jurisdiction of the state.[420] Importantly, positive obligations to secure the rights of the ECHR could not be 'divided and tailored in accordance with the particular circumstances of the extra-territorial act'.[421] In this sense, extraterritorial acts was rejected as a basis of jurisdiction, as the threshold of effective control was not reached for such acts. However, ten years later, the Court had a change of heart in the 2011 *Al-Skeini* case and expressly overturned its previous statement that positive obligations could not be divided,[422] and more so, confirmed that jurisdiction of the state 'may extend to acts of its authorities which produce effects outside its own territory.'[423] In *Al-Skeini*, a jurisdictional link was established between the UK and the death of six persons in Iraq as the UK had assumed 'the exercise of some of the public powers normally to be exercised by a sovereign government'. More concretely, the UK had 'assumed authority and responsibility for the maintenance of security in south-east Iraq', by which, 'through its soldiers engaged in security operations […] exercised authority and control over individuals killed in the course of such security operations'.[424] Even before the *Al-Skeini* ruling, the Court had also found on other occasions, seemingly contradictory to the *Banković* ruling, jurisdiction based on extraterritorial acts producing extraterritorial effects. In three separate cases against Turkey, killings or injuries caused by the shooting of Turkish forces abroad was sufficient to hold that the victims fell within the jurisdiction of Turkey without much further discussion.[425] Likewise in the *Ilaşcu* case, the Court had held that 'a State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction'.[426] Similarly, in the case *Xhavara and Others v. Italy and Albania*, the ECtHR did not question the jurisdiction of Italy where fifty-eight migrants had drowned in international waters following interception by

[420] *Banković and Others v. Belgium and Others*, para. 75. See also *M.N. and Others v. Belgium* para. 112.

[421] *Banković and Others v. Belgium and Others*, para, 75.

[422] *Al-Skeini and Others v. The United Kingdom*, para. 137: 'It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, *the Convention rights can be "divided and tailored*"'. [emphasis added].

[423] *Al-Skeini and Others v. the United Kingdom*, para. 133.

[424] *Al-Skeini and Others v. the United Kingdom*, para. 149.

[425] See ECtHR Judgment of 28 June 2007, App. no. 60167/00, *Pad and Others v. Turkey*, para. 54; ECtHR Judgment of 24 June 2008, App. no. 36832/97, *Solomou and Others v. Turkey*, para. 50; and ECtHR Judgment 3 June 2008, App. no. 45653/99, Andreou v. Turkey, para. 25: 'It observed that even though the applicant had sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, had been such that the applicant should be regarded as "within [the] jurisdiction" of Turkey within the meaning of Article 1 of the Convention.'

[426] *Ilaşcu and Others v. Moldova and Russia*, para. 317.

an Italian navy ship, which had caused the shipwreck.[427] Thus, seemingly, if a violation was a direct and a predictable consequence of state action, the jurisdiction of the state may be engaged.[428] The case law of the Court and its approach to jurisdiction is somewhat difficult to come to terms with and Moreno-Lax has described it as 'the strategic ambiguity with which the Court formulates certain doctrines, allowing for adaptation to different scenarios over time.'[429] In any case, this has given room to support an approach of functional jurisdiction on the findings of the Court. As has been done by scholars, to which we now turn.

Before *Al-Skeini*, Gammeltoft-Hansen had suggested a functional conception of jurisdiction where 'the deciding factor is not "the place where the violation occurred, but rather the relationship between the individual and the State in relation to a violation of any of the rights set forth in the [ICPPR], wherever they occurred"'.[430] In this view then, jurisdiction is conditional on two elements: on the one hand, the relationship between the individual and the state. On the other hand, a violation by the state of the human rights of an individual. Thus, the first one concerns 'the specific power or authority assumed by the state acting extraterritorially in a given capacity',[431] and the second one implies the failure of a state to comply with its obligations under international human rights law. In this sense, Gammeltoft-Hansen also has noted that, 'the scope and application of rights is more broadly assessed in relation to the degree of control and authority exercised in the specific situation.'[432] Thus, the authority exercised is central as it delimits what obligation the state owes to the individual concerned. This idea aligns with the argument later advanced by Judge Bonello in his concurring opinion in the *Al-Skeini* case. Bonello, by referring to the five ways states ensure observance of human rights – by not violating human rights, by preventing and investigating violations, by punishing perpetrators and by compensating victims – held that a state has jurisdiction 'whenever the observance or the breach of any of these functions is within its authority and control.'[433] Following *Al-Skeini*, De Boer analyzing the reasoning of the ECtHR, argued that while the Court found jurisdiction on what it labeled as effective control, in reality it was 'a functional jurisdiction test in disguise': 'that if state agents

[427] ECtHR Decision of 11 January 2001, App. No. 39473/98) *Xhavara and Others v. Italy and Albania.* The Italian ship had tried to board the vessel to prevent the migrants from reaching the Italian coast and caused the shipwreck.

[428] See Moreno-Lax (2020) p. 405.

[429] Moreno-Lax (2020) p. 402.

[430] UN Human Rights Committee Decision of 29 July 1981, Communication No. 052/1979 *Lopez Burgos v. Uruguay*, para. 12(2) as cited in Gammeltoft-Hansen (2011), p. 152. Gammeltoft-Hansen cites a statement by the HRC in in a case regarding violations of the ICPPR, but argues for this understanding of jurisdiction to be applied in the context of the ECHR as well.

[431] Gammeltoft-Hansen (2011) p. 124.

[432] Gammeltoft-Hansen (2011) p. 154.

[433] *Al-Skeini and Others v. The United Kingdom*, concurring opinion of Judge Bonello, paras. 10-11.

are in a position to safeguard the rights of individuals […] the state *ipso facto* has jurisdiction with regard to the rights it is able to preserve'.[434] Moreno-Lax has proposed a slightly different functional approach where jurisdiction is 'a function of state sovereignty'.[435] In her take, functional then refers to 'the governmental "functions" through which the power of the state finds concrete expression in a given case': namely expressed through legislative, executive, and/or adjudicative activity.[436]

Applying the approach of functional jurisdiction as advanced by scholars to the Mediterranean, migrants become subject to the jurisdiction of a European state when that state violates a particular right of the individual, given that the violation took place within the exercise of power which had given rise to an obligation to protect that right of the person concerned. Put in other words, migrants need to find themselves under the authority of a European state, and within this given context, the state incurred an obligation to protect certain rights of the migrant, to which the state failed to comply. In this regard, Papastavridis has noted that it is possible to claim that, once a coastal state receives a distress call and acknowledge it, it becomes responsible to coordinate a search and rescue operation, and from this incurs an obligation toward the individuals concerned so as to say that the effects of its decisions could establish jurisdiction.[437] The UN Special Rapporteur on extrajudicial, arbitrary and summary executions has made a similar argument, but with implications beyond a specific distress call. Asserting that as the EU and its Member States, 'have put in place an extensive surveillance system focused on security and border patrol' they have 'chosen to provide security in the Mediterranean' and thus, cannot escape their obligation to also protect. In this sense, in the opinion of the Special Rapporteur, 'they are exercising sufficient functional control to be subject to the one obligation inextricably linked to ocean surveillance: an adequate and effective system of rescue'.[438] From this view, migrants who European states fail to rescue would then also fall within their jurisdiction, potentially also incidents unknown to the state at the material time, granted that the measures taken by European states to protect and prevent are considered as insufficient. This could arguably be the case given the increase of aerial surveillance and withdrawal of maritime vessels, which albeit increasing capacity for detection, does not enhance rescue operations. Likewise illustrated by the constraints put on NGOs offering

[434] De Boer (2015) p. 129.

[435] Moreno-Lax (2020) p. 402.

[436] Moreno-Lax (2020) p. 402f Also adding that, 'jurisdiction, from this perspective, is therefore *always* functional', and beyond including the notion of effective control over areas and persons, it also encompasses 'control over (general) policy areas or (individual) tactical operations, performed or producing effects abroad'.

[437] Papastavridis (2017) p. 167f.

[438] UNGA. (2017, August 15). *Special Rapporteur on extrajudicial, arbitrary and summary executions, Unlawful deaths of refugees and migrants*. A/72/335, para. 64.

humanitarian aid and pushback practices to third states, even causing deaths during interception, such as in the *Safi* case.

Finally, Moreno-Lax has argued that pullbacks at the high seas fall within the jurisdiction of European states. If a vessel of migrants is detected by a European state, and forwarded and assigned to the coast guard of a third state, which brings the migrants back and disembarks them, European states could be said to have exercised public power in a functional sense as the action taken builds from "policy and operation control" and as such is an expression of the sovereign functions of the state.[439] This view of jurisdiction as functional explicitly seeks to overcome the shift to "contactless" control of migration by the EU, through considering that control 'exercised through remote management techniques and/or in cooperation with a local administration acting as a proxy'[440] also amounts to "effective control" as it stems from the policy decisions taken by the EU on migration, which then is implemented by the Member States at an operational level.

All things considered, the functional approach to jurisdiction draws from the exercise of authority by European states over migrants in the Mediterranean, achieved by the control of search and rescue services in the area or through indirect control achieved by externalization to third states. But more so, and primarily, jurisdiction is exercised as a result from the obligation that arises from this control. The most relevant obligation would, given the context of migrants in distress at sea, arguably be to protect the right to life, and we will return to this question in section 4.5.1 on positive obligations of states toward migrants in the Mediterranean. In this light, the exception established by *N.D. and N.T. v. Spain* could be mentioned as it sets out that if the violation is a result of the individuals own "faulty conduct" the state is not considered to be at fault.[441] Nonetheless, this exception does not affect the question of jurisdiction of the state. Although in a later stage it could be argued that through risking their lives by trying to cross the Mediterranean it is their own faulty behavior resulting in the violation. However, states are under a positive obligation to protect lives even if a person put themselves at risk.[442] Indeed,

[439] See Moreno-Lax (2020) pp. 404-413. Specifically arguing that the policy and operation control by Italy in the context of rescue operations in the Central Mediterranean 'entails a series of elements characteristic of public powers that are exercised by the Italian State—both territorially and extraterritorially; both directly and through the intermediation of the [Libyan Coast Guard]—that taken together generate overall effective control'.

[440] Moreno-Lax (2020) p. 387.

[441] See ECtHR Judgment of 13 February 2020, App. nos. 8675/15 and 8697/15, *N.D. and N.T. v. Spain*, paras. 204-232. The ECtHR held that as they had tried to enter Spanish territory in an unauthorized manner and had not demonstrated that they had been incapable of using the legal procedures available in order to obtain permission to cross the border, the alleged violation of the ECHR was a consequence of their own conduct.

[442] As noted by Judge Türmen, taking the view that perhaps faulty behaviour should be part of the evaluation, in ECtHR Judgment of 30 November 2004, App no. 48939/99, *Case of Öneryildiz v. Turkey.* Partly Dissenting Opinion of Judge Türmen: 'Thirdly, the majority

the *N.D. and N.T.* case concerned the prohibition of collective expulsion, and the right to life arguably carries more weight, which should delimit the state from claiming such an exception.

At last, it should be mentioned that the functional approach and jurisdiction arising from extraterritorial effects is far from uncontroversial.[443] To this end, Stoyanova has instead proposed a "procedural link", based on the reasoning of the ECtHR, whereby jurisdiction of a state is achieved through a civil or criminal proceeding concerning an extraterritorial event.[444] Such a link would however be limited to, in line with the pronouncements of the ECtHR, either where proceedings have already been initiated by the state or when the case manifests "special features" as to justify the finding of a procedural link anyhow.[445] Such "special features" according to the Court 'necessary depend on the particular circumstances of each case',[446] but in the *Güzelyurtlu* case, could be said to have been related to the exercise of control and power of Turkey.[447] As such, similar to the main strain of functional jurisdiction emphasizing the exercise of authority. Importantly, Stoyanova points out that jurisdiction from a procedural link necessarily requires that the state's compliance with the procedural obligation of Article 2 [and 3] is also the merits of the case.[448] In this sense, jurisdiction arises because a state has failed to comply with its obligation to investigate. For this reason, it is necessary to establish whether the state had a duty to launch an investigation. This positive obligation of states to investigate missing migrants in the Mediterranean will be further discussed in Section 4.5.2. But applying this view by Stoyanova to

do not attach any weight to the fact that the applicant by his own behaviour contributed to the creation of a risk to life and caused the death of nine members of his own family'.

[443] For scholarly debate see Kanalan, I. (2018). Extraterritorial State Obligations beyond the Concept of Jurisdiction. *German Law Journal*, 19(1), 43–64; Milanovic, M. (2015). Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age. *Harvard International Law Journal*, 56, 81-119; and Hathaway et. al. (2011). Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially. *Arizona State Law Journal*, 43(2), 389–426.

[444] Stoyanova (2023) pp. 257-263; See also *Güzelyurtlu and Others v Cyprus and Turkey*, para. 188: 'if the investigative or judicial authorities of a Contracting State institute their own criminal investigation or proceedings concerning a death which has occurred outside the jurisdiction of that State, by virtue of their domestic law (e.g. under provisions on universal jurisdiction or on the basis of the active or passive personality principle), the institution of that investigation or those proceedings is sufficient to establish a jurisdictional link for the purposes of Article 1 between that State and the victim's relatives who later bring proceedings before the Court'; and for civil proceedings see ECtHR Judgment of December 14 2006, App. No. 1398/03, *Markovic and Others v Italy*, paras. 54–56.

[445] *Güzelyurtlu and Others v Cyprus and Turkey*, paras. 188-190.

[446] *Güzelyurtlu and Others v Cyprus and Turkey*, para. 190.

[447] Stoyanova (2023) p. 261: 'In the specific case of Güzelyurtlu, the 'special features' were found to have been fulfilled in relation to Turkey. A special feature was the recognition that Turkey is an occupying power and the absence of recognition of the TRNC as a State by the international community. The second special feature was that there was an Interpol notice and the suspects were detained for a period of time by the TRNC authorities.'

[448] Stoyanova (2023) p. 260.

the Mediterranean context, it is possible to argue that once a state has a duty to investigate the disappearance of a person, this would then create a "procedural link" resulting in jurisdiction of the state. Here, the "special feature", if proceedings have not been initiated, could be the control European states exercise over the Mediterranean, in terms of surveillance and rescue services, discussed before, or even more so, could be argued to be fulfilled through the claim that the case at hand concerns an enforced disappearance. By doing so, international human rights law, importantly the ICPPED lies out the obligation of State Parties (all European coastal states to the Mediterranean except Turkey) to investigate acts possibly amounting to enforced disappearances it has been made aware of. Thus, this also demonstrates the impact of labeling missing migrants as enforced disappearances, because by fulfilling the definitional elements, it could facilitate creating a jurisdictional link between victims and European states within the meaning of the ECHR. Nevertheless, the jurisdiction based on a "procedural link" is inherently restricted, as the Court is limited to assessing the compliance of the state with the obligation to investigate, and not the responsibility for a material breach of the ECHR.[449] However, this also highlights the importance of victimhood of relatives to disappeared migrants, as their right to know the truth and the corresponding obligation of an effective investigation this entails, also reinforces the duty on the state. As such, it is also possible to argue that given the status of relatives as victims, jurisdiction could be established on territorial grounds if a relative to a disappeared person is within the territory of a European state. In light of the suffering they experience from the lack of investigation, they could bring the investigation of a disappearance into the jurisdiction of the relevant state.

To finalize the discussion on different type of jurisdiction, the next Section will summarize the findings on when European states could be said to exercise jurisdiction over migrants in the Mediterranean.

4.4.4 Jurisdiction over migrants in the Mediterranean

The transnational nature of migration naturally implies jurisdictional issues, particularly in the context of the high sea beyond the sovereignty of any state. Thus, the jurisdictional link between migrants in the Mediterranean and European states is not straightforward. The clearest cases where migrants could be considered as being within the jurisdiction of a European state within the meaning of Article 1 ECHR are based on territorial jurisdiction such as if a migrant dies or goes missing in the jurisdictional waters of the state or if their body is washed ashore on European territory. However, given the limited extension of territorial waters the majority of migrants who disappear

[449] Stoyanova, p. 262: '[…] individuals can be constituted as right holders when they are legally and procedurally tied to the State by bringing judicial proceedings (if such are allowed by the domestic law) that trigger the application of Article 6. Their rights are, however, limited in terms of scope and content. These are procedural, not substantive rights, under the ECHR.'

do so in international waters, and necessarily we are concerned with the question of extraterritorial jurisdiction. Some possible options where jurisdiction could be argued have been explored. More solid ones: disembarked survivors after a rescue operations and bodies recovered following such an operation based on the effective control exercised by the flag state of the ship; to less obvious cases: financial support to third states as a form of effective control, to functional approaches focusing on extraterritorial effects or based on "procedural links". The former holding that the obligation of states to protect certain rights of migrants, resulting from the authority exercised over the Mediterranean, implies a jurisdictional link where that obligation to prevent violations have been breached. The latter taking the view that the obligation on states to investigate creates this jurisdictional link though the failure to launch such investigations, which in turn connects to the victim status of relatives to the disappeared person, potentially also creating a jurisdictional link if they find themselves on the territory of a European state.

Ultimately, states retain their obligation to respect human rights also at international borders,[450] and whether externalization of border controls have led to a *de facto* and *de jure* exception from jurisdiction of European states – stripping thousands of people from protection of their human rights – is a pressing issue for international human rights law. The case law of the ECtHR on jurisdiction serves to shine some light but given the absence of clear pronouncements dealing with death and loss during migration, jurisdiction for these cases needs to be clarified. Mann has argued that there exists a 'legal black hole" for migrants in the Mediterranean as the very structure of international law has led to migrants being rendered rightless, with no way of holding states accountable for drownings on the high sea.[451] In this light, it is proper to once again recall that whereas the case law of the ECtHR as it stands may not expressly support a finding of jurisdiction over missing migrants, this is not a permanent state of affairs, but international law is ever evolving. Perhaps European states are not exercising effective control the way it has been understood so far in the jurisprudence of the Court, but the decisions taken by EU Member States have had a direct effect on thousands of lives, as evidenced by the agonizing number of lives lost. Everything considered, there clearly exists possible ways of arguing that migrants come within the jurisdiction of European states within the meaning of the ECHR. More so, the

[450] OHCHR has held that states have an obligation derived from international human rights law to protect, respect and fulfil human rights of all migrants at international borders. Establishing three recommended principles: 1) The primacy of human rights: Human rights should be at the centre of all border governance measures; 2) Non-discrimination: Migrants should be protected against any form of discrimination at borders; and 3) Assistance and protection from harm: States should consider the individual circumstances of all migrants at borders, and ensure effective protection and access to justice. See OHCHR. (n.d.) *UN Recommended Principles and Guidelines on Human Rights at International Borders*.

[451] See Mann (2018). Discussed previously in Section 1.3.

ECtHR have continuously repeated the need for an effective human rights protection, and that:

> the special nature of the context as regards migration 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 which the States have undertaken to secure to everyone within their jurisdiction.[452]

The seriousness of the Mediterranean situation means that the standards must be higher. States cannot claim exception to their jurisdiction, territorial nor extraterritorial, because that would render the rights and freedoms protected by the ECHR as theoretical and illusory. Considering the living instrument the ECHR is, the ECtHR should endorse an approach of extraterritorial jurisdiction which responds to the restrictive development in a manner that appropriately guarantees the full protection of rights and freedoms set out in the Convention. Fundamentally, the Court should seek to not let legal loopholes on jurisdiction lead to individuals falling outside the enjoyment of these rights inherent to every human being. However, while desirable from the perspective of protection of victims, it is not certain that this approach is beneficial from other perspectives. A thorough analysis of legal activism of the ECtHR is beyond the scope of this study, but the democratic issues arising from such practice can at least be voiced.[453]

Lastly, having considered what circumstances of missing migrants in the Mediterranean fits the concept of enforced disappearances by assessing the definitional elements and now concluding the discussion on the jurisdictional threshold of the ECHR as a necessary condition for holding a state responsible for violating the human rights protected by the Convention, we will turn to assessing what, if any, obligations of the ECHR, European states have breached, and what rights and freedoms of migrants have been violated.

4.5 Breaches of obligations by European States

When establishing responsibility of a state for failing to uphold its international obligation, ARSIWA conditions state responsibility on two elements: attribution and breach.[454] Breach is defined as an act or omission that is not in conformity with what is required of a state by an international

[452] See *Hirsi Jamaa and Others v. Italy*, para. 178; ECtHR Judgment of April 5, 2022, App. nos. 55798/16 and 55808/16, 55817/16, 55820/16, 55823/16, A.*A. and Others v. North Macedonia*, para. 63; and *N.D and N.T. vs Spain*, para. 110.

[453] For discussion on issues with expansion of jurisdiction to hold European states responsible for human rights violations committed against migrants at borders and the high sea see Farahat, A. (2022). Human rights and the political: Assessing the allegation of human rights overreach in migration matters. *Netherlands Quarterly of Human Rights*, 40(2), 180-201.

[454] Article 2 ARSIWA.

obligation of that state.[455] As to attribution, for the context of protection of human rights, Scheinin has argued that this element in public international law overlaps with the jurisdictional threshold in international human rights law.[456] At the same time, Besson has argued that attribution is separate and comes secondary once jurisdiction of the state has been established.[457] This difference is not of too great importance to us at this stage. Jurisdiction has been discussed just before in Section 4.4 and the question of attribution was touched upon in Section 4.3.2. Rather, what becomes crucial, in the words of Scheinin, is 'assessing the substantive issue of whether a State has indeed breached its obligations under a primary norm of international law'.[458] Hence, we are interested in the obligations that the ECHR places upon the State Parties, and how these obligations can be understood to have been breached by European states in the context of missing migrants in the Mediterranean. As such, attribution to the state could be said to be presupposed in the following analysis, based on that the duties considered are owed by the state, and by so, also breached by the state. This approach will become clearer in the following discussion.

Before this, a consideration of human rights obligations in a theoretical sense is in place. It is generally recognized that human rights law imposes negative and positive obligation on states. Negative obligations imply that the state must refrain from action, positive obligations requires that the state must take action.[459] Parallel to this division, another common approach has been to understand that human right imposes three type of duties on sates: to respect rights, to protect rights and to provide aid when rights have been violated.[460] On the one hand, to respect could be understood as being a negative duty, as it obliges to state to not infringe upon the rights of individuals. On the other hand, the duties to protect and aid, are positive obligations requiring that the state develops measures and establish procedures that prevent violations from

[455] Article 2 and 12 ARSIWA.

[456] See Scheinin, M. (2009). Just another word? Jurisdiction in the roadmaps of state responsibility and human rights. In: Langford et al., *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge University Press, 212–230.

[457] Besson, S. (2012). The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to. *Leiden Journal of International Law*, 25(4), 857–884, p. 867.

[458] Scheinin (2007) p. 217.

[459] See Fredman, S. (2008). *Human Rights Transformed: Positive Rights and Positive Duties.* Oxford University Press.

[460] See Reeves, A. R. (2015). Standard Threats: How to Violate Basic Human Rights. *Social Theory and Practice*, 41(3), 403–434, p. 416f; Donnelly, J. (2013). *Universal Human Rights in Theory and Practice* (3rd ed.). Cornell University Press, pp. 36-38. See also *Al-Skeini and Others v. The United Kingdom*, Concurring Opinion of Judge Bonello, para. 10: 'States ensure the observance of human rights in five primordial ways: firstly, by not violating (through their agents) human rights; secondly, by having in place systems which prevent breaches of human rights; thirdly, by investigating complaints of human rights abuses; fourthly, by scourging those of their agents who infringe human rights; and, finally, by compensating the victims of breaches of human rights.'

happening, and if they do, a duty to launch investigations, prosecute and punish perpetrators and compensate victims. This understanding of human rights obligations as a duty to respect, to prevent and to investigate, has been deployed in the following Sections as to structure the discussion.

In the context of enforced disappearances, the negative obligation to respect, puts a duty on the state to not commit acts of enforced disappearances. This right of individuals to not be subjected to enforced disappearance is absolute.[461] As have been mentioned, it is unlikely that, in the context of migration in the Mediterranean, there is any conduct amounting to enforced disappearance that will be directly attributable to a European state. For this reason, the obligation to respect will not be extensively discussed. Accordingly, positive obligations of states in relation to enforced disappearance will be the focus of the current analysis. These duties of prevention and investigation requires the state to adopt preventative measures to mitigate the risk of an enforced disappearance happening and to effectively investigate suspected cases of enforced disappearances. Attribution to the state of failure to comply with positive obligations is less problematic to establish, as the failure to comply with these obligations is inherently committed through the omissions of state officials. However, positive obligations are more complicated than negative ones, in the sense that their content and scope, what a state *ought* to do, is more difficult to determine and delimit, than what a state *ought not* to do. This difficulty is connected to the related issue of differentiation between action and omissions.[462] Without deep diving into the conceptual difficulties of the distinction, we will satisfy ourselves with noting that, in the framework of positive obligations, 'for an omission to be legally relevant, there must be an obligation upon the State to do something in the first place, and in this sense, the State's omission needs to be shown to have been wrongful'.[463] Having mentioned this, what becomes relevant is to determine which positive obligation states have toward migrants in the Mediterranean, as to be able to deem whether their omissions to prevent or investigate these disappearances are legally relevant or not.

In the context of Europe, the positive obligation on states derives from the duty on states 'to secure to everyone within their jurisdiction the rights and freedoms' imposed by Article 1 of the ECHR, in conjunction with the substantial rights of the ECHR.[464] From this, a jurisdictional limitation can be identified. The threshold of jurisdiction has already been discussed and we

[461] Article 1(2) ICPPED: 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance'.

[462] See Stoyanova (2023) p. 13.

[463] Stoyanova (2023) p. 15.

[464] The first time this notion of positive obligations was formulated was in the "Belgian Linguistic Case". See ECtHR Judgment of 23 July 1968, App. no. 1474/62, *'Relating to Certain Aspects of the Laws on the Use of the Languages in Education in Belgium' v Belgium.*

have seen the limitation it may pose as to whether the victims of enforced disappearances in the context of migration could actually be considered as right-holders under the ECHR. Nonetheless, the notion of extraterritorial positive obligation likewise exists, meaning that states may have obligations in favor of individuals outside their jurisdiction.[465] More so, the existence of a positive obligation may serve to create a jurisdictional link as discussed in Section 4.4.3 on functional jurisdiction. We will return to the particular difficulties this poses for state responsibility for enforced disappearances of migrants in the Mediterranean in the next section when discussing the duty to prevent. The ECtHR has refrained from developing 'a general theory of the positive obligations which may flow from the Convention',[466] but it is possible from the case law to identify different type of positive obligations which are triggered under specific circumstances, procedural and substantive ones.[467] The procedural one relating to investigation and the substantive one to preventative measures.

Taking into account that the articles the ECtHR have found violated in cases of enforced disappearances have been the right to life (Article 2), the prohibition of torture and inhuman treatment (Article 3), the right to liberty and security (Article 5) and the right to an effective remedy (Article 13 read in conjunction with Article 2 or 3),[468] these will be the focus of the study. More so, for the particular situation of the Mediterranean Sea, the most relevant Articles have been assessed to be Article 2 and 3, mainly in their substantive and procedural limb as placing positive obligation on states to prevent and investigate, but also materially, when possible to argue a direct violation by the state. Although Article 5 also bears significance, given the absence of deprivation of liberty amounting to the prohibition of this Article, it has been deemed as less probable that a violation will be found, therefore much space will not be dedicated thereto. The same goes for Article 13 which only will be discussed briefly in connection with the procedural limb of Article 2 and 3. By considering the obligations placed on states by virtue of these Articles, we will now turn to examine firstly, the duty on states to prevent enforced disappearances, secondly, the duty on states to investigate enforced disappearances and lastly, the duty on states to respect the prohibition of enforced disappearances.

[465] See Chapter 8 in Stoyanova (2023).

[466] ECtHR Judgment of 21 June 1988, App. no. 10126/82, *Plattform 'Ärzte für das Leben' v Austria*, para. 31.

[467] Stoyanova (2023) p. 18f.

[468] See Czepek (2013), p. 8; see also Vermeulen (2012) pp. 164-166l and Scovazzi & Citroni (2007) pp. 220-224; Although applicants have also, unsuccessfully, argued violations of the right to family life (article 8), right to an effective remedy (article 6) and discrimination (article 14). States have also been found to have violated article 38, by failure to cooperate with the Court.

4.5.1 Duty to prevent

The duty on states to prevent enforced disappearances is expressed in the 1992 Declaration as that 'each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction.'[469] In turn, Vermeulen has identified in the ICPPED three obligation on states in terms of preventing the crime: Firstly, the state must criminalize enforced disappearances in domestic law. Secondly, states must establish safeguards surrounding arrest and detention to prevent that persons deprived of liberty are made victims of an enforced disappearance. Thirdly, state agents must be trained as to be able to recognize and report actual or possible cases of enforced disappearances.[470] In this regard, it should be clarified that under ICPPED states are only obliged to prevent enforced disappearances committed by state actors.[471] However, having the ECHR as our legal instrument of basis, a breach of the positive obligation may include the duties mentioned above, but it may also extend to prevention of acts committed by non-state actors. Even more, in concrete cases of an individual who is a victim of an enforced disappearance, the ECHR, through the case law of the ECtHR, should provide more concrete positive obligations, especially in relation to the obligation on states to protect the right to life.

First through, Article 5 ECHR and the right to freedom and security will be briefly discussed. As mentioned in the beginning of this Chapter in Section 4.1, in cases where there has not been sufficient evidence to prove the involvement of the state in the inhuman treatment or killing of the disappeared person, at least the deprivation of liberty has been easier to substantiate with evidence and attribute to the state. Thus, the finding by the ECtHR of a violation of Article 5 in cases of enforced disappearance are rather common where state agents are involved.[472] However, given the circumstances of the Mediterranean, and the issue already discussed about whether this element of the crime can be said to be fulfilled, a violation of Article 5 is more unlikely in the case of enforced disappearances at sea. When a feasible claim could be made that the migrant has been deprived of their liberty,[473] for example interception and detention at sea, Article 5 could be violated through its positive obligation, as states must have in place safeguards to prevent arbitrary and unlawful deprivations of liberty.[474] The Court has pronounced

[469] Article 3 ICPPED.

[470] See Vermeulen (2012) p. 66.

[471] As the only obligation placed on states for acts committed by non-state actors is to 'take appropriate measures to investigate acts' and 'to bring those responsible to justice' see Article 3 ICPPED.

[472] Scovazzi & Citroni remark that in almost all cases of enforced disappearance before the ECtHR, the Court has found violations of Article 5. Scovazzi & Citroni (2007) p. 220.

[473] Detention of migrants at land borders would be the obvious case. The practice of arbitrary and possibly unlawful detention by Greece of newly arrived migrants will be discussed further in Section 4.5.3.

[474] See ECtHR Judgment of 19 May 2016, App. no. 37289/12, J.*N. v. The United Kingdom*, para. 77: 'In laying down that any deprivation of liberty must be effected "in

that unacknowledged detention is arbitrary and violates the right to freedom,[475] meaning that the failure to identify migrants who have been detained would for obvious reasons result in it being unacknowledged and thus would violate Article 5.

Nonetheless, here we need to consider if this situation would amount to deprivation of liberty, or merely a restriction on the liberty of movement. While the latter perhaps could suffice for the threshold for the definition of enforced disappearance under ICPPED, they are two different concepts under the ECHR. Considering that the ECtHR has made a distinction between deprivation of liberty and confinement of migrants with the purpose of identification, it is not certain whether the limited and temporary nature of an interception at sea, would suffice to be classified as a deprivation of liberty under Article 5, as to require states to immediately identify the persons in order to be in compliance with its positive obligations. However, Article 5 also imposes a positive obligation on states to protect the liberty of its citizens, especially to provide protection of vulnerable persons, also in cases when depravation of liberty is committed by non-state actors.[476] In this regard, migrants, especially asylum-seekers,[477] are clearly in a vulnerable situation and they are often taken advantage of, reinforcing the obligation on states to protect them. Cases where migrants are taken hostage by smugglers who then blackmail the families, would perhaps amount to a situation of deprivation of liberty which states should prevent. But migrants are not citizens of European states, and even if we disregard this fact, holding that such treatment should be prevented by states, the situation is most likely to take place outside the jurisdiction of EU Member States, leaving only the possible responsibility of

accordance with a procedure prescribed by law", Article 5 § 1 does not merely refer back to domestic law […] it also relates to the "quality of the law". […] Factors relevant to this assessment of the "quality of law" – which are referred to in some cases as "safeguards against arbitrariness" – will include the existence of clear legal provisions for ordering detention, for extending detention, and for setting time-limits for detention; and the existence of an effective remedy by which the applicant can contest the "lawfulness" and "length" of his continuing detention.'

[475] See *Kurt v Turkey*, para. 124: 'The Court emphasises in this respect that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5'.

[476] ECtHR Judgment of 16 June 2005, App. no. 61603/00, *Storck v. Germany*, para. 102: '[…] the Convention must equally be construed as laying down a positive obligation on the State to protect the liberty of its citizens. […]. The State is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge'.

[477] ECtHR Judgment of 21 January 2011, App. no. 30696/09, *M.S.S. v. Belgium and Greece*, para. 251: 'The Court attaches considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection. It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the Reception Directive'.

Turkey for failing to prevent this. Having briefly discussed Article 5, the following paragraphs will focus on Article 2 and 3.

The positive obligation on states as regards the right to life imposes obligations on states to take appropriate steps to safeguard the lives of those within its jurisdiction. Beyond implementing effective criminal law provisions, the duty also extends to 'preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual'.[478] Article 3 in turn, obliges states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including ill-treatment by private individuals.[479] Similar to Article 2, states are obliged to put in place a legislative and regulatory framework of protection and in certain circumstances, take operational measures to protect specific individuals. [480] However, the scope of such an obligation should not 'impose an impossible or disproportionate burden on the authorities'.[481] In this regard, the Court has held that:

> A positive obligation will arise […] where it has been established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[482]

In the case law of the ECtHR on enforced disappearances, the Court has found states to be responsible for the failure to prevent violations of the rights in the ECHR. In the *Medova v. Russia* case, the ECtHR, not finding it proven that the disappearance and death was committed by state agents, nonetheless found that the state had violated the right to life, through the positive obligation in Article 2. The Court considered that the state knew or ought to have known about the real and immediate risk to the victim's life.[483]

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[478] ECtHR Judgment of 9 June 1998, Reports 1998-III, L.*C.B. v. The United Kingdom*, para. 36; and ECtHR Judgment of 28 October 1998, Reports 1998-VIII, *Osman v. the United Kingdom*, para. 115.

[479] ECtHR Judgment of 10 May 2001, App. no. 29392/95, *Z and Others v. The United Kingdom*, para. 73; and ECtHR Judgment of 28 January 2014, App. no. 35810/09 *Case of O'Keeffe v. Ireland*, para. 144.

[480] ECtHR Judgment of 2 February 2021, App. no. 22457/16, *X and Others v. Bulgaria*, para. 178.

[481] *Osman v. the United Kingdom*, para. 116.

[482] See ECtHR Judgment of 24 October 2002, App. no. 37703/97, *Mastromatteo v Italy*, para. 68; and ECtHR Judgment of 12 January 2012, App. nos. 36146/05 and 42418/05, *Gorovensky and Bugara v Ukraine*, para. 32. For same observation made by the ECtHR but in regards to positive obligations under Article 3 see: *X and Others v. Bulgaria*, para. 183; and ECtHR Judgment of 11 February 2020, App. no. 56867/15, *Buturugă v. Romania*, para. 61.

[483] Given that that the state officials who temporarily had had the captors of the victim, but had released them, 'must have been alarmed by those persons' suspicious behaviour'

Ultimately, since state officials had had the victim and the captors within their control during an identity check, but then released them, the state agents 'could have prevented the commission of an offence, but they released the six men, after which [the victim] disappeared.' For that 'the authorities' decision to release the six men, which resulted in the disappearance of [the victim], constituted a breach of the positive obligation to take preventive measures to protect those whose life is at risk from the criminal acts of other individuals'.[484] As for a violation of Article 3, the Court held that it had not been established whether the disappeared person had been subjected to ill-treatment, thus, not being possible to conclude that the state had had a positive obligation under Article 3.[485] In *Mahmut Kaya v. Turkey*, the Court did neither find it established beyond reasonable doubt that there were state agents responsible for the disappearance and subsequent killing, but similarly held that the state must have been aware of the danger of not only extra-judicial killing but also ill-treatment, as the perpetrators were known to the authorities and acting with the knowledge or acquiescence of the Turkish security forces.[486] Turkey was found to have failed to fulfill its positive obligation to prevent a violation of the right to life.[487] In contrast to *Medova*, the body of the disappeared person had been recovered, from this, it was possible to conclude that the victim had been exposed to inhuman and degrading treatment, thus resulting in the Court also finding that the state had failed to prevent a violation of Article 3.[488]

The two cases mentioned above both took place in the territory of the state, and as migrants going missing in the Mediterranean takes place outside the territory of European states, we need to address the question of extraterritorial positive obligations: if individuals outside the territory of the state can be considered as right-holders giving rise to a corresponding obligation of the state. Normally, states are only expected to have positive obligation to persons within its jurisdiction, meaning both territorial but also extraterritorial based on effective control over an area or over a person.[489] However, as previously discussed, the functional approach of jurisdiction holds that jurisdiction may arise from extraterritorial effects, which in turn is connected to the existence of a positive obligation of the state. Under this approach, human rights obligations of states extend to individuals outside its jurisdiction who can be harmed by decisions taken by the state.

given the additional steps taken to verify their identity, see ECtHR Judgment of 15 January 2009, App. no. 25385/04, *Medova v. Russia*, para. 98.

[484] *Medova v. Russia*, para. 99.

[485] *Medova v. Russia*, para. 117.

[486] ECtHR Judgment of 28 March 2000, App. no. 22535/93, *Mahmut Kaya v. Turkey*, para. 87 and 90. See paras. 91, 94-101 and 116.

[487] *Mahmut Kaya v. Turkey*, para. 94-101.

[488] *Mahmut Kaya v. Turkey*, para. 118-119.

[489] See Stoyanova (2023) pp. 231-236.

Here we should clarify the relation between on the one side, international human rights law on jurisdiction and positive obligations, and on the other side, public international law on state responsibility and international obligations of states. The exercise of jurisdiction is the precondition for the state to have any positive obligation toward the individuals concerned under human rights law. But, to determine whether the state is responsible for a breach through omission of one of its international obligations, for the omission to be legally relevant in the context of state responsibility, there needs to be an obligation on the state to act under public international law. In this sense, 'if the State knew and/or could foresee that extraterritorial harm could materialize, but failed to take preventive measures, then the omission can become legally relevant.'[490] For assessing whether an omission is legally relevant, Stoyanova has identified three key analytical standards in the ECtHR's case law as to determine the boundaries of how far positive obligations extend: state knowledge, causality and reasonableness.[491] The standard of state knowledge encompasses a boundary based on to what extent the state authorities knew or ought to have known about the risk of harm.[492] Causality refers to a standard of there being a causal link between the harm realized and the omission of the state.[493] Reasonableness invokes the limit that states are only expected to undertake reasonable steps which do not impose an impossible and disproportionate burden.[494]

Thus, considering the distinction between international human rights law and public international law on state responsibility, the question is if extraterritorial effects, more than possibly functioning as to label an omission as legally relevant for public international law, can also function so as to create jurisdiction in human rights law? As have been mentioned, this remains a controversial topic and no definite answer can be given. To the extent that it is uncertain whether extraterritorial effects can give rise to jurisdiction and thus also impose positive obligation on European states, the three elements of knowledge, causality and reasonableness will be assessed to consider whether the omissions of European states would be legally relevant as to hold them responsible for breaching an international obligation under public international law. Holding the omission as legally relevant could be a first step in order to support a claim that states have positive obligations towards migrants in the Mediterranean under international human rights law as well, possibly creating a jurisdictional link.

Starting off with the standard of state knowledge, its content and scope has been discussed above in section 4.4.3. In sum, we concluded that the well-known situation in the Mediterranean was sufficient to hold that European

[490] Stoyanova (2023) p. 256.
[491] Stoyanova (2023) p. 15.
[492] Stoyanova (2023) p. 21.
[493] Stoyanova (2023) p. 45.
[494] Stoyanova (2023) p. 73.

states have knowledge of the general risk migrants face. The real and immediate risk from the life-threating situation of migrants at sea in unseaworthy boats does not need much discussion. While the conditions migrants experience during smuggling trips could amount to treatment contrary to Article 3, considering the case law of the ECtHR, the remains of the person would probably have to be recovered, to prove such ill-treatment for individual victims. More concretely, we may consider the situation resulting from pushbacks where migrants are sent back to Libya, Turkey or Morocco, where they might be detained, risk repatriation to their country of origin and might ultimately disappear. Given the extensive number of reports by international organizations and NGOs on the human rights situation of migrants in these countries, these circumstances cannot be said to not be known by European states.[495] This would amount to failing to prevent enforced disappearances, through a violation of the principle of *non-refoulement* derived from Article 3 ECHR. To the extent that this is a direct violation committed by the state it will be further discussed in Section 4.5.3 on the duty to respect.

On another note, the standard of causation between the omission and harm does not pose great challenge. Especially considering the ECtHR having stated that 'the failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State'.[496] It seems rather obvious to this author that in most circumstances, if an EU Member States would have intervened – executed a rescue operation and disembarked survivors on their territory – the disappearances and most-likely deaths would not have happened. The same goes for if the omission consists in allowing rescue operation of, or even handing them over to, the Libyan, Turkish or Moroccan Coast Guard, as any violation committed in these states could have been prevented through the action of an EU Member State. More so, the causal link between the EU's restrictive migration policies and strengthened border controls with more dangerous smuggling journeys causing migrant deaths has

[495] Especially for the situation in Libya. The ECtHR noting in *Hirsi* that 'by transferring the applicants to Libya, the Italian authorities, in full knowledge of the facts, exposed them to treatment proscribed by the Convention.', See *Hirsi Jamaa and Others v. Italy*, para. 137. That European states knew, or ought to have known, about the risk of serious human rights violations occurring in Libya against migrants has also been pointed out by the CoE Commissioner for Human Rights, see Commissioner for Human Rights of the CoE. (2019, November 15). *Third party intervention to Application No. 21660/18 S.S. and others v. Italy*. Strasbourg.; and the UN Fact-Finding Mission to Libya in its final recommendations calling upon the UN, the international community and third states: 'To abide by the customary international law principle of non-refoulement and cease all direct and indirect support to Libyan actors involved in crimes against humanity and gross human rights violations against migrants, such as the Directorate for Combating Illegal Migration, the Stability Support Apparatus and the Libyan Coast Guard.' See UN Independent Fact-Finding Mission on Libya. (2023, March 3), para. 103(g).

[496] *O'Keeffe v Ireland*, para. 149 [emphasis added]. See also ECtHR Judgment of 9 June 2009, App. no. 33401/02, *Opuz v. Turkey*, para. 136; and ECtHR Judgment of 10 February 2011, App. no. 44973/04, *Premininy v. Russia*, para. 84.

been observed,[497] also supporting the argument of the causality between the omission and harm.

In order to assess what is reasonable to expect from a state other possible measures needs to be evaluated and how they strike a fair balance between different interests in society.[498] In this sense, the sovereignty of states means that they are free to set their own migration policies, decide who to allow access to their territory, and shape requirements for entry. In this regard, the ECtHR has pointed out that while the ECHR is intended to guarantee practical and effective rights, 'this does not, however, imply a general duty for a Contracting State under Article 4 of Protocol No. 4 to bring persons who are under the jurisdiction of another State within its own jurisdiction.'[499] This pronouncement of the Court should however be scrutinized. It is expressly related to the prohibition of collective expulsion, and it only mentions that there is no obligation to bring individuals from *another* jurisdiction into the state's jurisdiction. Thus, it could be remarked that migrants at the high sea are under no jurisdiction at all. More so, our main right of concern is the right to life and strictly speaking, a distinction could be made between executing rescue operation to save the lives of migrants, and then subsequently going through the process to assess whether these individuals fulfill the national requirements to be allowed access to the territory. In this sense, the interest of the state in shaping its own migration policy is not incompatible strictly speaking with taking measures to save lives of migrants in the Mediterranean. Whether it is incompatible with the aim of preventing refugees from reaching European territory and seeking asylum is arguably irrelevant. Such an aim is not *per se* related to the migration policy of who a state lets in or not, given that offering international protection to refugees is not based on national law, but derived from international refugee law. Thus, whereas in practice, rescue operations may affect numbers of arrivals of migrants, it does not restrict the state from shaping its migration policy to its own judgment, as long as it complies with its obligations under international law.

[497] See UNHRC. (2013, April 24), para. 61 '[…] such policies [strengthening the capacities of neighboring States coastguards] have the effect of driving further underground attempts to reach European Union territory. Smuggling rings are reinforced, migrants are made more vulnerable, corruption is made more potent, exploitation more rife, human rights violations are more prevalent and graver, and ultimately lives may be more at risk than before.'. Also the WGEID has pointed out this in its 2017 report, 'Many migration policies adopted by States in recent decades, as well as the militarization of borders, have led to an expansion of trafficking and smuggling of migrants. To avoid the restrictive measures adopted by States, many migrants choose clandestine and less safe routes as well as more dangerous means of transportation […]'. See WGEID. (2017, July 28). Enforced disappearances in the context of migration, para. 36.

[498] Stoyanova (2023) p. 81.

[499] *N.D. and N.T v. Spain*, para. 221.

Lastly, it should be addressed that states are always obliged to provide 'general protection to society',[500] this may amount to the preventative duties found in the ICPPED as defined by Vermeulen. But awareness of a general problematic situation does not result in that the state must adopt protective operational measures in regard to every individual.[501] From this, it appears dubious to hold that the general knowledge of states that migrants are drowning in the Mediterranean, could result in a legal obligation on European states to adopt protective operational measures, as the particular individuals at risk are not even known to the state. However, once a vessel carrying migrants is detected, they also become known to the state. At this moment, it could be argued that as states are obliged under international maritime law to assist people in distress at sea, the failure to comply with this obligation, although not of human rights character, is a legally relevant omission, as to hold the state responsible for failing to prevent violations of the right to life.

To conclude the discussion on the duty to prevent a short summary is in place. We began by holding that as to Article 5 ECHR, states may be seen as violating it if migrants are subject to unacknowledged detention. More so, it could also be possible to argue Turkey's responsibility for failing to protect the liberty of asylum seekers, especially as a vulnerable group, by not having sufficient safeguards established to prevent ill-treatment by smugglers. Nevertheless, the obligation on states to prevent enforced disappearances of migrants in the Mediterranean is mainly achieved through the positive obligation to protect the right to life. In this light, for a state to be obliged to take protective operational measures, it must have known or ought to have known of the risk posed to the individual. More so, in the extraterritorial setting of decisions taken by European states affecting the lives of migrants, to determine whether a state is responsible for the failure to prevent violations of the right to life, the omission to do so must be legally relevant, and it is so if the state was under an obligation to act.

Typically, states owe positive obligations to persons within their jurisdiction, and as such, if migrants are within the jurisdictional waters of the state, the state also has an obligation to protect their rights. Nonetheless, I have argued that it is possible that the detection of migrants at the high sea is sufficient to impose an obligation of the state to prevent violation of the right to life. Having assessed the three standards of knowledge, causality and reasonableness, European states have knowledge of the risk suffered by migrants, either by drowning or ill-treatment upon return to a third state, there is a causal link between the omission and harm by not rescuing and it could

[500] ECtHR Judgment of 4 October 2016, App. no. 69546/12, *Cevrioğlu v. Turkey*, para. 50.

[501] See Stoyanova (2023) pp. 26 and 31; However, as pointed out by the ECtHR in *Hirsi*: 'The fact that a large number of irregular immigrants in Libya found themselves in the same situation as the applicants does not make the risk concerned any less individual where it is sufficiently real and probable' See *Hirsi Jamaa and Others v. Italy*, para. 136.

also be argued to be reasonable to require European states to take measures to prevent losses of life. From this then, we may be able to say that there is an obligation of European states to act and protect the right to life, and the omission then becomes legally relevant under public international law. This finding could be used to support a claim that also under international human rights law, states have positive obligations towards migrants in the Mediterranean, possibly then creating the jurisdictional link discussed in Section 4.4.

Ultimately, the determination would depend upon whether victims are considered to be under the public power exercised by the state, and if their lives could be harmed by the effect of a decision that the state makes. The case law of the ECtHR on jurisdiction from extraterritorial effects, is not conclusive on this matter, but it should however be remarked that, so far, it has concerned acts of states causing harm extraterritorially. Thus, comparing victims who are injured by shootings with the failure to save migrants after detection – acts with omission – implies complications. The moral differences between killing and letting die can be discussed, but under prevailing international law on human rights jurisdiction, positive obligations from omissions done extraterritorially, is faced with challenges.[502] Having discussed the positive duty on states to prevent, we now turn to the procedural obligation of European states to investigate disappeared migrants in the Mediterranean.

4.5.2 Duty to investigate

The obligation of states to guarantee human rights, in the situation of enforced disappearance, implies the duty to investigate, prosecute and punish perpetrators of such acts. To investigate requires a prompt, impartial and thorough investigation once a possible enforced disappearance has come to the attention of the state's authorities.[503] To prosecute implies that the state must, other than criminalize enforced disappearance in domestic law, also establish jurisdiction over the crime, extradite or prosecute alleged perpetrators and apply the proper statute of limitations of the crime.[504] To punish obliges states to impose appropriate sentences taking into consideration the seriousness of the crime.[505] As have been mentioned, the obligation to investigate any act of enforced disappearance is placed upon states by article 3 ICPPED, and within ECHR it finds its equivalent in the procedural obligation on states to investigate any loss of life by Article 2 or

[502] See Stoyanova, Chapter 8, on these difficulties. She argues that human rights law as regulating the relationship between individuals organized in a political community with political institutions claiming authority, implies that the question whether the State is to be found responsible for an omission cannot be answered without reference to the political community and its interests, and in an extraterritorial setting there is no such clear standard against which an omission can be juxtaposed. Stoyanova (2023).

[503] Vermeulen (2012) p. 76.

[504] Vermeulen (2012) p. 79.

[505] Vermeulen (2012) p. 88.

treatment contrary to Article 3. The ICPPED is fairly unclear what this obligation on states implies, as it only stipulates that each state party shall take appropriate measures to investigate.[506] The ECtHR is more concrete, as through the case law of the ECtHR the content of the procedural obligation of states have been elaborated upon by the Court. Importantly, considering the case law on enforced disappearances, the ECtHR has more commonly held states responsible for failing to comply with the procedural obligation, rather than for a material breach of Article 2 and 3.[507]

Within the framework of the ECHR, the procedural obligation within Article 2 creates a duty upon states to investigate any deprivation of life, even if the state is not responsible for the death itself.[508] The obligation is not only confined to deaths caused by the use of force, but the ECtHR has also held that 'there should be an effective official investigation when individuals have died in suspicious circumstances'.[509] This procedural obligation stems from the need to hold accountable those responsible for the deprivation of life, but it is not merely composed of criminal prosecution but may also extend into other forms of inquiry.[510] The obligation arises from 'the mere fact that the authorities are informed that a death had taken place'.[511] For Article 3, the procedural obligation is triggered 'where an individual claims on arguable grounds to have suffered acts contrary to Article 3', including acts by non-state actors.[512] The procedural obligation in Article 2 and 3 is connected to the right to an effective remedy in Article 13. In this sense, the ECtHR has held that:

> the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of

[506] Vermeulen has remarked that 'This could include the enactment of criminal law measures and the implementation of criminal investigative powers in relation to such acts but the exact scope remains ambiguous. Moreover, it is unclear what requirements are attached to the investigation and bringing the perpetrators to justice. for instance, issues such as information on the results of the investigation and the participation of relatives therein are not addressed', Vermeulen (2012) p. 92.

[507] This has been pointed out by Baranowska, who has noted that in the jurisprudence of the Court, in a majority of cases of enforced disappearances the ECtHR has found a violation of the procedural obligation of article 2, rather than a material violation, see Baranowska (2021) p. 67.

[508] The same is the case for Article 3, where an individual raises an arguable claim of treatment infringing Article 3 at the hands of state agents, this requires by implication that there should be an effective official investigation. See ECtHR Judgment of 28 October 1998, 90/1997/874/1086, *Assenov and Others v. Bulgaria*, para. 102; and *El-Masri v. the former Yugoslav Republic of Macedonia*, para. 182.

[509] ECtHR Judgment of 23 March 2010, App. No. 12219/05, *Iorga v. Moldova*, para. 26

[510] Schabas (2015) p. 134.

[511] ECtHR Judgment of 9 April 2009, App. No. 71463/01, *Šilih v Slovenia*, para. 156.

[512] *X and Others v Bulgaria* para. 184.

> those responsible and including effective access for the complainant to the investigatory procedure.[513]

Nonetheless, the complaint of violations of the procedural obligation of Article 2 and 3 versus the substantive right under Article 13, is dealt with by the ECtHR as two separate issues.[514] To this end, the Court has also noted the inherent difference in cases of alleged violations of Article 2 in comparison to Article 3. On the one hand, for the right to life there exist an obligation on states to *ex officio* initiate investigations 'for the practical reason that the victim is deceased and the circumstances of the death may be largely confined within the knowledge of State officials'.[515] Failure to do so, could amount to a violation of the procedural obligation. On the other hand, for the state to comply with the procedural obligation of Article 3 it is not necessary that an investigation has been launched *ex officio*. Instead, the requirement to be provided with an effective remedy under Article 13, 'will generally provide both redress to the applicant and the necessary procedural safeguards against abuses by State officials'.[516] The exact difference between violations of the procedural obligation and the right to an effective remedy is not completely clear judged by the case law of the ECtHR. However, the former would seem to have more to do with the lack of an effective official investigation, whereas the latter concerns a substantial breach through the inadequate character of the investigation. As such, the procedural obligation of Article 3 would seem to be more connected to the effectiveness of the investigation, whereas Article 2 also includes the very obligation to initiate an investigation.

As to the procedural obligation for cases of enforced disappearances, the ECtHR underlined in *Tahsin Acar v. Turkey* that 'investigations should take place in every case of a killing resulting from the use of force, regardless of whether the alleged perpetrators are State agents or third persons'.[517] In this regard, the Court also found that, while there was no proof that the disappeared person had been killed, less so by state agents, the procedural obligation on states to investigate also applied to 'cases where a person has disappeared in circumstances which may be regarded as life-threatening'.[518]

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[513] ECtHR Judgment of 18 December 1996, App. No. 21987/93, *Aksoy v. Turkey*, para. 98.

[514] ECtHR Judgment of 30 March 2016, App. No. 5878/08, *Armani Da Silva v. The United Kingdom*, para. 231: 'The State's obligation to carry out an effective investigation has in the Court's case-law been considered as an obligation inherent in Article 2, […]. Although the failure to comply with such obligation may have consequences for the right protected under Article 13, the procedural obligation of Article 2 is seen as a distinct obligation'.

[515] ECtHR Judgment of 27 June 2000, App. No. 22277/93, *İlhan v. Turkey*, Para. 91

[516] *İlhan v. Turkey*, para. 92.

[517] ECtHR Judgment of 8 April 2004, App. No. 26307/95, *Tahsin Acar v. Turkey*, para. 220. See also ECtHR Judgment of 15 January 2004, App. No. 27699/95, *Tekdağ v. Turkey* para. 78: This obligation extends to but is not confined to cases that concern intentional killing resulting from the use of force by agents of the State.'

[518] *Tahsin Acar v. Turkey*, para. 226.

While the investigatory obligation is one of means, and not result,[519] the duty of states to investigate a disappearance remain as long as the fate of the disappeared person is unaccounted for. In this regard, the labeling of missing migrants as an enforced disappearance has an impact on the procedural obligation due to the "continuing situation" an enforced disappearance entail.[520] In *Varnava and others v. Turkey* the Court emphasized that a disappearance is not an '"instantaneous" act or event', but the distinctive element of failure or refusal to account for the fate of the disappeared person gives rise to a continuing situation. As such, the ECtHR made a distinction between the obligation to investigate a suspicious *death* compared to a suspicious *disappearance*, underlining that the procedural obligation for a disappearance will 'persist as long as the fate of the person is unaccounted for', even if the person is presumed dead.[521] Later, in *Palić v. Bosnia and Herzegovina*, the ECtHR confirmed that 'the procedural obligation arising from a disappearance will generally remain as long as the whereabouts and fate of the person are unaccounted for' and more importantly, that the obligation to investigate did not cease to exist solely upon the discovery of the remains of the disappeared person. The Court stated that 'this only casts light on one aspect of the fate of the missing person and the obligation to account for the disappearance and death, as well as to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain.'[522] Given the broadly acknowledged fact that thousands of migrants have gone missing trying to cross the Mediterranean, disappearing in life-threatening situations, it is most probable that we are dealing with cases of deaths, and states are potentially under an obligation to investigate such fatalities. However, although most can be presumed to be deceased, in the situations disappeared migrants fulfill the definitional elements of an enforced disappearance, they should be treated as suspicious *disappearances*, and as such, requiring investigation as long as their fate and whereabouts are unaccounted for.

What should be added here is that the procedural obligation is generally limited to victims who were under the jurisdiction of the state at the time of death.[523] The obligation can be extended extraterritorially when there are

[519] See *Šilih v Slovenia*, para. 193.

[520] The concept was first formulated by the ECtHR already in 1958. See ECtHR Judgment of 9 June 1958, App. no. 214/56, *De Becker v. Belgium*. But applied for the first time in the context of enforced disappearances in 2001. See ECtHR Judgment of 10 May 2001, App. No. 25781/94, *Cyprus v. Turkey*.

[521] *Varnava and Others. v. Turkey*, para. 148.

[522] ECtHR Judgment of 15 February 2011, App. No. 4704/04, *Palić v. Bosnia and Herzegovina*, para. 46.

[523] See ECtHR Partial Decision of 3 June 2010, App. No. Applications nos. 59623/08, 3706/09, 16206/09, 25180/09, 32744/09, 36499/09 and 57250/09, *Emin and Others v. Cyprus, Greece and the United Kingdom*, para. 2: 'The Court recalls that generally the procedural obligation falls on the respondent State under whose jurisdiction the victim was at the time of death. Article 2 does not require member States' criminal laws to provide for universal jurisdiction in cases involving the death of one of their nationals'.

"special features" to depart from this general approach,[524] but the Court has not clarified what those special features could be.[525] In *Al-Adsani v. the United Kingdom*, the ECtHR referred to a "causal connection" between the state and the violation,[526] without clarifying what kind of causal connection would be necessary to constitute a "special feature". Perhaps it is possible to argue that the causal link between the omission and harm, discussed in Section 4.5.1 above, could give rise to an obligation to investigate these losses of life. Mainly referring to the causal connection between the strict migration and border policy of the EU; the reduction of maritime vessels being able to conduct search and rescue operation due to increased presence of aerial surveillance and imposed difficulties for NGOs providing humanitarian aid; with the massive losses of life in the Mediterranean. Additionally, a special feature could be the very labeling of the presumed death as being a case of enforced disappearance, testifying to its seriousness and more so, reinforcing the investigatory duty by virtue of the ICPPED and international human rights law. Given the distinctive element of enforced disappearances as concealment of the fate of the disappeared person, often caused by the lack of investigations, considering migrants as cases of enforced disappearances arguably would amount to a "special feature" as to require states to launch investigations of disappearances happening, even if outside their territory, in the Mediterranean Sea and while en route seeking to reach Europe.

In any case, it can be noted that a body washed ashore on European territory would give rise to a procedural obligation for the concerned state, as it cannot be ruled out where the death took place. Likewise, the procedural obligation could be imposed on a state by relatives requesting the state authorities to investigate. If the person was last seen or known to have been on a vessel heading toward a European state and other factors are present implying that the disappearance may have taken place within the territory of the state, investigation should not be ruled out. Often drowning accidents, the nature of these deaths could be contended as not being a deprivation of life. Nonetheless, caused by the unseaworthy vessels, lack of available life vests, and even resulting from interceptions at sea, this should be sufficient to amount to "uncertain circumstances". Investigations should not be disregarded simply on the assumption that these deaths have been "natural",

[524] ECtHR Judgment of 7 January 2010, App. No. 25965/04, *Rantsev v. Cyprus and Russia*, para. 241: 'The Court recalls that Ms Rantseva's death took place in Cyprus. Accordingly, unless it can be shown that there are special features in the present case which require a departure from the general approach, the obligation to ensure an effective official investigation applies to Cyprus alone [and not also to Russia].'

[525] Being a national of a state is not sufficient for that states to incur an obligation to provide for universal jurisdiction in cases involving the death of one of their nationals. See *Rantsev v. Cyprus and Russia*, para. 242.

[526] ECtHR Judgment of 21 November 2001, App. No. 35763/97, *Al-Adsani v. The United Kingdom*, para. 40. In the case the ECtHR found that as the alleged torture did not take place within the jurisdiction of the UK, nor that it was contended that the authorities 'had any causal connection with its occurrence', the United Kingdom had no positive obligation to investigate.

as it cannot be ruled out by simply recovering a body what has been the case. Especially considering that deaths have been the result of pushback practices, these deaths caused by acts of European states, certainly requires investigation. Illustrated by *Safi and Others v. Greece*, where eleven migrants died following the sinking of the vessel caused by the towing done by the Greek Coast Guard, Greece was found to have violated the procedural limb of Article 2. While criminal proceedings had been launched against the Coast Guard, the investigation did not comply with Article 2 due to problems with interpretation of the testimonies given by the survivors that had not been addressed in time, the fact that the survivors had not been able to participate properly in the proceedings and that the survivors had made complaints which had not been examined by the public prosecutor, which were 'obvious lines of inquiry which had not been pursued, thus undermining the ability of the investigation to determine the exact circumstances in which the boat had sunk'.[527]

In conclusion, migrants missing in the Mediterranean can be said to have disappeared in life-threatening circumstances, and to the extent these most-likely deaths have taken place within the jurisdiction of a state, or there are "special features" – arguably the causal connection between restrictive EU border and migration measures and the massive loss of life as well as the very labeling of disappearances as an enforced disappearance – European states have a positive obligation to investigate. While many cases may be drowning accidents with no direct perpetrator, it is not possible to rule out a violation of the right to life simply upon a presumption of an accidental death. Additionally, although presumed deaths to a large extent, this does not alleviate the burden on the state to investigate, as the continuing situation of disappearances implies that the duty prevails as long as the fate and the whereabouts of the persons is unaccounted for. More so, investigations should be launched *ex officio* and the lack thereof, or the inadequate character of an investigation, may result in a violation of the procedural limb of Article 2, possibly also a substantial violation of Article 13. As such, the investigation should be capable of leading to the identification and punishment of those responsible.

In this light, we can recall the discussion on the right to the truth and returning the remains as being more extensive than just identifying and punishing the responsible. Whereas the content and scope of the investigatory duty may be more limited within the ECHR, this yet again serves to illustrate the importance of labeling missing migrants in the Mediterranean as enforced disappearances. Because by doing so, European states would incur a reinforced obligation to investigate by virtue of ICPPED. More so, the rights of relatives to know the truth of the fate of their relative and having their remains returned, or at least located, would be strengthened. Through the right

[527] *Safi and Others v. Greece*, paras. 121-128 [unofficial translation from French to English as found in ECtHR press release on the case] .

to the truth, being owed also to society at large, the narrative of the "refugee crisis" as external to the EU would be challenged and bring to light the actual role of European states in these deaths.

Concluding the findings on the duty of European states to investigate disappearances of migrants, we will now turn to the last topic of examination: the negative obligation of states to respect the rights enshrined in the ECHR in the context of enforced disappearances in the Mediterranean.

4.5.3 Duty to respect

The failure to fulfill the duty to respect the rights and freedoms of the ECHR is only attributable to the state if it is committed by agents of the state.[528] As has been thoroughly discussed, the possibility of attributing acts committed against migrants in the Mediterranean to European states is low. These disappearances and deaths will most often not have been done by the hand of state officials, and if they have, issues of providing proof also poses a challenge. Therefore, states will most likely not be found responsible for having violated the negative obligation to respect the prohibition of enforced disappearances. Nonetheless, four potential cases of direct violations of the ECHR in this regard could be conceived of, and as such, will be discussed: three against the disappeared person and one concerning the rights of relatives to disappeared persons.

The two first possible situations at hand regard migrants who disappear following having been under the control of the state. First, rescue operations at sea. This was the situation in the *Safi* case, where migrants died following the towing of the vessel by the Greek Coast Guard. It is possible to argue that the towing would amount to a form of deprivation of liberty, conducted by state officials, and if the deaths are not investigated resulting in concealing their fate, it could be argued to be a case of enforced disappearance, for which the state is responsible, and would have violated the right to life, substantially and procedurally, and possibly the right to an effective remedy as well. The second situation would be migrants who disappear after having been detained upon arrival to Europe by sea. Systematic practice of detention of migrants has been reported in Greece, where migrants have been detained without being identified nor formally registered, before being pushed back to Turkey. Being a clear case of unacknowledged detention and as such violating Article 5, migrants who disappear following this kind of treatment, in addition to the lack of investigation, would arguably be cases of enforced disappearances. This brings into mind the practice in Latin-America where states cooperated in abduction, detention and returns of political refugees. Although practice such as that under Operation Condor does not exist in Europe, there are formal similarities: the exchange of surveillance information, large-scale detention of migrants and cooperation on returns of irregular migrants, even refugees

[528] Or when acts of non-state actors are attributable to the state.

under the EU-Turkey Deal. Clearly the purpose of this cooperation is not to hand over political refugees and *make them disappear*, but in practice, considering the human rights shortcomings of the countries migrants are returned to, it may have a similar result of people disappearing.

Thirdly, the situation in *Hirsi*, where the migrants who were sent back to Libya were found to have had their rights protected by Article 3 violated by Italy. For this situation we are not strictly labeling the situation as an enforced disappearance attributed to the state, but a violation of the principle of *non-refoulement*. Under international refugee law, the prohibition only applies to refugees and asylum seekers, whereas under international human rights law, it applies to any person within the jurisdiction of the state. This principle has been interpreted by the ECtHR to be protected by Article 3 ECHR and prohibits returns 'where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.'[529] As Article 16 ICPPED establishes the prohibition for cases where the person could be subject to an enforced disappearance, the return of any individual – refugee, asylum seeker or migrant – who risks becoming a victim of an enforced disappearance should also be considered by the ECtHR as treatment contrary to Article 3. To this end, the WGEID has noted that the mass returns of Syrian refugees by Turkey in 2016 could violate the principle of *non-refoulement* as 'the situation in the Syrian Arab Republic facilitates the occurrence of enforced disappearances or, at the very least, exposes the refugees returning to the country to greater risks'.[530] Likewise, the UN Fact-finding Mission has reported on migrants having been victims of enforced disappearances in Libya and the dispersal tactics by Moroccan authorities could potentially also result in disappearances. Thus, the pushback practices done at sea could result in European states being held responsible for, not enforced disappearances *per se*, but violating the principle of *non-refoulement* through exposing persons to the risk of enforced disappearances.

Fourth and lastly, we consider the special characteristic of enforced disappearances as having more than just one victim – apart from the disappeared person itself – also the relatives. This could also be of particular relevance for the purpose of establishing jurisdiction; either through the presence of the relatives on the state's territory or from the procedural link in a functional approach.[531] As previously mentioned, the ECtHR has recognized that relatives to a disappeared person may be victims. However, the finding that they have been subject to treatment contrary to Article 3 is

[529] *Hirsi Jamaa and Others v. Italy*, para. 114.

[530] WGEID. (2017, July 28). Enforced disappearances in the context of migration, para. 33; see also WGEID. (2016, July 27). *Report of the WGEID on its mission to Turkey*, paras. 55-56; and UNHRC. (2013, August 16). Report of the independent international commission of inquiry on the Syrian Arab Republic. A/HRC/24/46, paras. 67-74.

[531] See discussion in Section 4.4.3.

not based on a presumption, but their suffering resulting from the disappearance has to be proven by special features which justify finding an additional violation. A violation in this regard is not limited to a situation where the State has been found responsible for the disappearance itself, but also 'can arise where the failure of the authorities to respond to the quest for information by the relatives or the obstacles placed in their way'.[532] Thus, the phycological suffering from the uncertainty of the fate appears not to be sufficient. Instead, the essence of the violation against the relatives 'lies in the authorities' reactions and attitudes to the situation when it has been brought to their attention'.[533] As a result, for European states to be found to have violated Article 3 in prejudice of the relatives, they would need to have had a more or less active role in making petitions and enquiries to the authorities. The uncertainty and suffering experienced by family members need to be accompanied by other "aggravating features" so as to say that they have been subject to degrading treatment. It is somewhat striking that investigations into suspected deaths are to be launched *ex officio*, seeking to not place too heavy of a burden on relatives, yet, the lack thereof, is not considered as sufficient in itself as to label relatives as victims.

In sum, European states could be considered to be responsible for failing to respect the prohibition of enforced disappearances in the following situations of migrants in the Mediterranean: One, interception at sea causing deaths. Two, detention following arrival by sea and a consequent disappearance. Three, through pushbacks violating the principle of non-refoulement and as such, indirectly responsible for enforced disappearance. Four, by subjecting the relatives to degrading treatment through the lack of investigation. It can be noted that the second situation has the strongest potential to be labeled an enforced disappearance in the traditional understanding of the crime, due to the fact that the elements of the definition are present: deprivation of liberty by state agents and possibly refusal to acknowledge due to lack of either identification during detention and/or absence of investigation. Nonetheless, as this thesis have intended to illustrate, the situation of migrants in the Mediterranean and lack of accountability for these deaths, have many similarities with the concept of enforced disappearances in international law.

[532] *Varnava and Others. v. Turkey*, para. 200.
[533] Ibid.

5 Conclusion

This thesis has sought to answer the question whether European states can be held responsible for enforced disappearance of migrants in the Mediterranean Sea under the ECHR. The international legal concept of enforced disappearances was chosen due to the seemingly similarities between the situation of missing migrants and that of victims of enforced disappearances. Namely the result of relatives of the missing and disappeared person being left in the unknown about the fate of their loved ones, the denial of any involvement of the state through the lack of investigation and ultimately, absence of any responsibility.

This thesis has demonstrated the challenges of fitting the circumstances of missing migrants in the Mediterranean into the concept of enforced disappearances as it is understood today in international law. When examining the definitional elements of deprivation of liberty with involvement of state agents and a refusal to acknowledge the fate of the disappeared person, there are limited instances where the situation experienced by migrants corresponds to these cumulative elements. In general, unless migrants have been detained by the coast guard, deprivation of liberty would need to be argued based on that consent given to smugglers have not been voluntarily. Involvement of European States is in most cases indirect, either through the financial support to third states or caused by the absence of investigation and preventative measures contributing to maintaining a situation where disappearances and deaths are more likely to happen. Similarly, the refusal to acknowledge is mainly established by tending to the argument that the lack of investigation has the result of effectively concealing the fate of the person by not seeking to clarify the circumstances.

But that is not to say that there are no potential cases which would amount to an enforced disappearance. Especially migrants who disappear following detention upon arrival by sea, particularly a risk if push backed to third states where the occurrence of enforced disappearances has been denounced, or interception at sea where deaths and disappearances are a result of acts by European States. The absence of thorough investigation into such events would arguably bring these situations to correspond to the definitional elements.

Given the geopolitical context of migration in the Mediterranean, and the purpose of evaluating state responsibility of European States, the ECHR stands out as the most relevant framework for human rights protection. However, its adequacy in addressing state responsibility for enforced disappearances of missing migrants is debatable. To begin with, the Convention does not explicitly prohibit enforced disappearances; rather, the crime is assessed based on the infringement it causes upon the guaranteed

rights and freedoms. Consequently, the distinction between an enforced disappearance and a mere disappearance holds little material significance in terms of the violations of the Articles. Furthermore, the possibility of attributing responsibility to a state is severely constrained by jurisdiction mainly being understood as territorial or based on effective control. Hence, the majority of disappearances occurring in international waters, renders them most often outside the jurisdiction of European States.

Nonetheless, we have seen the potential impact labeling missing migrants in the Mediterranean as enforced disappearances could have. I refer mainly to that by doing so, the investigatory duty on states is reinforced by virtue of the ICPPED requiring states to take appropriate measures to investigate acts, regardless of perpetrator, of enforced disappearances. More so, the right to the truth would arguably imply that investigations need to extend beyond the mere purpose of identifying and punishing perpetrators, but also revealing the very circumstances of the disappearance. By so, the prevailing narrative of the Mediterranean crisis as external to Europe would be challenged and the role of European States, notably EU Member States, in creating and sustaining this humanitarian crisis would be brought to light. This shift in perspective has the potential to enhance accountability and could contribute to the development of new approaches for reconciling migration management with state sovereignty concerns while ensuring the comprehensive protection of human rights.

This could be a first step in overcoming the legal black hole where migrants in the Mediterranean have been rendered rightless. The issue of jurisdiction is essential and while no conclusive answer can be given, there are instances where an arguable claim can be made that disappeared migrants come within the jurisdiction of European States. Considering the functional approach to jurisdiction, while not fully endorsed by the ECtHR, it has found itself implicitly expressed in the reasonings of the Court. To this end, we have seen that the jurisdictional claim can be fortified by the very labeling of the situation as an enforced disappearance. Apart from the seriousness this implies due to the gravity of the crime, the reinforced investigatory duty of states could serve to create a procedural link as to establish jurisdiction. By holding that the state is under an obligation to investigate the disappearances, the failure to conduct such investigations could be brought before the ECtHR. More so, the vulnerable situation of migrants, especially asylum-seekers, calls for reinforced measures to prevent violations. Combining this with the duty of states to assist people in distress at sea, it could be argued that European States have a positive obligation toward migrants in the Mediterranean to prevent losses of life from happening. The holding of the existence of such a duty could serve to create a jurisdictional link when the state fails to take preventative measures.

These claims are far from infallible, and although the Court sometimes tends to judicial activism, apart from the democratic issues with this, it is not certain such an approach is desirable. For instance, the *Hirsi* case, where the Court arguably embraced an activist stance, the response of European States was much to shift to a contactless approach which has worsened the situation for migrants. Moreover, given that the overall situation does not align well with the concept of enforced disappearances, expanding the definition to include these disappearances raises valid concerns as to its appropriateness. While the intention is good, an overly expansive approach risks diluting the core essence of the crime. It is one thing to expand the definition to non-state actors spreading terror, but another to include missing migrants in the Mediterranean, which are most often not results of actions, but of the omission of European States in providing safe and legal pathways to Europe.

The Mediterranean Sea has witnessed devastating numbers of disappearances and deaths of migrants in recent years, and the fact that these numbers have not dropped in conjunction with the decrease of arrivals to Europe, is deeply concerning. The introduction of this thesis brought up the Messenia tragedy of 2023 where over 800 people are estimated to have died. A news article reported on the anguish of persons who, fearing they might be relatives of the disappeared persons, traveled to Greece to seek try to clarify the fate of their loved ones. This possibility remains a distant reality for many who have lost someone dear without a trace. In light of the vulnerable situation of migrants, often subjected to human rights violations without accountability, there is a need for finding ways so as the guarantee their rights, and not leave them in a state of rightlessness. Recognizing that international law is constantly evolving, the prohibition of enforced disappearance in international law could be interpreted to better reflect today's reality. This could include acknowledging the thousands of migrants who go missing, not only in the Mediterranean but also globally, and expanding the scope of protection to encompass these disappearances.

Bibliography

Books

Baranowska, G. (2021). *Rights of Families of Disappeared Persons: How International Bodies Address the Needs of Families of Disappeared Persons in Europe*. Intersentia.

Buzan, B., & Wæver, O. (2003). *Regions and Powers: The Structure of International Security.* Cambridge University Press.

Boss, P. (2000). *Ambiguous Loss: Learning to Live with Unresolved Grief*. Harvard University Press: Cambridge.

Cassese, A. (2003). *International criminal law*. Oxford University Press.

Donnelly, J. (2013). *Universal Human Rights in Theory and Practice* (3rd ed.). Cornell University Press.

Fredman, S. (2008). *Human Rights Transformed: Positive Rights and Positive Duties*. Oxford University Press.

Gallagher, A. T. (2014). *The international law of migrant smuggling*. Cambridge University Press.

Gammeltoft-Hansen, T. (2011). *Access to asylum. international refugee law and the globalisation of migration control.* Cambridge University Press.

Heath, J., & Zahedi, A. (2023). *Book of the Disappeared*. University of Michigan Press.

Lavenex, S. (2022). *The cat and mouse game of refugee externalisation policies: Between law and politics*. Taylor and Francis.

Liguori, A. (2019). *Migration law and the externalization of border controls: European state responsibility*. Routledge, Taylor & Francis Group.

Pérez Solla, M. A. (2006) *Enforced Disappearance in International Human Rights*. McFarland & Company.

Schabas, W. A. (2015). *The European Convention on Human Rights: A Commentar*y (1st ed.). Oxford University Press.

Schneider, J. (2015). *Reparation and enforcement of judgments: a comparative analysis of the European and InterAmerican human rights systems*. Berlin: epubli GmbH.

Scovazzi, T., & Citroni, G. (2007). *The struggle against enforced disappearance and the 2007 United Nations convention*. Martinus Nijhoff Publishers.

Stępka, M. (2022). *Identifying Security Logics in the EU Policy Discourse: The "Migration Crisis" and the EU* (1st ed. 2022.). Springer International Publishing.

Stoyanova, V. (2023). *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries*. Oxford University Press.

Vermeulen, M. L. (2012). *Enforced disappearance: determining state responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance*. Intersentia.

Chapters

Bisong, A. (2020). Migration Partnership Framework and the Externalization of European Union's (EU) Migration Policy in West Africa: The Case of Mali and Niger in Rayp, G., Ruyssen, I., Marchand, K. (eds) *Regional Integration and Migration Governance in the Global South.* United Nations University Series on Regionalism, vol 20. Springer, Cham. 217–237.

Gazzotti et. al. (2023). A "European" Externalisation Strategy? A Transnational Perspective on Aid, Border Regimes, and the EU Trust Fund for Africa in Morocco. In Finotelli, C., Ponzo, I. (eds) *Migration Control Logics and Strategies in Europe*. IMISCOE Research Series. Springer, Cham. 69–89.

Huneeus, A. V. (2013, January 6). Compliance with International Court Judgments and Decisions. In K. J. Alter, C. Romano, & Y. Shany (Eds.), *Oxford Handbook of International Adjudication* (Univ. of Wisconsin Legal Studies Research Paper No. 1219).

Lavenex, S. (2022). The cat and mouse game of refugee externalisation policies: Between law and politics in Dastyari, A., Nethery, A., & Hirsch, A. (Eds.). *Refugee externalisation policies.* Routledge, Taylor & Francis Group, 27–44.

Papastavridis, E. (2017). Rescuing migrants at sea and the law of international responsibility. In T. Gammeltoft-Hansen & J. Vedsted-Hansen (Eds.), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control*. New York: Routledge.

Scheinin, M. (2009). Just another word? Jurisdiction in the roadmaps of state responsibility and human rights. In: Langford et al., *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge University Press, 212–230.

Journal articles

Andreu-Guzmán, F. (2001, September). The Draft International Convention on the Protection of All Persons from Forced Disappearance. *ICJ Review: Impunity, Crimes Against Humanity and Forced Disappearance*, no. 62-63, 73–106.

Ashraf, S., Badshah, I., & Khan, U. (2023). The role of women's political activism against enforced disappearances in Balochistan: a study of the Baluch missing persons. *Inter-Asia Cultural Studies*, 24(6), 979–993.

Augustova, K., Farrand-Carrapico, H., & Obradovic-Wochnik, J. (2023). Push and back: The ripple effect of EU border externalisation from Croatia to Iran. *Environment and Planning C: Politics and Space*, 41(5), 847-865.

Banu, B. (2014). Sovereignty as Erasure: Rethinking Enforced Disappearances. *Qui Parle*, 23(1), 35–75.

Bellido Lora, M. (2023). Inmigración y cooperación hispano-marroquí en búsqueda y salvamento marítimo: perspectivas de una cooperación SAR en la región del Estrecho de Gibraltar. *Revista de Estudios Jurídicos y Criminológicos*, N.º 7, 87–124.

Besson, S. (2012). The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to. *Leiden Journal of International Law*, 25(4), 857–884.

Bordin, F. L. (2014). Reflections of customary international law: the authority of codification conventions and ILC draft articles in international law. *International & Comparative Law Quarterly*, 63(3), 535–567.

Cançado Trindade, A. A. (2012). Enforced Disappearances of Persons as a Violation of Jus Cogens: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights. *Nordic Journal of International Law*, 81(4), 507–536.

Cantor, D., Tan, N. F., Gkliati, M., Mavropoulou, E., Allinson, K., Chakrabarty, S., Grundler, M., Hillary, L., McDonnell, E., Moodley, R., Phillips, S., Pijnenburg, A., Reyhani, A.-N., Soares, S., & Yacoub, N. (2022). Externalisation, Access to Territorial Asylum, and International Law. *International Journal of Refugee Law*, 34(1), 120–156.

Carrera, S., den Hertog, L., & Stefan, M. (2017, April 15). It Wasn't Me! The Luxembourg Court Orders on the EU–Turkey Refugee Deal. *CEPS Policy Insights*, 2017(15). Centre for European Policy Studies.

Casaglia, A., & Pacciardi, A. (2022). A close look at the EU–Turkey deal: The language of border externalisation. Environment and Planning C: *Politics and Space*, 40(8), 1659–1676.

Czepek, J. (2013). European Court of Human Rights on Enforced Disappearances Case-Law Study. *Internal Security*, 5(1), 7–16.

Davis, H., & Klinkner, M. (2022). Investigating across borders: the right to the truth in a European context. *The International Journal of Human Rights*, 26(4), 683-700.

De Boer, T. (2015). Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection. *Journal of Refugee Studies*, 28(1), 118–134.

Duhaime, B., & Thibault, A. (2017). Protection of migrants from enforced disappearance: A human rights perspective. *International Review of the Red Cross*, 99(2), 569–587.

Engle, E. (2009, October 1). Third Party Effect of Fundamental Rights (Drittwirkung). *Hanse Law Review*, 5(2), 165-173.

Esteve, F. (2017). The Search and Rescue Tasks Coordinated by the European Border and Coast Guard Agency (Frontex) regarding the Surveillance of External Maritime Borders. *Paix et Securite Internationales - Journal of International Law and International Relations*, 5, 93–116.

Farahat, A. (2022). Human rights and the political: Assessing the allegation of human rights overreach in migration matters. *Netherlands Quarterly of Human Rights*, 40(2), 180-201.

Finucane, B. (2009, June 28). Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War. *Yale Journal of International Law*, 35(1), 171–198.

Frelick, B., Kysel, I. M., & Podkul, J. (2016). The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants. *Journal on Migration and Human Security*, 4(4), 190–220.

Gammeltoft-Hansen, T., & Hathaway, J. C. (2015). Non-Refoulement in a World of Cooperative Deterrence. *Columbia Journal of Transnational Law*, 53(2), 235–284.

García Andrade, P. (2018). EU external competences in the field of migration: How to act externally when thinking internally. *Common Market Law Review*, 55(1), 157-200.

Gatta. (2018). Legal Avenues to Access International Protection in the European Union: Past Actions and Future Perspectives. *Journal européen des droits de l'homme / European Journal of Human Rights*, 3, 163-201.

Gazzotti, L., & Hagan, M. (2021). Dispersal and dispossession as bordering: Exploring migration governance through mobility in Post-2013 Morocco. *The Journal of North African Studies*, 26(5), 912–931.

Hathaway et. al. (2011). Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially. *Arizona State Law Journal*, 43(2), 389–426.

Heijer, M. D. (2013). Reflections on Refoulement and Collective Expulsion in the Hirsi Case. *International Journal of Refugee Law*, 25(2), 265–290.

Kanalan, I. (2018). Extraterritorial State Obligations beyond the Concept of Jurisdiction. *German Law Journal*, 19(1), 43–64.

Keller, H., & Heri, C. (2014). Enforced disappearance and the european court of human rights: wall of silence, fact-finding difficulties and states as subversive objectors. *Journal of International Criminal Justice*, 12(4), 735-750.

Loukinas, P. (2022). Drones for Border Surveillance: Multipurpose Use, Uncertainty and Challenges at EU Borders. *GEOPOLITICS*, 27(1), 89–112.

Mann, I. (2018). Maritime Legal Black Holes: Migration and Rightlessness in International Law. *European Journal of International Law*, 29(2), 347–372.

Milanovic, M. (2015). Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age. *Harvard International Law Journal*, 56, 81-119.

Moreno-Lax, V. (2018) The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' *Paradigm. JCMS: Journal of Common Market Studie*s, 56: 119–140.

Moreno-Lax, V. (2020). The Architecture of Functional Jurisdiction: Unpacking Contactless Control - On Public Powers, S.S. and Others v. Italy, and the "Operational Model." *German Law Journal*, 21(3), 385–416.

Moreno-Lax, V., & Giuffré, M. (2017, March 31). The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows. In S. Juss (Ed.), *Research Handbook on International Refugee Law* (Edward Elgar, Forthcoming).

Nudd, E., & Vicente, A. (2021). Addressing a forgotten struggle: Victims of enforced disappearance in Africa. *Torture Journal*, 31(2), 68–82.

on the Protection of All Persons from Forced Disappearance. *ICJ Review: Impunity, Crimes Against Humanity and Forced Disappearance*, no. 62-63, 63–72.

Panebianco, S. (2022). The EU and migration in the Mediterranean: EU borders' control by proxy. *Journal of Ethnic & Migration Studies*, 48(6), 1398–1416.

Panepinto, A. (2017). The right to the truth in international law: The significance of Strasbourg's contributions. *Legal Studies*, 37(4), 739–764.

Pasqualucci, J. M. (1996). Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure. *Michigan Journal of International Law*, 18(1).

Pijnenburg, A. (2023). Migration Deals Seen through the Lens of the ICESCR. *International Journal of Refugee Law*, 35(2), 151–170.

Reeves, A. R. (2015). Standard Threats: How to Violate Basic Human Rights. *Social Theory and Practice*, 41(3), 403–434.

Rescia, V. M. R. (1999). Reparations in the Inter-American System for the Protection of Human Rights. *ILSA Journal of International & Comparative Law*, 5(3), 583–602.

Rijken et. al. (2018). Protecting the EU external borders and the prohibition of refoulement. *Melbourne Journal of International Law*.

Sarkin, J. (2012). Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law. *Nordic Journal of International Law*, 81(4), 537–584.

Pacciardi, A., & Berndtsson, J. (2022). EU border externalisation and security outsourcing: exploring the migration industry in Libya. *Journal of Ethnic and Migration Studies*, 48(17), 4010–4028.

Papastergiou, V. (2021, November 16). Detention as the Default: How Greece, with the support of the EU, is generalizing administrative detention of migrants. *Oxfam International and Greek Council for Refugees*. Joint Agency Briefing Paper.

Spijkerboer, T. (2018). Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice. *Journal of Refugee Studies*, 31(2), 216–239.

Stepka, M. (2023). The new pact on migration and asylum: another step in the eu migration-security continuum or preservation of the status quo?. *Bialostockie Studia Prawnicze*, 28(1), 23-37.

Tayler, W. (2001, September). Background to the Elaboration of the Draft International Convention on the Protection of All Persons from Forced Disappearance. *ICJ Review: Impunity, Crimes Against Humanity and Forced Disappearance*, no. 62-63, 63–72.

Tazzioli, M. (2020). Governing migrant mobility through mobility: Containment and dispersal at the internal frontiers of Europe. *Environment and Planning C: Politics and Space*, 38(1), 3-19.

van Noorloos, M. (2021). A Critical Reflection on the Right to the Truth about Gross Human Rights Violations. *Human Rights Law Review*, 21(4), 874–898.

Velasco, A. C. (2022). Vulnerability and marginalisation at sea: maritime search and rescue, and the meaning of "place of safety." *International Journal of Law in Context*, 18(1), 85–99.

Electronic sources

ACAPS. (n.d.) Country analysis: Spain. https://www.acaps.org/en/countries/spain (accessed December 30, 2023).

Ahdani J. (2018, September 7). Mustapha El Khalfi: "Le Maroc refuse d'être le gendarme de l'immigration clandestine". *Telquel.* https://telquel.ma/2018/09/07/mustapha-el-khalfi-le-maroc-refuse-detre-le-gendarme-de-limmigration-clandestine_1609841 (accessed December 30, 2023).

Al Jazeera. (2023, July 11). Libya jails 38 over deaths in Mediterranean Sea smuggling case. https://www.aljazeera.com/news/2023/7/11/libya-jails-38-over-deaths-in-mediterranean-sea-smuggling-case (accessed December 30, 2023).

Blay Puntas, I. (2022, June). The use of drones for maritime surveillance and border control. *Centre Delàs Working Papers.* https://centredelas.org/wp-content/uploads/2022/06/WP_DronesFrontex_ENG.pdf (accessed December 30, 2023).

Bonomolo, A., & Kirchgaessner, S. (2015, April 20). Italy PM Matteo Renzi compares migrant shipwreck crisis to Srebrenica massacre. *The Guardian*. https://www.theguardian.com/world/2015/apr/20/italy-pm-matteo-renzi-migrant-shipwreck-crisis-srebrenica-massacre (accessed December 30, 2023).

Clarke, L. (2018, June 28). In the Hands of the Libyan Coast Guard: Pushbacks by Proxy. *Open Migration*. https://openmigration.org/en/analyses/in-the-hands-of-the-libyan-coast-guard-pushbacks-by-proxy/ (accessed December 30, 2023).

Eljechtimi, A. (2021, December 15). Morocco's foreign minister warns EU over migration. *Reuters*. https://www.reuters.com/article/morocco-eu-migration-int-idUSKBN28P252/ (accessed December 30, 2023).

Emmanouilidou, L. (2023, June 22). Migrant Boat Disaster Has Greece and European Authorities Facing Criticism. *NPR*. https://www.npr.org/2023/06/22/1183842802/migrant-boat-disaster-has-greece-and-european-authorities-facing-criticism (accessed December 30, 2023).

EU watchdog launches investigation into Frontex's role in deadly Adriana shipwreck. (2023, July 26). *Euronews*. https://www.euronews.com/my-europe/2023/07/26/eu-watchdog-launches-investigation-into-frontexs-role-in-deadly-adriana-shipwreck (accessed December 30, 2023)

Fink, M., Gombeer, K., & Rijpma, J. (2018, July 9). *In Search of a Safe Harbour for the Aquarius: The Troubled Waters of International and EU Law*. EU Migration Law Blog. https://eumigrationlawblog.eu/in-search-of-a-safe-harbour-for-the-aquarius-the-troubled-waters-of-international-and-eu-law/ (accessed December 30, 2023).

France 24. (2023, June 15). Nine arrested for people smuggling after Greece migrant ship disaster. https://www.france24.com/en/europe/20230615-nine-arrested-for-people-smuggling-after-greece-migrant-ship-disaster (accessed December 30, 2023).

Gálán Caballero, J., Martín, M., & Grasso, D. (2019, March 29). España rescata a un tercio de los migrantes en aguas de responsabilidad marroquí. *El País*. https://elpais.com/politica/2019/03/26/actualidad/1553613053_040695.html (accessed December 30, 2023).

Gálán Caballero, J., Martín, M., & Grasso, D. (2022, August 21). Salvamento Marítimo reduce drásticamente el rescate de pateras en aguas de responsabilidad marroquí. *El País*. https://elpais.com/espana/2022-08-21/salvamento-maritimo-reduce-drasticamente-el-rescate-de-pateras-en-aguas-de-responsabilidad-marroqui.html (accessed December 30, 2023).

Jones, C., Lanneau, R., & Maccanico, Y. (2022, December). Access denied: Secrecy and the externalisation of EU migration control. Heinrich-Böll-Stiftung European Union & Statewatch. https://eu.boell.org/sites/default/files/2023-03/secrecy_externalisation_migration_web.pdf (accessed December 30, 2023).

Kassab et. al. (2023, June 18). Greek migrant boat tragedy: What do we know so far? *Madamasr*. https://www.madamasr.com/en/2023/06/18/feature/politics/greek-migrant-boat-tragedy-what-do-we-know-far/ (accessed December 30, 2023).

Martín, M. & Abellán, L. (2019, February 21). Spain and Morocco reach deal to curb irregular migration flows. *El País*. https://english.elpais.com/elpais/2019/02/21/inenglish/1550736538_089908.html (accessed December 30, 2023).

Italian Navy. (n.d.). Mare Nostrum Operation. https://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx (accessed December 30, 2023).

Smith, H. (2023, June 14). Scores Drown as Refugee Boat Sinks off Greece. *The Guardian*. https://www.theguardian.com/world/2023/jun/14/scores-drown-refugee-boat-sinks-off-greece (accessed December 30, 2023).

Syed, A. (2023, June 23). What to Know About Greece's Deadliest Migrant Shipwreck in Years. *Time*. https://time.com/6287419/greece-deadly-migrant-shipwreck/ (accessed December 30, 2023).

Tagaris, K., & Papadimas, L. (2023, June 30). Greece migrant tragedy: Survivor accounts say coastguard rope toppled boat. *Reuters*. https://www.reuters.com/world/europe/greece-migrant-tragedy-survivor-accounts-say-coastguard-rope-toppled-boat-2023-06-30/ (accessed on December 30, 2023).

The New York Times. (2020, March 10). *At Secret Site in Greece, Suspected Migrants Are Warehoused.* https://www.nytimes.com/2020/03/10/world/europe/greece-migrants-secret-site.html (accessed December 30, 2023).

Varo, L. J., Peregil, F., & Martín, M. (2021, May 18). More than 6,000 people swim to Ceuta amid diplomatic row between Spain and Morocco. *El País*. https://english.elpais.com/spanish_news/2021-05-18/more-than-6000-people-swim-to-ceuta-amid-diplomatic-row-between-spain-and-morocco.html (accessed December 30, 2023).

Official documents

United Nations

United Nations General Assembly

UNGA (2006, November 13) Third Committee Approves Draft Resolution Concerning Convention on Enforced Disappearances. GA/SHC/3872.

UNGA. (2016, August 4). Report of the Special Rapporteur on the Human Rights of Migrants. A/71/285.

UNGA. (2017, August 15). Special Rapporteur on extrajudicial, arbitrary and summary executions, Unlawful deaths of refugees and migrants. A/72/335.

Office of the United Nations High Commissioner for Human Rights

OHCHR. (2010). Recommended Principles and Guidelines on Human Rights and Human Trafficking. HR/PUB/10/2.

OHCHR. (2014). Recommended Principles and Guidelines on Human Rights at International Borders.

OHCHR. (2016, March). UN rights chief expresses serious concerns over EU-Turkey agreement. OHCHR Press Release. https://www.ohchr.org/en/press-releases/2016/03/un-rights-chief-expresses-serious-concerns-over-eu-turkey-agreement (accessed December 30, 2023).

OHCHR & United Nations Support Mission in Libya. (2016, December 13). Detained and Dehumanised: Report on Human Rights Abuses Against Migrants in Libya.

OHCHR. (2019, July 18). *UN experts condemn criminalization of migrant rescues and threats in Italy.* Geneva. https://www.ohchr.org/en/press-releases/2019/07/italy-un-experts-condemn-criminalisation-migrant-rescues-and-threats?LangID=E&NewsID=24833 (accessed December 30, 2023).

OHCHR. (2021, May). Lethal Disregard: Search and rescue and the protection of migrants in the central Mediterranean Sea. Thematic report.

OHCHR. (2023, June 27). Detention of Civilians in the Context of the Armed Attack by the Russian Federation against Ukraine.

OHCHR. (n.d.) UN Recommended Principles and Guidelines on Human Rights at International Borders.

United Nations Commission on Human Rights

UNCHR. (1979, November 21).Report of the Expert on the Question of the Fate of Missing and Disappeared Persons in Chile. A/34/583/Add.1.

UNCHR. (1980, February 29). Resolution 20 (XXXVI). Question of missing and disappeared persons.

UNCHR. (1981, January 22) Report of the Working Group on enforced or involuntary disappearances. E/CN.4/1435.

UNCHR. (2002, January 8). Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances. E/CN.4/2002/71.

UNCHR (2003, February 12). Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance. E/CN.4/2003/71.

UNCHR (2004, February 24). Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance. E/CN.4/2004/59.

UNCHR (2005, March 10). Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance. E/CN.4/2005/66.

UNCHR (2006, February 2). Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance. E/CN.4/2006/57.

UNCHR. (2000, January 6). Report of the Special Rapporteur Ms. Gabriela Rodríguez Pizarro on Human Rights of Migrants, (E/CN.4/2000/82).

United Nations Human Rights Council

UNHRC. (2013, April 24). Report of the Special Rapporteur on the human rights of migrants: Regional Study: Management of the External Borders of the European Union and Its Impact on the Human Rights of Migrants. (A/HRC/23/46.).

UNHRC. (2013, August 16). Report of the independent international commission of inquiry on the Syrian Arab Republic. A/HRC/24/46.

UNHRC (2020, October 6) Resolution 45/3. Enforced or involuntary disappearances. A/HRC/RES/45/3.

UNHRC (2021, May 12). Report of the Special Rapporteur on the human rights of migrants: Report on means to address the human rights impact of pushbacks of migrants on land and at sea. (A/HRC/47/30).

United Nations Working Group on Enforced and Involuntary Disappearances

WGEID (2004, December 23) Annual Report for 2004. E/CN.4/2005/65.

WGEID. (2016, July 27). Report of the WGEID on its mission to Turkey. A/HRC/33/51/Add.1.

WGEID. (2017, July 25). Communications, cases examined, observations and other activities conducted. A/HRC/WGEID/112/1

WGEID. (2017, July 28). Enforced disappearances in the context of migration. (A/HRC/36/39/Add.2).

WGEID. (2019, July 30). Communications, cases examined, observations and other activities conducted. A/HRC/WGEID/118/1

United Nations Economic and Social Council

ECOSOC (2001, June 4). Decision 2001/221 Question of enforced or involuntary disappearances.

ECOSOC. (2006, February 2). Report of the Intersessional Open-ended.

United Nations High Commissioner for Refugees

UNHCR. (2014, November 18) Legal avenues to safety and protection through other forms of admission.

UNHCR. Mediterranean situation. https://data.unhcr.org/en/situations/mediterranean (accessed December 31, 2023)

Council of Europe Commissioner for Human Rights

Commissioner for Human Rights of the CoE. (2022, September 29). For the Rights of the Living, for the Dignity of the Dead: Time to End the Plight of Missing Migrants in Europe. https://www.coe.int/ca/web/commissioner/-/for-the-rights-of-the-living-for-the-dignity-of-the-dead-time-to-end-the-plight-of-missing-migrants-in-europe

Commissioner for Human Rights of the CoE. (2019, November 15). Third party intervention to Application No. 21660/18 S.S. and others v. Italy. Strasbourg.

Commissioner for Human Rights of the CoE. (2019, June). *Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean*. Council of Europe. https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87 (accessed December 30, 2023)

Commissioner for Human Rights of the CoE (2016, March) Missing persons and victims of enforced disappearance in Europe. Issue paper prepared by Gabriella Citroni.

Muižnieks, N. (2014, November 10). *Ensuring the Rights of Migrants in the EU: From Vulnerability to Empowerment*. Speech at the Fundamental Rights Conference "Fundamental Rights and Migration to the EU". Commissioner for Human Rights of the CoE. (CommDH/Speech(2014)11) Rome. https://rm.coe.int/16806da9c8 (accessed December 30, 2023).

European Union

European Council

European Council (1999) Presidency Conclusions, Tampere European Council 15 and 16 October 1999

European Council. (2005, December 13). Global approach to migration: Priority actions focusing on Africa and the Mediterranean. (15744/05)

European Council. (2015, April 23). Special meeting of the European Council, , 23 April 2015 - statement. https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/ (accessed December 30, 2023)

European Council. (2016, March 18 March) EU-Turkey statement. Press release. https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/

European Council. (2017, February 3). *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route,*

European Council. (2017, October 19). European Council meeting (19 October 2017) – Conclusions (EUCO 14/17).

Council of the European Union

Council of the European Union. Valletta summit on Migration 11-12 November 2015. Malta.

European Commission

European Commission. (2007, May 16). On circular migration and mobility partnerships between the European Union and third countries. (COM(2007) 248 final). Brussels.

European Commission. (2011, November 18). The Global Approach to Migration and Mobility (COM [2011] 743). Brussels

European Commission. (2014, October 7). Frontex Joint Operation 'Triton' – Concerted efforts to manage migration in the Central Mediterranean. (MEMO/14/566). Brussels. https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_566

European Commission. (2015, May 13). A European Agenda on Migration (COM(2015) 240 final). Brussels.

See European Commission. (2015, May 27). EU Action Plan against migrant smuggling (2015-2020). (COM(2015) 285 final). Brussels;

European Commission (2015, November 12). A European Union Emergency Trust Fund for Africa. (MEMO/15/6056) https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_6056

European Commission. (2016, March 16). Next operational steps in EU-Turkey cooperation in the field of migration, (COM(2016) 166 final)

European Commission. (2016, June 7). Communication from the Commission on establishing a new Partnership Framework with third countries under the European Agenda on Migration. (COM(2016) 385 final). Strasbourg.

European Commission. (2016, October 18). First Progress Report on the Partnership Framework with third countries under the European Agenda on Migration. (COM(2016) 700 final). Brussels

European Commission. (2016, December 14). Second Progress Report: First Deliverables on the Partnership Framework with third countries under the European Agenda on Migration. (COM(2016) 960 final). Brussels

European Commission. (2017, March 2). Third Progress Report on the Partnership Framework with third countries under the European Agenda on Migration (COM(2017) 205 fina). Brussels

European Commission. (2017, June 13). Fourth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration. (COM(2017) 350 final). Strasbourg;

European Commission. (2017, September 6). Fifth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration. (COM(2017) 471 final). Brussels.

European Commission. (2018, July 24). Managing migration: Commission expands on disembarkation and controlled centre concepts. https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4629

European Commission. (2018, December 14). Western Mediterranean Route: EU reinforces support to Morocco. Press Release. https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6705 (accessed December 30, 2023)

European Commission. (2020). Migration and Asylum Package: New Pact on Migration and Asylum – Documents adopted on 23 September 2020. Retrieved from https://commission.europa.eu/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en

European Commission. (2020, September 23). Communication from the Commission on a New Pact on Migration and Asylum (COM(2020) 609 final). Brussels.

European Commission. (2020, September 23). Commission Recommendation (EU) 2020/1365 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities:

European Commission. (2021, September 29). A renewed EU action plan against migrant smuggling (2021-2025). (COM(2021) 591 final). Brussels.

European Commission. (2022, February). EU Support on Migration in Libya: EU Emergency Trust Fund for Africa North of Africa window. European Commission. Fact Sheet. https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-03/EUTF_libya_en.pdf (accessed December, 30)

European Commission. (2023, February). EU migration support in Morocco. European Commission Fact Sheet. https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-03/EU_support_migration_morocco.pdf

European Commission. (2023, March 2). EU launches new cooperation programmes with Morocco worth €624 million green transition, migration and reforms. Press release. https://ec.europa.eu/commission/presscorner/detail/en/ip_23_423

European Commission. (2023, November 28). Proposal for a Regulation of the European Parliament and of the Council on enhancing police cooperation in relation to the prevention, detection, and investigation of migrant smuggling and trafficking in human beings, and on enhancing

Europol's support to preventing and combating such crimes and amending Regulation (EU) 2016/794. (COM(2023) 754 final). Brussels.

European Commission. (2023, November 28). Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorized entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA (COM(2023) 755 final). Brussels.

Reports from International Organizations

International Organization for Migration

IOM. Mediterranean Missing Project. (2016, September) 'Like a part of a puzzle which is missing': The impact on families of a relative missing in migration across the Mediterranean. Report on the situation of families.

IOM. (2016). Identification and Tracing of Dead and Missing Migrants. Fatal Journeys, Volume 2. Geneva.

IOM. (2018, November 16) *Mediterranean Migrant Arrivals Reach 103,347 in 2018; Deaths Reach 2,054.* Geneva. https://www.iom.int/news/mediterranean-migrant-arrivals-reach-103347-2018-deaths-reach-2054 (accessed December 30, 2023)

IOM. (2021). Migrant Smuggling on the Central Mediterranean Route. Study Report

IOM, Missing Migrants Project – Mediterranean https://missingmigrants.iom.int/region/mediterranean (accessed December, 30 2023).

IOM. Migration Flow to Europe. Arrivals. https://dtm.iom.int/europe/arrivals (accessed December 18, 2023)

International Maritime Organization

IMO. (2004, May 20) Guidelines on the Treatment of Persons Rescued at Sea. (MSC 78/26/Add.2).

IMO. (2015, October 14). *IMO Secretary-General welcomes UN Security Council resolution on migrant smuggling.* https://www.imo.org/en/MediaCentre/PressBriefings/Pages/45-UNSC-resolution-.aspx (accessed December 30, 2023)

UN Independent Fact-Finding Mission on Libya

UN Independent Fact-Finding Mission on Libya. (2023, March 3). Report of the Independent Fact-Finding Mission on Libya. UNHRC. (A/HRC/52/83)

UN Independent Fact-Finding Mission on Libya. (2022, June 27). Report of the Independent Fact-Finding Mission on Libya. UNHRC. (A/HRC/50/63)

Inter-American Commission on Human Rights

IACHR (1974, December 30). Annual Report of the Inter-American Commission on Human Rights 1974. OEA/Ser.L/V/II.34, Doc. 31 Rev.1

IACHR (1977, March 10). Annual Report of the Inter-American Commission on Human Rights 1976. OEA/Ser.L/VII.40 Doc. 5 corr.1,

IACHR. (1978, April 20). Annual Report of the Inter-American Commission on Human Rights 1977. OEA/Ser.L/V/II.43 Doc. 21 corr. 1,

Reports from Non-Governmental Organizations

Alarm Phone, Borderline Europe, Mediterranea & Sea-Watch. (2020, June 17). *Remote control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*. https://www.eu-libya.info/

Amnesty International, (2016, March 23). *Turkey 'Safe Country' Sham Revealed as Dozens of Afghans Forcibly Returned Hours after EU Refugee Deal*. https://www.amnesty.org/en/latest/news/2016/03/turkey-safe-country-sham-revealed-dozens-of-afghans-returned/ (accessed December 30, 2023)

Amnesty International. (2015, December 16). *Europe's Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey*. AI Index EUR 44/3022/2015 https://www.amnesty.org/en/documents/eur44/3022/2015/en/

Amnesty International. (2016, April 1). *Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU-Turkey Deal*. https://www.amnesty.org/en/press-releases/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/ (accessed December 30, 2023)

Amnesty International. (2016). *No Safe Refuge: Asylum-Seekers and Refugees Denied Effective Protection in Turkey*. https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR4438252016ENGLISH.pdf

Amnesty International. (n.d.) Libya 2022. https://www.amnesty.org/en/location/middle-east-and-north-africa/libya/report-libya/ (accessed December 30, 2023)

GADEM. (2018, September) Coûts et blessures,: Rapport sur les opérations des forces de l'ordre menées dans le nord du Maroc entre juillet et septembre 2018 Éléments factuels et analyse. https://loujna-tounkaranke.org/wp-content/uploads/2018/12/20180927_GADEM_Couts_et_blessures.pdf

Human Rights Watch. (2019, January 21). No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya. https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya (accessed December 30, 2023)

International Committee of the Red Cross (ICRC). (2022, November). *Counting the Dead*. ICRC Paris Delegation Forensic Department. Online Report. 1956/002.

Statewatch. (2019, November 24). *Aid, border security and EU-Morocco cooperation on migration control*. https://www.statewatch.org/analyses/2019/aid-border-security-and-eu-morocco-cooperation-on-migration-control/ (accessed December 30, 2023)

Statewatch. (2023, November 16). EU planning new anti-migration deals with Egypt and Tunisia, unrepentant in support for Libya. https://www.statewatch.org/news/2023/november/eu-planning-new-anti-migration-deals-with-egypt-and-tunisia-unrepentant-in-support-for-libya/ (accessed December 30, 2023)

The Asylum Information Database (AIDA). (2020, December 31). *Country Report: Greece*. The Greek Council for Refugees.

Other documents

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. (2019, February 19). Report to the Greek Government on the visit to Greece carried out by the CPT from 10 to 19 April 2018. (CPT/Inf (2019) 4). Strasbourg.

European Union Agency for Fundamental Rights. (2023, October 11). Legal proceedings against civil society actors involved in SAR operations, *June 2023 update - Search and rescue operations in the Mediterranean and fundamental rights*. https://fra.europa.eu/en/publication/2023/2023-update-ngo-ships-sar-activities?page=2#read-online (accessed December 30, 2023).

Europol. (2023). 19 arrests for smuggling migrants within EU. *Europol: Media & Press*. https://www.europol.europa.eu/media-press/newsroom/news/19-arrests-for-smuggling-migrants-within-eu

Frontex. (2018, September 27). Frontex begins testing unmanned aircraft for border surveillance. https://www.frontex.europa.eu/media-centre/news/news-release/frontex-begins-testing-unmanned-aircraft-for-border-surveillance-zSQ26A (accessed December 30, 2023)

Frontex. 2020. Frontex Consultative Forum on Fundamental Rights: Seventh Annual Report

The Frontex Scrutiny Working Group. (2021, July 14). Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations. LIBE Committee on Civil Liberties, Justice and Home Affairs

Frontex. (2022, September 20). Frontex aircraft fly 1000 mission. https://www.frontex.europa.eu/media-centre/news/news-release/frontex-aircraft-fly-1000-mission-HRtGEK

Frontex. (2023, February 13). *Management Board Decision 6/2023 of 13 February 2023 adopting the Annual Procurement Plan for 2023 for the Agency*. (Ref. Ares(2023)1027641)

Legal instruments

International Conventions and Treaties

European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950. Entry into force 3 September 1953.

Convention Relating to the Status of Refugees, Geneva, 28 July 1951. Entry into force 22 April 1954.

International Covenant on Civil and Political Rights, New York, 16 December 1966. Entry into force 23 March 1976.

American Convention on Human Rights, San José, 22 November 1969. Entry into force 18 July 1978.

International Convention for the Safety of Life at Sea, London, 1 November 1974. Entry into force 25 May 1980.

International Convention on Maritime Search and Rescue, Hamburg, 27 April 1979. Entry into force 22 June 1985.

United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. Entry into force, 16 November 1994.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984. Entry into force 26 June 1987.

Inter-American Convention on Forced Disappearance of Persons, 9 June 1994. Entry into force 28 March 1996.

Rome Statute of the International Criminal Court, Rome, 17 July 1998. Entry into force 1 July 2002.

International Convention for the Protection of All Persons from Enforced Disappearance, New York, 20 December 2006. Entry into force 23 December 2010.

United Nations Resolutions

UN General Assembly. (1978, December 20). Resolution 33/173. Disappeared Persons

UN General Assembly. (2000, November 15). Resolution 55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime,

UN Human Rights Council. 2006, June 29) Resolution 1/1

UN General Assembly. (2007, January 12). Resolution 61/177. International Convention for the Protection of All Persons from Enforced Disappearance. A/RES/61/177.

Council of Europe Resolutions

Parliamentary Assembly of the CoE. (2019, June28). Resolution 2299 (2019). Pushback policies and practice in Council of Europe member States.

Parliamentary Assembly of the CoE. (1984, September 26) Resolution 828 (1984). Enforced disappearances.

Parliamentary Assembly of the CoE. (2005, October 3) Resolution 1463 (2005) Enforced disappearances.

European Union

European Parliament and Council Regulations and Directives

Regulation 656/2014. Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

Regulation 2016/1624. Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC

Regulation 2007/2004. Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

Regulation 2019/1896. Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

Regulation 2021/947. Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU of the European Parliament and of the Council and repealing Regulation (EU) 2017/1601 of the European Parliament and of the Council and Council Regulation (EC, Euratom) No 480/2009.

Directive 2013/32. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast),

European Council Directives and Decisions

European Council Directive 2002/90/EC. Defining the facilitation of unauthorised entry, transit and residence.

European Council Framework Decision 2002/946/JHA. On the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.

Council Decision (CFSP) 2013/233 of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya)

Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED).

Council Decision (CFSP) 2016/993 of 20 June 2016 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA)

Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI).

Council Decision (CFSP) 2023/1305 of 26 June 2023 amending Decision 2013/233/CFSP on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya)

Table of Cases

European Court of Human Rights

Judgments and decisions

ECtHR Judgment of 9 June 1958, App. no. 214/56, *De Becker v. Belgium*.

ECtHR Judgment of 23 July 1968, App. no. 1474/62, *'Relating to Certain Aspects of the Laws on the Use of the Languages in Education in Belgium' v Belgium.*

ECtHR Judgment of 25 April 1978, App. no. 5856/72, *Tyrer v. the United Kingdom.*

ECtHR Judgment of 21 June 1988, App. no. 10126/82, *Plattform 'Ärzte für das Leben' v Austria*.

ECtHR Judgment of 18 December 1996, App. No. 21987/93, *Aksoy v. Turkey.*

ECtHR Judgment of 25 May 1998, App. no. 24276/94 *Kurt v. Turkey.*

ECtHR Judgment of 9 June 1998, Reports 1998-III, L.*C.B. v. The United Kingdom.*

ECtHR Judgment of 28 October 1998, Reports 1998-VIII, *Osman v. the United Kingdom*.

ECtHR Judgment of 28 October 1998, 90/1997/874/1086, *Assenov and Others v. Bulgaria*.

ECtHR Judgment of 8 July 1999, App. no. 23657/94 *Çakici v. Turkey.*

ECtHR Judgment of 28 March 2000, App. no. 22535/93, *Mahmut Kaya v. Turkey.*

ECtHR Judgment of 9 May 2000, App. No. 20764/92, *Ertak v. Turkey.*

ECtHR Judgment of 13 June 2000, App. no. 23531/94, *Timurtaş v. Turkey*.

ECtHR Judgment of 27 June 2000, App. No. 22277/93, *İlhan v. Turkey*.

ECtHR Decision of 11 January 2001, App. No. 39473/98) *Xhavara and Others v. Italy and Albania.*

ECtHR Judgment of 10 May 2001, App. no. 29392/95, *Z and Others v. The United Kingdom*.

ECtHR Judgment of 10 May 2001, App. No. 25781/94, *Cyprus v. Turkey.*

ECtHR Judgment of 21 November 2001, App. No. 35763/97, *Al-Adsani v. The United Kingdom.*

ECtHR Decision of 12 December 2001, App. no. 52207/99, *Banković and Others v. Belgium and Others.*

ECtHR Judgment of 24 October 2002, App. no. 37703/97, *Mastromatteo v Italy.*

ECtHR Judgment of 17 February 2004, App. No. 25760/94, *İpek v. Turkey*.

ECtHR Judgment of 8 April 2004, App. No. 26307/95, *Tahsin Acar v. Turkey*.

ECtHR Judgment of 8 July 2004, App. no. 48787/99, *Ilaşcu and Others v. Moldova and Russia.*

ECtHR Judgment of 31 May 2005, App. no. 27601/95, *Toğcu v. Turkey.*

ECtHR Judgment of 16 June 2005, App. no. 61603/00, *Storck v. Germany*.

ECtHR Judgment of 13 December 2006, App. No. 1398/03, *Markovic and Others v Italy*.

ECtHR Judgment of 1 March 2007, App. No. 19497/02, *Erkan Orhan v. Turkey*.

ECtHR Judgment of 5 April 2007, App. no. 74237/01, *Baysayeva v. Russia*.

ECtHR Judgment of 28 June 2007, App. no. 60167/00, Pad and Others v. Turkey.

ECtHR Judgment of 29 January 2008, App. no. 13229/03, *Saadi v. The United Kingdom*.

ECtHR Judgment 3 June 2008, App. no. 45653/99, *Andreou v. Turkey*.

ECtHR Judgment of 24 June 2008, App. no. 36832/97, *Solomou and Others v. Turkey.*

ECtHR Judgment of 15 January 2009, App. no. 25385/04, *Medova v. Russia*.

ECtHR Judgment of 9 April 2009, App. No. 71463/01, *Šilih v Slovenia*.

ECtHR Judgment of 9 June 2009, App. no. 33401/02, *Opuz v. Turkey*.

ECtHR Judgment of 11 June 2009, App. no. 28159/03, *Khasuyeva v. Russia*.

ECtHR Judgment of 18 September 2009, App. nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 *Varnava and Others. v. Turkey*.

ECtHR Judgment of 7 January 2010, App. No. 25965/04, *Rantsev v. Cyprus and Russia*.

ECtHR Judgment of 23 March 2010, App. No. 12219/05, *Iorga v. Moldova*.

ECtHR Judgment of 29 March 2010, App. no. 3394/03, *Medvedyev and Others v. France.*

ECtHR Partial Decision of 3 June 2010, App. No. App. nos. 59623/08, 3706/09, 16206/09, 25180/09, 32744/09, 36499/09 and 57250/09, *Emin and Others v. Cyprus, Greece and the United Kingdom*.

ECtHR Judgment of 21 January 2011, App. no. 30696/09, *M.S.S. v. Belgium and Greece.*

ECtHR Judgment of 10 February 2011, App. no. 44973/04, *Premininy v. Russia*.

ECtHR Judgment of 15 February 2011, App. No. 4704/04, *Palić v. Bosnia and Herzegovina*.

ECtHR Judgment of 24 May 2011, App. No. 33810/07 *Association "21 December 1989" and Others v. Romania*.

ECtHR Judgment of 7 July 2011, App. no. 55721/07, *Al-Skeini and Others v. The United Kingdom.*

ECtHR Judgment of 12 January 2012, App. nos. 36146/05 and 42418/05, *Gorovensky and Bugara v Ukraine.*

ECtHR Judgment of 23 February 2012, App. no. 27765/09 *Hirsi Jamaa and Others v. Italy*.

ECtHR Judgment of 19 October 2012, App. nos. 43370/04, 8252/05, and 18454/06, *Catan and Others v. Moldova and Russia*.

ECtHR Judgment of 18 November 2012, App. nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10 *Aslakhanova and Others v. Russia.*

ECtHR Judgment of 13 December 2012, App. no. 39630/09 *El-Masri v. The Former Yugoslav Republic of Macedonia*.

ECtHR Judgment of 3 October 2013, App. No. 31890/11, *Nizomkhon Dzhurayev v. Russia*.

ECtHR Judgment of 21 October 2013, App. nos. 55508/07 and 29520/09 *Janowiec and Others v. Russia*.

ECtHR Judgment of 28 January 2014, App. no. 35810/09 *Case of O'Keeffe v. Ireland*.

ECtHR Judgment of 24 July 2014, App. No. 28761/11, *Al Nashiri v. Poland*.

ECtHR Judgment of 28 September 2015, App. No. 23380/09, *Bouyid v Belgium.*

ECtHR Judgment of 30 March 2016, App. No. 5878/08, *Armani Da Silva v. The United Kingdom*.

ECtHR Judgment of 19 May 2016, App. no. 37289/12, J.*N. v. The United Kingdom*.

ECtHR Judgment of 31 May 2016, App. no. 11167/12, *Bakanova v. Lithuania*.

ECtHR Judgment of 4 October 2016, App. no. 69546/12, *Cevrioğlu v. Turkey*.

ECtHR Judgment of 15 December 2016, App. no. 16483/12, *Khlaifia and Others v. Italy*.

ECtHR Judgment of 4 April 2017, App. no. 36925/07, *Güzelyurtlu and Others v. Cyprus and Turkey*.

ECtHR Judgment of May 31 2018, App. No. 46454/11 *Abu Zubaydah v Lithuania*.

ECtHR Judgment of May 31 2018, App. No. 33234/12, *Al Nashiri v Romania*.

ECtHR Judgment of 21 November 2019, App. nos. 61411/15, 61420/15, 61427/15, and 3028/16, *Z.A. and Others v. Russia.*

ECtHR Judgment of 21 November 2019, App. no. 47287/15, *Ilias and Ahmed v. Hungary*.

ECtHR Judgment of 11 February 2020, App. no. 56867/15, *Buturugă v. Romania*.

ECtHR Judgment of 13 February 2020, App. nos. 8675/15 and 8697/15, *N.D. and N.T. v. Spain.*

ECtHR Decision of 27 February 2020, App. no. 44837/07, Çiçek and Others v. Turkey.

ECtHR Decision of 5 May 2020, App. no. 3599/18, *M.N. and Others v. Belgium*.

ECtHR Judgment of 21 January 2021, App. no. 38263/08, *Georgia v. Russia (II)*.

ECtHR Judgment of 2 February 2021, App. no. 22457/16, *X and Others v. Bulgaria*.

ECtHR Judgment of 2 March 2021, App. no. 36037/17, *R.R. and Others v. Hungary*.

ECtHR Judgment of 5 April 2022, App. nos. 55798/16 and 55808/16, 55817/16, 55820/16, 55823/16, *A.A. and Others v. North Macedonia*.

ECtHR Judgment of 7 July 2022, App. no. 5418/15 *Safi and Others v. Greece.*

Concurring Opinions

ECtHR Judgment of 7 July 2011, App. no. 55721/07, *Al-Skeini and Others v. The United Kingdom*, Concurring Opinion of Judge Bonello.

ECtHR Judgment of 30 November 2004, App no. 48939/99, *Öneryildiz v. Turkey*, Partly Dissenting Opinion of Judge Türmen.

Pending cases

ECtHR Communicated Case of 26 June 2019 App. No. 21660/18. *S.S. and Others v. Italy*.

Court of Justice of the European Union

CJEU Order of 28 February 2017, T-192/16, *NF v European Council.*

CJEU Order of 28 February 2017, T-193/16, *NG v European Council.*

CJEU Order of 28 February 2017, T-257/16; *NM v European Council.*

CJEU Order of 7 April 2022, T-282/21, *SS and ST v Frontex.*

CJEU Judgment of 6 September 2023, T-600/21, *WS and Others v Frontex.*

CJEU Order of 28 November 2023, T-600/22, *ST v Frontex.*

CJEU Order of 13 December 2023, T-136/22, *Hamoudi v Frontex.*

Inter-American Court of Human Rights

IACtHR Judgment of 29 July 1988 (Merits) *Velásquez-Rodríguez v. Honduras*.

IACtHR Judgment of 19 September 1996 (Reparations and Costs) *Neira Alegría and others v. Peru.*

IACtHR Judgment of 3 November 1997 (Merits) *Castillo-Páez v. Peru.*

IACtHR Judgment of 24 January 24 (Merits) *Blake v. Guatemala.*

IACtHR Judgment of 25 November 2000 (Merits) *Bámaca Velásquez v. Guatemala.*

IACtHR Judgment of 22 February 2002 (Reparations and Costs) *Bámaca Velásquez v. Guatemala.*

IACtHR Judgment of 15 September 2005 (Merits, Reparations, and Costs) "*Mapiripán Massacre" v. Colombia.*

IACtHR Judgment of 1 July 2006 (Preliminary Objections, Merits, Reparations and Costs) *Ituango Massacres v. Colombia.*

United Nations Human Rights Committee

UN Human Rights Committee Decision of 21 July 1983 Communication No. 107:1981 *Almeida de Quinteros v. Uruguay.*

UN Human Rights Committee Decision of 29 July 1981, Communication No. 052/1979 *Lopez Burgos v. Uruguay.*