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‘The Right to Seek Asylum: Interception at Sea and the Principle of
Non-Refoulement’

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by

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First, let me begin with a particular word of thanks to the Government of Italy, for ensuring the topicality of my talk tonight...

But secondly, let me recall an event now nearly thirty years, when on 29 September 1981, President Ronald Reagan signed Executive Order 12324 on the ‘Interdiction of Illegal Aliens’ – the model, perhaps, for all that has followed

Like many who were then working for the Office of the United Nations High Commissioner for Refugees, I was struck by the incongruity, the inconsistency, between this measure and the resolute stand taken by the United States on the protection of Indochinese refugees in South East Asia, for whom first asylum, non-discrimination and at least temporary admission were considered the essential minimum.

With all that has happened since, and given today’s obsession with so-called irregular movements of people, with smuggling, trafficking, asylum and the search for refuge, it probably sounds dated to talk of *freedom* of movement and of the right of everyone to leave any country, including their own. But it is no more contradictory, I suggest, than for governments to talk of their respect for human dignity and human rights, even as they organise programmes of interception, interdiction and the return of people to territories and regimes where such respect is little known and perhaps even less understood.

Freedom of movement, though, is still a human good, and the phenomenon of human migration, so important to the economies of so many States, continues to challenge the institutions of government.

It is not yet unlawful to move or to migrate, or to seek asylum, even if the criminalisation of 'irregular emigration' by sending States seems to be desired by the developed world. Even so, the range of permissible restrictions on freedom of movement and the absence of any immediately correlative duty of admission, other than towards nationals, makes the claim somewhat illusory. Perhaps Article 13(2) of the 1948 Universal Declaration of Human Rights was just a political gesture; perhaps the world today has in fact moved closer to what was then the Soviet position, that the right to freedom of movement should be recognized as *only* exercisable in accordance with the laws of the State...

And yet there is still one dimension in which the individual's right to leave his or her country *does* in fact chime with an obligation of the State; and that is in connection with that other right, set out in Article 14(1) of the Universal Declaration, which is the right 'to seek and to enjoy' asylum from persecution. The principle of *non-refoulement* – the obligation on States not to send individuals to territories in which they may be persecuted, or in which they are at risk of torture or other serious harm – may not immediately correlate with the right of every one to seek asylum, but it does clearly place limits on what States may lawfully do.

Non-refoulement

For this rule is solidly grounded in international human rights and refugee law, in treaty, in doctrine, and in customary international law. It is an inherent aspect of the absolute prohibition of torture, even sharing perhaps in some of the latter's *jus cogens* character. It applies independently of any formal recognition of refugee status or entitlement to other forms of protection, and it applies to the actions of States, wherever undertaken, whether at the land border, or in maritime zones, including the high seas. Its essential characteristics are acts attributable to the State or other international actor, which have the foreseeable effect of exposing the individual to a serious risk of irreversible harm, contrary to international law.

UNHCR's Executive Committee, indeed, has particularly emphasized the importance of fully respecting the principle of *non-refoulement* in the context of maritime operations:

'... interception measures should not result in asylum-seekers and refugees being denied access to international protection, or in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law.'

In addition, I would argue, there is a corresponding obligation on States not to frustrate the exercise of the right to seek asylum in such a way as to leave individuals at risk of persecution or other relevant harm, although I also accept that this begins to tread on the contested doctrine of abuse of rights. It is certainly difficult to construct an argument for legal liability in the absence of evidence of obligations clearly accepted by States, but as we can see in practice, the measures which a State takes to prevent the movement of people in search of refuge are often but a short step from violating established rules of international law – rules whose indirect effect can also work to protect those in search of refuge.

As the Fifth Chamber noted in *Medvedyev v France* in 2008, however legitimate it may be, the end does not justify the use of no matter what means. And to this the Grand Chamber added that, while firmness must be shown to those who contribute to the scourge of drugs,

‘Nevertheless, the special nature of the maritime environment relied upon by the Government in the instant case cannot justify an area outside the law where ships’ crews 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, any more than it can provide offenders with a “safe haven”.’

The movement of people in search of refuge, employment, family or for any number of other understandably human reasons is a social reality with which States must learn to deal according to law. People have always moved, and States themselves accept that there will be those who deserve international protection among them.

How, then, to identify those in need of refuge? What is to be done with those who have no justifiable claim to enter? How are they all to be treated in the meantime?

Looking at the interception and return measures adopted in the Mediterranean and off the west coast of Africa, however, one may rightly wonder what has happened to the values and principles considered fundamental to the Member States of the European Union.

The European Union

Precisely because there are those who do propose or debate measures in opposition to or in derogation from them, it is worth recalling that the Union is ‘founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’;

that the Union, ‘recognizes the rights, freedoms and principles set out in the Charter...’, and that ‘Fundamental rights, as guaranteed by the [European Convention] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’.

Likewise, Article 78(1) of the Treaty on the Functioning of the European Union requires the Union to develop a common asylum policy with regard to ‘*any* third country national requiring international protection and ensuring compliance with the principle of *non-refoulement*’ – policy which ‘must be in accordance with the Geneva Convention... and other relevant treaties.’

In addition, recognition of the applicability of and need for compliance with international principles runs through the various regulations, directives and decisions adopted by EU institutions, and is expressly acknowledged also in the recent judgments of the Court of Justice.

So it is all the more surprising when governments, ministers and officials either pretend that the rules do not apply, or seek ways to avoid their being triggered.

In my view, the problems begin at the beginning, just as they commonly do also at the national level. A policy or goal is identified – in this case, reducing the number of irregular migrants, including asylum seekers, leaving the north African coast and heading for Europe – and then belatedly some attempt is made to bend implementation of the policy to fit in with principle and rule. A better approach, in my view, would be to begin with a clear understanding of the applicable law – the prohibition of discrimination, of *refoulement*, of inhuman or degrading treatment – and then to see what can be done by working within the rules.

Of course, this approach is premised on the assumption that States generally seek to work within the rule of law. It will not likely influence the State determined to deal with the migrant and the asylum seeker arbitrarily, and without reference to principle. Such cases must be confronted head-on, by way of judicial and political mechanisms of control.

Borders

First, however, it helps to think about the geographical context in which interception operations by the EU and Member States take place. Here we find States operating, nominally in the management of the EU’s external borders, but actually in a physical domain where borders as we commonly understand them simply do not exist – at sea, on the high seas, or even in the contiguous zone or territorial waters of other States, in fact, at notional or virtual borders reconstituted on the basis of national and regional interest.

Seen from within the EU, these frontiers are flexible, allowing States to project a non-territorial conception of national interests into a common or even a contested space. Globalization may have driven a horse and cart through some of the old assumptions regarding sovereignty in the territorial sense, but the fact that migrants and those in search of refuge may be obliged to cross the seas offers new opportunities for States now to project power and influence. This carries legal implications, however, in many ways no different from what would arise if one State were to seek to act within the territory of another.

The exercise of sovereign powers – and as the late Ian Brownlie noted in a related context, the extraterritorial exercise of sovereign powers is normally the business of naval vessels – is always accompanied by the responsibility of the State for such internationally wrongful acts as may be attributed to its organs.

It follows, therefore, that a common approach can be adopted in the matter of State responsibility to high seas interception, to interception operations conducted in the contiguous zone or territorial waters of another State, whether with or without consent, to practices of disembarkation of those intercepted, and even to the exercise of official functions, such as processing people on the territory of another State, for example, at air- or seaports.

From a State responsibility perspective, the only variable of interest, I suggest, is the possibility of *joint* responsibility, where one or more States or international organizations may be liable for conduct in breach of international law.

Migrants, refugees and asylum seekers at sea are not just flotsam and jetsam, adrift and open to control and dispersal by whomever finds them. The seas are regulated, though not perfectly, and those in distress at sea must be rescued, irrespective of their status. Refugees and asylum seekers may not fit easily within the established framework of practice regarding disembarkation, care and consular assistance, but the principles of protection are there to provide guidance.

As the International Maritime Organization and others have already recognized, new rules dealing with the detail may be required. But this is in the nature of international law as a dynamic institution. In South East Asia in the 1970s and 1980s, solutions also had to be found, not to interception as we think of it today, but to the asylum seeker at sea, in search of refuge but too often in need of rescue. Under the auspices of UNHCR, an international response was organized, premised on fundamental principles which drew from the long-established rule of rescue, but with the addition of protection and solutions – *non-refoulement*, disembarkation, first asylum, minimum standards of treatment, and resettlement.

The Sea

Whenever a State elects to try to control the movements of people beyond its borders, a myriad legal issues arise. In maritime areas, the State must tailor its activities to fit within an already regulated and structured regime – one that places high value on freedom of navigation, recognizes the primary responsibility and interests of flag States, and allows coastal nations to exercise certain powers within territorial waters and the contiguous zone.

But when the would-be intercepting State sets out to sea, it soon discovers that there are gaps in the legal regime, some of which can be exploited to advantage when looking for ways to manage irregular movements. The rule of non-interference with navigation and the limited recognition given to the right of visit, let alone that of search and seizure or control, are each premised, like so many of the rules, on the existence or presence or possibility of another's legal interest – that of the flag State or the coastal State. But if the State with a legal interest has no practical interest in protesting, or can be persuaded not to, or even to cooperate, then it might seem that there is no limit to what you can do.

Applicable law

That is a mistake, however, and the European Union for one has not been blind to the wider implications. The problem, though, lies not in formal recognition of protection principles but, as ever, in operationalising the rules – in making protection a reality at the point of enforcement.

On the plus side stands a substantial body of legislation: the Frontex regulation itself; the RABIT amendment, with its express insistence on compliance with fundamental rights and conformity with Member States' protection and *non-refoulement* obligations; and the Schengen Borders Code, Article 3 of which requires the Code to be applied, 'without prejudice to the rights of refugees... in particular as regards *non-refoulement*'.

Add to this the April 2010 Council Decision supplementing the Code and dealing specifically with the surveillance of maritime borders and Frontex operations; it is currently being challenged by the Parliament on *vires* grounds, and it was also objected to by Malta and Italy, mainly for its proposal that in the last resort, rescue cases should be disembarked in the State hosting the Frontex operation. The Decision's formulation of the applicable law in the matter of protection, however, is unremarkable, restating the principle of *non-refoulement* and the need to avoid indirect breach, but also providing for those intercepted to have an opportunity to set out reasons why they might be at risk of such a violation of their rights.

So far, so good; but what's missing?

On 12 February, last Saturday, the BBC reported movements from Tunisia, with some 3,000 (now 5,000 and rising) said to have arrived on the Italian island of Lampedusa over several days. It further reported that the Italian Interior and Foreign Ministers had requested, 'the immediate deployment of a Frontex mission for patrolling and interception off the Tunisian coast.'

Was this to ensure *protection*? Evidently not, for the previous day Interior Minister Maroni had raised the well-tried spectre of terrorists and Al-Qaeda affiliates and common criminals using the confusion to enter Europe.

Was there any evidence to support this assertion? Evidently not, and it is hard to imagine that such anti-social elements would voluntarily submit to the compulsory fingerprinting and other checks awaiting anyone arriving irregularly in Europe today. But the point is, that protection obligations and the fundamental rights said to be common to the EU and its Member States were not paramount, or perhaps even present, in the political mind.

Interceptions so far

What do we know about either unilateral or Frontex-led interception operations so far? Not as much as we might expect as citizens of a democratic Union bounded by the rule of law and basic principles of good governance, such as transparency and accountability.

We do know that Spain and Frontex have run operations off the West African coast for the past several years, and that Spain has relevant bilateral agreements with Cape Verde, Mauritania and Senegal. We know that the objectives of such operations have included the identification of passengers, returning them to ports of departure, deterring passage through interceptions in territorial waters and the contiguous zone, and cooperation with coastal State authorities in preventing departures. We are told that a local enforcement officer is always on board the relevant EU vessel, and that this officer is 'responsible' for any decision to divert boats and passengers back to land.

Who were they, the intercepted? Where did they come from? Why were they on the move? What happened next? Nobody knows.

Experience in other theatres of operation, however, clearly allows the inference that among them were those in need of international protection. The countries of origin of those intercepted in the Mediterranean under Operations Nautilus and Chronos included refugee source countries such

as Eritrea, Somalia and Ethiopia. Moreover, the majority of those who had succeeded in making landfall in an earlier period were granted one or other form of protection.

Little enough is known, too, of those intercepted and returned to Libya by Italian or joint Italian/Libyan patrols, under the 2008 Treaty of Friendship, Partnership and Cooperation and the 2009 Additional Technical-Operational Protocol. Significant numbers have certainly been stopped and sent back (and this success was recently relied on by Malta in explaining its refusal to participate in joint patrols with Frontex).

In its submission to the European Court of Human Rights in the case of *Hirsi v. Italy*, UNHCR noted in particular that these agreements do not define the categories of those to be re-admitted and ‘lack specific safeguards for persons in need of international protection’. After setting out what it knew of the modalities of specific ‘push-back’ operations in the Strait of Sicily, UNHCR then reported confirmation by the Italian Government that neither an identification process nor any interview had been carried out. UNHCR’s own interviews of returnees, however, indicated that those pushed back included numbers requiring protection.

UNHCR has a limited presence in Libya, which means limited access to its refugee determination procedure. Conditions in reception and detention centres are often of ‘very low standard’, and beatings and ill-treatment have been reported. A re-admission agreement is also said to have been concluded between Libya and Eritrea, which may well increase the risk of *refoulement*, particularly given the overall unpredictability of the situation. UNHCR concluded that,

‘Libya does not at this point have either the legal framework or institutional capacity to ensure the protection of asylum-seekers and refugees. The already fragile asylum situation in Libya risks being further exacerbated by the “push-back” practice.’

What role for Frontex?

Exactly what Frontex *does* in an interception context has been questioned. Human Rights Watch has claimed that Frontex has been involved in facilitating interception, though this has been denied. Amnesty International and ECRE note that Frontex has stated that it does not know whether any asylum applications were submitted during interception operations, as it does not collect the data.

How, then, should we approach what appears to be wilful ignorance? In the *Roma Rights Case* in 2004, discrimination on racial grounds was alleged in the conduct of immigration procedures

by British officials at Prague Airport, which were intended to prevent potential asylum seekers leaving for the United Kingdom. There, too, the authorities did not keep any records of the ethnic origin of those they interviewed. Finding on the evidence that the government had acted in violation of relevant legislation, the House of Lords called attention to the importance of gathering information, ‘which might have helped ensure that this high-risk operation was not being conducted in a discriminatory manner...’

Given the secrecy attaching to interception operations, and the fact that no data are gathered or retained, it is reasonable to infer that some level of Frontex involvement has occurred, and that, absent evidence to the contrary, the relevant principles of international and EU law have not been observed.

Responsibility

Where does responsibility lie for maritime interceptions, and for the treatment thereafter of those who are disembarked or returned to the port of departure or other port? These two issues – interception and treatment – may be separable, but they are nonetheless characterised by common principles of responsibility.

The applicable law is indisputable. Even the Schengen Borders Code locates itself firmly among the international obligations of States, including those relating to refugee protection, and in the fundamental rights common to the European Union and its members. The European Commission accepts that the Code is to be applied extraterritorially, not just at the land borders. Even if didn’t, international law would answer this question in the affirmative, for international law looks not just to where the impugned act takes place, but also to the actor or actors to whom it is attributable and, above all, to consequences and effects.

There is no *a priori* reason for the inapplicability of international protection obligations on the high seas or in the maritime zones of third States.

A principal point of focus is the nature and content of the primary obligation at issue, in this case, the duty of the State to refrain from acts and omissions which have the foreseeable consequence of exposing individuals to the serious risk of treatment contrary to Article 3 of the European Convention or of other relevant prohibited conduct. In this context, jurisprudence and doctrine have clearly detached certain obligations from territory; they have located responsibility in the acts of individuals or organs, and thereby primarily in the principle of attribution.

The concept of jurisdiction, however, also remains important as a threshold criterion of responsibility for human rights violations, and much has recently been written on this problematic issue. ‘Jurisdiction’ is a term most usually used against a general international law background, where it signifies the legal competence of the State – judicial, legislative and administrative – ‘often referred to as sovereignty’. But as Ian Brownlie noted, jurisdiction is also understood to include enforcement or prerogative jurisdiction, namely, ‘... the power to take executive action in pursuance of or consequent on the making of decisions or rules.’ Interception operations are a typical example of such enforcement or prerogative jurisdiction

However, both responsibility and attribution will likely be contested. Frontex and individual States thus tend to give weight to the presence on board EU vessels of local enforcement officers, whose responsibility to decide on return and local disembarkation is somehow thought to discharge any responsibility of the intercepting State. Italy stresses the *joint* nature of patrols and the treaty basis for Libya’s responsibility for the migrants, while also apparently going out of its way to avoid any actual physical contact with those intercepted. Frontex again suggests that ‘merely’ advising the source country of the location of vessels to be intercepted falls short of any act that might generate international responsibility.

These justifications are misconceived, as even a passing glance at the jurisprudence of the European Court of Human Rights or the law of State and international organization responsibility would show.

Interception operations are initiated and coordinated by the EU agency, Frontex, and collaboratively or individually by EU Member States. Directly or indirectly, they affect the rights of individuals, some or many of whom may be in need of international protection. Within the terms of the ILC articles on State responsibility, particularly Articles 4 and 6, interceptions continue to be carried out in the exercise of governmental authority by the State, or in the equivalent exercise of its executive competence by the EU’s agency.

Nothing in the evidence of practice to date reveals any break in the chain of liability. Neither the presence on board of a third State official, nor the use of joint patrols in which actual interception is undertaken by a third State, disengages the primary actor from responsibility for setting the scene which allows the result, if nothing more. In each case, the EU agency or Member State exercises a sufficient degree of effective control; it may not be solely liable for what follows, but it is liable nonetheless.

Responsibility in these circumstances is underlined by principles clearly laid down by the International Court of Justice over sixty years ago, in the *Corfu Channel Case*. There, in addition

to reminding States of what may flow from elementary considerations of humanity, the Court placed considerable weight on the presumed knowledge of the presence of mines which could be attributed to the coastal State, and on that State's singular failure to warn of the danger – 'grave omissions', in the words of the Court, which engaged its international responsibility.

In the present situation, presumed knowledge lies with the intercepting EU organs and individual Member States. It concerns danger, not in international waters this time, but in the coastal State itself – the risk of ill-treatment contrary to international law and the danger of *refoulement*.

This historically solid approach to the principles finds endorsement in the recent judgment of the European Court of Human Rights in the case of *M.S.S. v. Belgium and Greece* (2011). The Court expressly acknowledged the competence of Member States to take steps to prevent unlawful immigration, but emphasized once again the necessity to comply with international obligations, and to pay particular regard to Article 3. The Court also gave weight to the fact that the applicants were asylum seekers, and therefore members of 'a particularly underprivileged and vulnerable population group in need of special protection'. Its concern was, 'whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect...' In view of,

'the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority... independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3..., as well as a particularly prompt response... [and] also... access to a remedy with automatic suspensive effect...'

Particularly important in the Court's approach to the issues were the many and various published reports regarding the treatment of refugees and asylum seekers in Greece, which are expressly referred to, including as evidence of the risk of *refoulement*. Also relevant were reports on the risk to which the applicant and persons similarly situated were exposed in their country of origin, and the evidence of practice in Belgium granting protection in such cases.

The Court concluded, in regard to the treatment of refugees and asylum seekers in Greece, that '... the general situation was known to the Belgian authorities and... the applicant should not be expected to bear the entire burden of proof', and that Belgium had not only knowledge but also the means (under the Dublin Regulation) to refuse transfer.

Transposing this approach to the case of maritime interceptions, the failure of both States and Frontex to make distinctions where international law requires distinctions to be made, or to record and retain data relating to passengers' nationality, reasons for departure and possible protection needs, simply strengthens the reasonableness of the inferences to be drawn from the facts – that interceptions at sea are resulting in the summary return of individuals in need of protection, in breach of international obligations.

The very fact that there has been no effective investigation or no investigation at all into the circumstances and fate of those returned by way of interception is an additional factor which may also allow the inference of violations of Convention-protected rights – an approach endorsed by the European Court of Human Rights in a long series of cases.

What lessons?

The jurisprudence of the European Court of Human Rights is of obvious relevance to the European Union and its Member States as they wrestle with the challenges of a globalizing world economy. The Court has shown its awareness of the broader goals involved in extraterritorial control measures, whether undertaken in the campaign against the trade in narcotics, or in relation to irregular migration; and it has accepted that the protection of fundamental rights afforded by Community law is equivalent to that provided by the Convention system.

However, as the Court emphasised in *Medvedyev*, 'the end does not justify the use of no matter what means...', and as it remarked in *M.S.S.*, 'States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of the protection afforded by...' the 1951 Convention and the European Convention.

Extrapolating from the Court's jurisprudence, it is not that hard to see how interception measures might be structured in compliance with fundamental rights. Perhaps the first and major problem, though, is that of mind-set – the point which I made at the beginning, namely, the problem common to many governmental institutions of failing to think human rights *before* thinking policy.

The object and purpose of EU operations in maritime areas, therefore, should be first and foremost to ensure protection, and secondarily to manage and prevent irregular migration.

Statements of principle, fundamental rights and international obligations are essential, but clearly they are not sufficient to ensure compliance. Even President Reagan's Executive Order 12324 provided that 'no person who is a refugee will be returned without his consent', and called for

‘strict observance of... international obligations concerning those who genuinely fear persecution in their homeland.’ The problem then, as now, is that such statements must be translated into operational detail; only then will interception operations begin to take account of asylum seekers as a vulnerable group in need of special protection. What is needed, therefore, is for EU agencies to be given and for EU Member States to assume a *protection mandate*, premised on the above goals, but which also, in its detail, incorporates other principles derived from general international law and from the jurisprudence of the European Court of Human Rights.

These include, in particular, the principle of effectiveness of obligations, and the incorporation in the regulatory framework of the principles of necessity, proportionality, legal certainty, and rigorous scrutiny.

The Court underlined in *Medvedyev* that *legal certainty* requires that powers to be exercised and their consequences must be clearly defined in the law and reasonably foreseeable in their application. The law, be it Union or national, must thus make express provision regarding, not only the circumstances permitting intervention, but also the possible consequences, such as custody and control over individuals, deprivation of liberty, restrictions on freedom of movement, disembarkation or other measures affecting or potentially affecting rights.

Clearly, agreements with other States are an essential legal basis for stop, search and seizure of vessels flying or entitled to fly their flag, for operations in their territorial waters or contiguous zone, and for the purpose of securing return or disembarkation. However, although necessary, such agreements are not sufficient for the legality overall of interception operations.

Any such agreements must also satisfy minimum formal and substantive requirements. They cannot be secret, but must be published and ideally subject also to parliamentary scrutiny. They must make provision for protection, including the determination of refugee status, for access to asylum or other solution, and for treatment in accordance with international law. They must be subject to international supervision in their application, ideally by UNHCR in the exercise of its protection responsibilities.

In the absence of effective and verifiable procedures and protection in countries of proposed return, the responsibility to ensure protection remains that of the EU agency or Member State. In practice, this will require that they identify all those intercepted, and keep records regarding nationality, age, personal circumstances and reasons for passage. Given *protection* as the object and purpose of interception operations, an effective opportunity must be given for objections and fears to be expressed; these must then be subject to rational consideration, leading to the formulation of written reasons in explanation of the next steps. Where this entails return to or

disembarkation in a non-EU State, a form of judicial control is required as a necessary safeguard against ill-treatment and the abuse of power – exactly what form of judicial control calls for an exercise of juristic imagination. In the nature of things, such oversight should be prompt, automatic, impartial and independent, extending ideally to the monitoring of interception operations overall.

Finally, the scheme of interception and protection will have to be knowledge-based and, through training and oversight, sensitive to protection needs. It must also be integrated into the Common European Asylum Policy, in particular, so that solutions can be found for those determined to be in need of international protection.

Most of the above represents the minimum due process to be expected of a Union founded on the rule of law, respect for fundamental rights, and the implementation of international obligations. It obviously presents challenges for EU States anxious about irregular migration. I suggest, however, that it is manageable once – and this is the common condition – once principles and fundamental rights are internalised and the necessary commitments are made.

Se non ora, quando?

If this is not done, then the old mistakes will continue to be made; and the price will be the harm done to others, contrary to international law, but paid by them.

The test by which to measure the success of interception is not to be written in numbers alone, be it of those rescued or simply prevented from arriving in Europe. It has also to be written in consequences, and in *protection* – and that is a task yet to be accomplished.

Some references – A non-exhaustive list

Case law

- International Court of Justice, *Corfu Channel Case*, (United Kingdom v. Albania), [1949] ICJ Reports 4
- European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Grand Chamber, 21 January 2011, §§160, 196-203, 216, 218, 231-3, 251, 286, 293, 295-6, 314, 338, 348-9, 352, 358, 366
- , *Medvedyev v France*, Application no. 3394/03, Grand Chamber, 29 March 2010, §81
- , *Al Saadoon and Mufdhi v. United Kingdom*, Application No. 61498/08, Admissibility, 30 June 2009; Merits, 2 March 2010
- , *Medvedyev v France*, Application no. 3394/03, Fifth Chamber, 10 July 2008, §§49, 216
- , *Chahal v. United Kingdom* (1996) 23 EHRR 413
- , *Saadi v. Italy*, Application no. 37201/06, Grand Chamber, 28 February 2008
- , *Soering v. United Kingdom* (1989) 11 EHRR 439
- House of Lords (United Kingdom), *R (European Roma Rights Centre) v. Immigration Officer, Prague Airport (UNHCR intervening)* [2005] 2 AC 1

Law of the European Union

- Treaty on the European Union, [2010] OJ C 83/13, Articles 2, 6
- Treaty on the Functioning of the European Union, [2010] IJ C 83/47, Article 78(1)
- Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the 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, 2010/252/EU, 26 April 2010, [2010] OJ L 111/20
- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L 348/98
- Regulation (EC) No. 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) 2007/2004 as regards that mechanism and regulating the task and powers of guest officers, [2007] OJ L 199/30
- Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2006] OJ L 105/1
- Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), [2004] OJ L 349/1

Monographs and articles

- Badie, Bertrand, *La fin des territoires*, Paris: Fayard, 1995
- Brownlie, Ian, *Principles of Public International Law*, Oxford: Oxford University Press, 7th edn., 2008.

- Gil-Bazo, María-Teresa, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law', (2008) 27/3 *Refugee Survey Quarterly* 33
- , 'Refugee Status and Subsidiary Protection under EC Law: The Qualification Directive and the Right to be Granted Asylum', in Baldaccini, A., Guild, E. & Toner, H., *'Whose Freedom, Security and Justice?'* Oxford: Hart Publishing, 229
- Goodwin-Gill, Guy S., 'The Extra-Territorial Reach of Human Rights Obligations: A Brief Perspective on the Link to Jurisdiction', in Boisson de Chazournes, L. & Kohen, M. G., eds., *International Law and the Quest for its Implementation/Le droit international et la quête de sa mise en oeuvre: Liber Amicorum Vera Gowlland-Debbas*, Leiden: Brill, 2010, 293-308
- , 'The Extra-Territorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations', 9 *UTS Law Review* 26-40 (2007)
- , 'State Responsibility and the "Good Faith" Obligation in International Law', in Fitzmaurice, M. & Sarooshi, D., eds., *Issues of State Responsibility before International Judicial Institutions*, Oxford: Hart Publishing, 2004, 75-104
- , 'Refugees and Responsibility in the Twenty-First Century: More Lessons from the South Pacific', 12 *Pacific Rim Law & Policy Journal* 23-46 (2003)
- , 'The Right to Leave, the Right to Return and the Question of a Right to Remain', in Gowlland-Debbas, V., ed., *The Problem of Refugees in the Light of Contemporary International Law Issues*, Dordrecht: Kluwer Academic Publishers, 1995, 95-106
- Guild, Elspeth, 'The Europeanisation of Europe's Asylum Policy', (2006) 18 *International Journal of Refugee Law* 630
- Moreno Lax, Violeta, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations accruing at Sea', (2011) 23 *International Journal of Refugee Law* (No. 2) (forthcoming)
- Papastavridis, Efthymios, 'Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas', (2010) 25 *IJMCL* 543

United Nations

- UNHCR, Submission to the European Court of Human Rights, *Hirsi and others v. Italy*, Application no. 27765/09, March 2010
- UNHCR Executive Committee, 'Protection Safeguards in Interception Measures', Conclusion No. 97 (LIV), 2003
- International Law Commission, 'Articles on the Responsibility of States for Internationally Wrongful Acts', Annex to UNGA res. 56/83, 12 December 2001

NGOs

- Amnesty International and ECRE, 'Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)', September 2010